



**Guidance for Local Authorities
In Relation to Proposals of National Significance
EPA Templates: “Services Agreement” and “Relationship Protocol”**

(Legal advice provided by Simpson Grierson)

1.0 Introduction

In 2009, Phase I of reforms to the Resource Management Act (RMA) introduced new provisions for dealing with applications for proposals of national significance. The Environmental Protection Authority (EPA) was established as a statutory office within the Ministry for the Environment (MfE). The roles of the EPA and the local authority are ascribed statutory functions under the RMA.

The EPA has developed a template "Services Agreement" and a "Relationship Protocol", and each council will be invited to enter into these with the EPA when an application is being considered for "call in" and subject to the provisions of Part 6AA of the RMA. It is also possible that the EPA may approach councils in advance of any applications being lodged with it.

Local Government New Zealand (LGNZ) and a working group of local authority representatives have been involved in developing these documents. LGNZ obtained legal advice on the documents and some changes to the original documents have been made as a consequence. There are, however, a number of issues contained in the template "Services Agreement" which we consider are still problematic. Councils are advised to consider the comments below, take their own legal advice, and suggest and agree on changes before signing the agreement with the EPA.

Each council involved in an application which is being considered for "call in" will have to negotiate its own contract with the EPA. LGNZ has identified the matters which we consider need to be carefully negotiated with the EPA before signing the agreement and protocol. As contracts are entered into with councils the generic template may be changed. We would advise councils, as they negotiate their own contracts, to discuss specific matters with relevant officers within those councils which have already been subject to a process under Part 6AA.

The purpose of the Relationship Protocol is broader than the statutory functions of both the EPA and the local authority. It relates to the local authority assisting the EPA in relation to its statutory functions and provides mechanisms for managing and resolving actual or potential conflict issues regarding the Council's other roles, such as being a submitter.

The MfE website contains a specific section on the EPA and this will include some questions and answers prepared by MfE on these agreements.

This guidance document makes some general comments at the beginning and then, by way of "comments", provides some specific advice against individual clauses of the attached Services Agreement and Relationship Protocol.

1.1 Role of the local authority in the call in process

Some of the acts that a local authority could carry out under Part 6AA include:

- (a) providing its views to the Minister on call-in of an application (section 147(4));
- (b) pre lodgement services;

- (c) being commissioned by the EPA and providing a report on any issue relating to a matter being dealt with by the EPA (section 149(2));
- (d) providing information to the EPA in circumstances where an application is first lodged with the local authority – application, submissions etc (section 149B));
- (e) suggesting members of a Board of Inquiry (BOI) to the Minister (section 149K));
- (f) being commissioned by the EPA and providing a key issues report (section 149G);
- (g) carrying out residual functions where a BOI or the Environment Court grants an application (section 1549X);
- (h) processing an application that is referred to it by the Minister (sections 149Y and 1549Z);
- (i) being asked directly by the BOI or the Environment Court to provide a report/services in an advisory role;
- (j) lodging its own submission on the matter.

In summary, the council has three broad, and potentially conflicting, roles in relation to a proposal of national significance. These are as a consultant/advisor to the EPA, submitter, and as the writer of a section 149G report (together with some limited statutory functions).

1.2 Services Agreement

The Services Agreement is a contract between the EPA and the Local Authority which sets out the obligations of each party. The agreement enables the EPA to acquire the services of the Local Authority to assist the EPA in compiling information to assist the Minister, a BOI or the Environment Court. The Services Agreement formalises the roles and functions of each party, lists the schedule of works to be provided and provides for cost recovery from the EPA. The agreement reflects the provisions of the RMA that some services are mandatory and others are optional. The template is a generic agreement only, and each council can negotiate changes to it. Notes are provided below on specific matters which each council should consider when negotiating the Services Agreement with the EPA.

The RMA provides that the Local Authority is required to produce a s149G report. The local authority may also agree to provide optional services which are listed in the schedule under the headings *Pre-lodgement; Lodgement; Service and Notification; Certificate of Compliance; Related Applications Received after the Referral is Made;* and *Boards of Inquiry*. These are listed in Schedule 2 which sets out the *Scope of Services and Deliverables*.

The Services Agreement includes a *Statement of Work* in Schedule 1. This comprises a list of the services which the council could provide to the EPA, together with information about the personnel involved in providing the services and the cost of providing the services. The provision of a s 149G report is listed in the Statement of Work as mandatory as it is specifically required under the Act. The other services are optional and will need to be negotiated with the EPA.

Comment is made below on whether the mandatory s149G key issues report should be included in the Services Agreement.

1.3 Relationship Protocol

The purpose of the Relationship Protocol is to set out how the relationship between the EPA and council should proceed. It is also used to identify potential conflicts. The Protocol is not legally binding and needs to be negotiated with each council. It is not specific to a “call in” project but sits at a higher level.

This protocol requires the identification of primary contacts for the EPA and the local authority. The primary contact at the local authority should be the “Relationship Manager” and this person is likely to differ from the person identified as the main contact for the provision of services under the Statement of Work for a specific call in. The “Relationship Manager”, for instance, may be the Manager of the Consents Team at the local authority and the “Main Contact” for the Statement of Work may be a senior planner in the consents team. This “Main Contact” will have overall responsibility for managing the Services Agreement with the EPA. As an alternative, it may be useful having the Relationship Manager as someone who is separate from the consents team – particularly if the council is to support or oppose the relevant project in its submissions.

For each call in, there may be more than one local authority involved and a Relationship Protocol for each. Each local authority will need to identify a “Relationship Manager” and the “Main Contact” for the Statement of Work.

A council may decide to lodge a submission (which could potentially be in opposition or support), after it has provided consultancy services to the EPA. Any submission could potentially give rise to a conflict of interest, or the perception of a conflict. While the Relationship Protocol acknowledges that a council may want to lodge a submission, clause 4.2 states (paraphrased) that “the parties ...will seek to both avoid and resolve differences...”. A council may wish to have this phrase removed before signing.

1.4 Delegations and advising elected members

This process raises a number of matters regarding delegations.

Signing of the Services Agreement

The Services Agreement is drafted as a deed, and therefore delegations will be needed to sign the document. Councils should check who has the appropriate delegations to sign the deed and adjust the delegations if necessary. Consideration should also be given to the requirements of the Property Law Act 2007, and whether the deed needs to be signed by two elected councillors.

Signing the Relationship Protocol

Councils will need to check that appropriate delegations are in place to sign the Relationship Protocol or the Chief Executive should be the signatory. If the CE does not sign s/he should be briefed.

Relationship Manager

Delegations may be needed to appoint the relationship manager and councils should check these and adjust accordingly.

Delegations in relation to Part 6AA more generally

A number of decisions or reports would need to be made by the council under Part 6AA of the RMA. New delegations are likely to be required to ensure that these decisions and reports can be made. By way of example, Councils can suggest BOI members to the Minister.

Submission

If a council decides to lodge its own submission, most will require it to be approved and signed off by elected members. For this reason, it is advised that officers advise elected members early in the process of the call in and whether they recommend lodging a submission on the matter. See detailed discussion below in relation to submissions. Some Councils may have delegations in place which allow officers to authorise the lodgement of submissions

1.5 Section 149G report (key issues)

It is implicit under the RMA that the Local Authority must produce a s149G(3) report once it is commissioned. Section 149G(3) states that the EPA must commission the local authority to prepare a report on the key issues that relate to the matter including:

- (a) any relevant provisions of a national policy statement, a New Zealand coastal policy statement, a regional policy statement or proposed regional policy statement, and a plan or proposed plan; and
- (b) a statement on whether all required resource consents in relation to the proposal to which the matter relates have been applied for; and
- (c) if applicable the activity status of all proposed activities in relation to the matter.

1.5.1 What should be included in the 149G(3) report?

The wording of the Act provides that the section 149G(3) report is on "key issues". This is different from the wording used in section 42A, which requires a report "on the information provided on the matter", and allows a detailed evaluation of options and a view of the proposal. The wording of section 149G(3) is, however, open ended and states what must be included rather than what cannot be included, as long as the content can be related back to the "key issues".

Section 149G(3) is also silent about when the report is prepared, in relation to the close of submissions. It is likely that the EPA will expect the report to be prepared early in the process (before submissions are received) and based on the application. The EPA may also expect the report to have limited scope. It is likely that guidance prepared by the EPA will clarify its approach. It is also possible that the EPA's expectations may change over time, with increased use of the call in provisions of the RMA.

The key matter to be set out in the section 149G(3) report is the planning framework for the proposal. It however, could potentially include views on possible conditions and the adequacy of information insofar as they relate to "key issues". This in turn may raise issues about cost recovery if the report goes beyond what may have been contemplated by the EPA at the time of commissioning the section 149G(3) report.

As the key issues report is provided by the local authority we do not consider the EPA has the ability to seek editorial changes to the report. However, this is a somewhat grey area and may be clarified through practical application and guidance provided by the EPA. The problem for councils is that the report is commissioned by the EPA and costs are recovered by the council for its preparation, implying that the EPA may seek to control, to some extent, the content of the report.

The statutory provisions do not state whether analysis of the matter against the plan provisions should be included in the key issues report (it does however require those provisions to be identified). This is another grey area and may be clarified through guidance from the EPA. At this stage we would suggest that a council will need to decide whether to take a narrow or broad interpretation of these provisions or to lodge its own submission. The EPA should be liaising with the Board and ensuring that the section 149G(3) report meets its expectations.

A local authority may be requested to provide a detailed evaluation of certain aspects of the proposal under section 149(2)(b), if engaged to do so by the EPA. A report prepared under section 149(2)(b) is essentially a further information report. We would not expect a report that is prepared under section 149(2)(b) to be comprehensive and cover all aspects of an application.

A Board of Inquiry may also commission a report from the local authority under sections 41C(4) and 92(2), provided the applicant agrees. Both reports relate to further information, rather than being comprehensive reports on the entire application.

A Board of Inquiry also appears to have the ability to commission a section 42A report from the local authority. (See section 42A(1), which incorporates the expanded definition of "local authority" in section 42(6)(b). Although section 42A(1) is not very well worded, the intention appears to be to give a BOI authority to commission a report from a local authority). Accordingly, in the event a BOI considered that the section 149G(3) report was not detailed enough, it could request further information in a section 42A report.

1.5.2 Should the s 149G(3) report included in the Services Agreement?

We have advised the EPA that we do not consider the s149G(3) report needs to be included in the Services Agreement, because the report is specifically provided for under the Act. Further, because the local authority will be carrying out a statutory function, the report will need to be satisfactory to fulfil that function. Therefore, the provision of this report is different from any consultancy services provided by the local authority. We also do not consider the EPA is entitled to exercise control over the report except to the extent of ensuring that it falls within the legislative framework. If the provision of the 149G(3) report is the only service being provided by the local authority the exchange of letters may be satisfactory instead of entering into a detailed contract as the obligations in the Services Agreement are onerous for a statutory function.

However, from a practical perspective there may be advantages in including it in the same agreement along with the other services provided to the EPA so that all the services provided by the local authority are captured.

Role of report writer at any hearing

It is not clear from the RMA what role the section 149G(3) report writer would have, if any, at the hearing of the matter. In particular, it is uncertain whether the report writer would be treated in the same manner as the writer of a section 42A report (and be open to questioning and possibly cross-examination on the content of the report). Section 41(4) does not appear to apply to the writer of a section 149G(3) report.

This may be a matter that you want to clarify with the EPA early on, or seek separate legal advice about. In the event that a local authority lodges a submission on a matter, and depending on the content of that submission and/or the section 149G(3) report, a different officer or consultant may need to be involved in preparing the Council's case in relation to the submission in order to limit any perceptions about conflicts of interest.

1.6 Other services a council may provide to the EPA

Through the Services Agreement a council may agree to provide other services to the EPA. There is no obligation to provide these services. The range of services which may be provided are:

- **Pre-lodgement.** A council may contract with the EPA to engage with the applicant before lodgement.
- **Lodgement.** A council may contract with the EPA to provide advice, once a matter is lodged with the EPA, on the adequacy of the application and the completeness of the matter lodged with the EPA (in order to fulfil s 88 requirements). A council may contract with the EPA to provide advice on whether further information is required (s 92 requirements).
- **Service and notification.** A council may contract with the EPA to provide the necessary information so the EPA can serve notice of the application on owners/occupiers/potentially affected parties.
- **Certificate of compliance (COC).** A council may contract with the EPA to provide advice on and assess an application for a COC.
- **Related applications after referral made.** Where a matter has already been referred to a BOI or the Environment Court a council may contract with the EPA to provide the services identified above.
- **Boards of Inquiry.** The BOI may request advice from a local authority. A council may contract with the EPA to provide this advice.

1.7 Council submission

When an application is "called in" there is no explicit statutory role for the local authority to evaluate the application (equivalent to a section 42A report in respect of a resource consent), except to the extent that an evaluation is required by the "key issues" report. A local authority may be concerned that the BOI or

Environment Court does not have access to full information/evaluation of a matter. Accordingly, a local authority may choose to lodge a submission in respect of the matter in order to make wider comment/analysis, unconstrained by expectations of the EPA and the provisions of the Services Agreement. Alternatively, a local authority may want to make submissions in support or opposition to a matter.

There will be no ability for cost recovery associated with the preparation of the submission or for the engagement of contractors on technical matters to support a submission. The costs, as a consequence are likely to be substantial, particularly when also considering the cost of preparing and presenting evidence to a BOI or the Environment Court.

Elected members may want to have input into the submission, and therefore the process may be a complicated one. In addition, a submission made on behalf of council will need to be signed off by elected members, unless there are appropriate delegations in place.

Where the lodgement of a submission needs to be authorised by elected members, officers should advise the key matters they consider should be covered in a submission and recommend that a submission be drafted. This should be done by way of a report to the appropriate committee or the council may have a sub committee. Submitters only have 20 working days to lodge a submission after public notification and therefore a report and recommendation to council on this matter should be done well before notification of the proposal (if possible). Councillors should be identified at that stage to sign off the submission.

If a council chooses to lodge its own submission and is also providing consultancy services to the EPA via the Services Agreement, it should consider:

- whether there are actual, or perceived, conflicts of interest. This may depend on whether or not the council lodges a submission, and on the nature of that submission.
- how to distinguish between the different tasks and roles and whether the scope of the consultancy services to the EPA needs to be reconsidered.
- whether tasks need to be assigned to different staff members or a consultant needs to be employed to undertake one of these tasks (either consultancy services to the EPA, or for the Council in relation to its submission).

The Relationship Protocol specifically recognises the local authority's right to participate in the proceedings as a submitter. It proceeds on the basis that this role must be kept distinct from the performance of any services to the EPA. If the council plays a purely technical role in providing services then the potential for a conflict of interest is reduced. However if the key issues report undertakes analysis of the matter against the plan provisions then there may be a perceived conflict of interest. This will be a difficult area to manage and will require sensitivity and an acute appreciation of the potential for conflicts of interest. Councils are, however, used to managing these difficult roles and a technical expert should be able to provide advice about the completeness of an application and then to have input into a submission. The Relationship Protocol at Section 3.2 (Roles and Responsibilities) requires that the performance by a local authority of

any services must be kept distinct from the local authority's participation as a submitter on a matter of national significance. The Services Agreement at Section 5 discusses Conflict Of Interest and does not go so far as to require the distinct separation of roles. We consider that the distinct separation of roles will be difficult to achieve because even if the preparation of a council submission is contracted to a consultant, s/he will be ultimately responsible to the council officer who authorises the submission.

The important matter is to identify actual and perceived conflicts of interest, as required in the Relationship Protocol. We see the provision of technical services, as related to the completeness of an application, as distinct from the preparation of a submission. If the Key Issues report is limited in scope, the potential for a conflict of interest is reduced if the local authority chooses to lodge a submission. If a BOI requires a more comprehensive analysis of issues then the separation of roles may be more difficult and the local authority will have to carefully consider how to manage these roles.

It may be possible to negotiate with the EPA to provide consultancy services in stages, with the ability to revisit whether it is possible to provide any consultancy services once the lodging of a submission is contemplated. This approach would allow the local authority to cease providing consultancy services for the next stage of the process in the event that its submission could give rise to an actual or perceived conflict.

1.7 Section 149(2) report (further information/commissioned report)

Section 149(2) provides the EPA with the ability to commission any person to prepare a report on any issue relating to a matter. This section of the Act is open ended and under this provision the EPA (or the BOI via the EPA) could require the council to prepare a report on any issue relating to a matter, this may include analysis/review of further information provided by the applicant.

This matter does not appear to be adequately covered under the Statement of Work "Optional Services" as it does not sit comfortably within:

Lodgement

- *Provide advice on adequacy and completeness of matter lodged with EPA (including the AEE).*
- *Provide advice about the need for further information or report*

Accordingly, we suggest the Statement of Work would need to be amended so that it can accommodate further services which are provided under s 149(2).

Reports requested by a BOI

A local authority may also want to consider whether to include the various reports that could be commissioned by the BOI, and have those included in the Statement of Work.

1.8 Cost recovery 149ZD

This section provides for cost recovery of “actual and reasonable costs” incurred by the local authority in complying with Part 6AA of the RMA. Council staff should, therefore, keep accurate records of the time spent on a matter subject to a “call in”. Considerable time may be spent negotiating the Services Agreement and these costs are not recoverable. An option is to rely on a standard contract with MfE until the Services Agreement is negotiated (as discussed below under timing).

There may be a cost recovery issue associated with the key issues report if there is dispute with the EPA over the content (ie a narrow focus report or a broad ranging evaluation).

The Resource Management Discount Regulations (when in force) will require a local authority to give a discount on any administrative charges under section 36 of the RMA, where it has not met the statutory timeframes for processing an application, and the local authority is responsible for the delay.

The Minister considers that a discount should also apply to the processing of matters of national significance (see paragraph 68 of the April 2010 Cabinet Paper) which seeks approval for key policy decisions on the Discount Regulations and approval to issue drafting instructions to the Parliamentary Counsel Office).

It is not clear from the Cabinet Paper whether the Minister intends to issue further regulations (pursuant to section 360(1)(b) of the RMA), which would apply to the EPA, or whether he expects the EPA to develop a voluntary policy of applying discounts when statutory timeframes are exceeded. LGNZ however understands that a voluntary policy is being considered by the Ministry for the Environment.

Whether this discount would affect the ability of local authorities to recover their costs under a Services Agreement will depend on the policy adopted by the EPA, and terms and conditions of the Services Agreement. It is possible that the EPA would apply its discount policy to a particular project, and could in turn seek to either:

- recover the discounted amount from the local authority (in the event the EPA had already paid the local authority); or
- reduce the amount the local authority could recover for its services.

Fault would need to be attributed to a party before a discount could be applied. Difficult issues in relation to who was at fault, or the apportionment of that fault, may need to be addressed between the EPA and the local authority.

This situation would be more complicated where a local authority had engaged a sub-contractor. The local authority would need to decide whether to try and recover any lost fees from the subcontractor. Whether this was possible would depend on the agreement between the local authority and the sub-contractor, and which party was at fault.

However, until any policy is adopted, it is difficult to know what if any impact there would be on the local authority. We suggest that legal advice is obtained on this issue, to ensure that the local authority's interests are protected. Issues which may need to be addressed include:

- what the policy is that the EPA is to adopt;
- whether the policy will be applied in a manner that could reduce the amount of fees recoverable by the local authority for the provision of services; and
- whether the policy would be applied to statutory timeframes, or all deadlines in a Statement Of Work.

We discuss the issues in relation to a discount policy later in this Guidance note, in the context of the liability and dispute resolution clauses of the Services Agreement.

1.9 Liability

Liability has been identified by LGNZ as an important matter to be considered in negotiating the contract. It will be important that councils know the financial risks, as well as benefits, in entering the Services Agreement. This would be assisted by having (ideally) a clause which provides for no liability to result from the provision of services, or alternatively, a clause which provides a cap on liability.

Clause 15.1 currently provides that there is no liability for:

- (a) loss of profit, loss of revenue, loss of business opportunity, or damage to goodwill; or
- (b) any indirect, consequential or special loss or damage.

This means that councils could still be liable for direct loss, which would be for an uncapped amount. An example of a direct loss could be if a statutory deadline was not met, and the EPA was required to apply a discount policy and could not recover the full amount of fees from an applicant. In this way, the actions of the council would directly result in a loss to the EPA.

By contrast, an indirect (or consequential) loss could occur where the council failed to meet a deadline and the EPA engaged another consultant to provide the services, and as a result incurred further costs as a consequence of the council's failure to provide any services.

Councils may want to seek an amendment to Clause 15 Liability through an alternative clause 15.1 which would provide a cap on the liability under this Services Agreement. The following is an example of an alternative clause. It provides for a cap on liability, but for both indirect and direct loss.

Limitation of liability: The liability of the each Party, whether in contract, tort or otherwise, shall be limited to any damage, loss, cost and liabilities of whatever nature in relation to this Agreement arising (directly or indirectly) from any act or omission by that Party to a maximum amount of [\$] provided that this limit shall not apply to any of the following:

- (a) breach by either Party of any of its obligations in this contract or at law relating to confidentiality;

(b) *wilful breach by, or unlawful acts or omissions of either Party;*

LGNZ understands that MfE would not agree to the inclusion of clauses which provided for no council liability for direct or indirect losses. It was however prepared to restrict liability to direct as opposed to indirect loss. This is the position under clause 15.1. We do not see much advantage to councils in adopting an approach which extends liability to indirect or consequential loss, although we consider there is merit in attempting to cap direct loss if it were able to be agreed. Accordingly, clause 15.1 above could be amended to provide a cap on liability for direct loss.

LGNZ understands that the current RiskPool Protection Wording for contractual claims excludes work performed under contract. Other insurance policies may do the same. Accordingly, it is not clear whether appropriate cover would be available to local authorities. If local authorities are wanting to amend Clause 15.1 to provide for a capped (or uncapped) liability, adequate insurance should be in place, or they should be sufficiently financial to meet a claim under the Agreement.

The exclusion in the RiskPool Protection Wording may be an additional reason why it may be preferable to avoid the requirement to provide a section 149G(3) report being written into the agreement.

1.10 Legal Advice

We advise any local authority to engage legal advice when negotiating the contents of the Services Agreement. While Local Government New Zealand's legal advisers have had input into the development of the Services Agreement and Relationship Protocol, and this advice note, we do not consider that all of the matters have been satisfactorily resolved by the EPA.

1.11 Timing

Timing is critical as section 149R requires the Board of Inquiry to prepare its written report within 9 months of the EPA giving public notice under the relevant section. The Act does, however, make provision for the timeframe to be extended. The EPA and the local authority are both likely (and advised) to finalise the contract before beginning work on a matter as this will ensure the roles are clearly defined from the outset. Issues in relation to the recovery of costs should therefore be minimised.

An interim arrangement can be entered into with the EPA (outside of the Services Agreement) to enable work to begin. Entering into an agreement via a standard MfE contract would allow, for example, an initial review of an application for resource consent and an audit to ensure all of the necessary consents have been applied for by the applicant. Once this work is carried out the EPA could notify the application (as required) and the council could work with the EPA to finalise the Services Agreement (including the Statement of Work). Experience to date indicates that the Services Agreement will take considerable time to negotiate. Changes may be made to the template over time, particularly if the same matters are negotiated for every call in.

A council could also enter into an agreement directly with an applicant for the pre-lodgement process – to enable direct cost recovery from the applicant.

1.12 Subcontractors

Clause 8 of the Services Agreement provides that the local authority may subcontract third parties. The template requires the local authority to ensure that the subcontractors will fulfil obligations to the EPA in respect of Conflict of Interest, General Obligations, Records and Procedures, Confidentiality and Intellectual Property Rights. Specifically, Clause 13.5 requires a local authority to undertake that a subcontractor will not infringe the intellectual property rights of any third parties.

A local authority which engages subcontractors will need to ensure that any contract they sign with the subcontractor for the provision of services covers these specific matters. It should also ensure that any issues arising from any discount policy are also covered (as discussed above in relation to Cost Recovery and Liability). It is likely that the standard contracts used to procure services will not be adequate. It may be advisable that a standard contract is developed in advance of a call in with a pool of contractors so they have already signed up to these provisions. Work can then be quickly initiated using these preferred “pre-approved” suppliers.

The agreement requires subcontractors to be either listed in the Statement of Work or agreement reached in writing that subcontractors can be engaged. This provides some flexibility as at the time the Services Agreement is signed by the local authority, the identity of the subcontractors will not necessarily be known.

1.13 Services Agreement and Relationship Protocol Annotated with Comments

Comments are attached to the template Services Agreement and the Relationship Protocol below for your consideration when you negotiate these for a “call in”. We anticipate that the templates will be changed by the EPA as contracts are negotiated and matters are subject to the “call in” procedures. You should also view the MfE website and EPA webpages as general information on the call in process is located there.

1.14 Updates to the Template

We would appreciate copies of the Services Agreements you negotiate with the EPA so we are aware of issues you have encountered and can provide specific advice to councils on problem areas of the Agreement. This will also enable us to seek changes to the template on behalf of councils.

The “grey areas” we have identified regarding the matters to be addressed in the 149G report, and the role of the report writer at the hearing, may also be clarified over time, but each Board of Inquiry may adopt its own approach in respect of these matters. Seeking the views of the Board, via the EPA, may be the best approach.

1.15 Useful documents

The following link is to a briefing document to Auckland City Council on the EPA and general statutory provisions and processes. This document may be a useful base document for councils preparing a general briefing document.

[Briefing to Auckland City Council on EPA and general statutory provisions and processes](#)

This section will be updated as matters being called in progresses. We would appreciate being sent links to documents that councils will find useful so we can include these on our website, eg:

- a briefing for elected members on a specific matter subject to a call in proposal and which outlines the various matters a council needs to consider including providing advice on who they would recommend be a member of the BOI and whether a submission should be prepared on the matter.
- copies of council contracts (or specific provisions) for use with subcontractors which covers off all the obligations the council has to make on their behalf through the Services Agreement.

1.16 Checklist for councils

The following check list maybe useful to cover off the necessary actions before signing the documents.

Check list
Actions for council before signing the Services Agreement
<ul style="list-style-type: none"> ▪ Engage legal advice. ▪ Consider the template agreement and the changes you may want made before signing. Take legal advice on this matter. Engage with the EPA and work through the matters before you sign. ▪ Commence work on the Key Issues report, pre-lodgement assistance, and other agreed tasks under a different contract if necessary or by way of an exchange of letters or directly to the applicant. ▪ Ensure appropriate delegations are in place to sign the Services Agreement. ▪ Ensure appropriate delegations are in place to sign the Statement of Work, where it is signed subsequent to the Services Agreement. ▪ Review standard contracts with subcontractors to ensure they reflect the provisions of the Services Agreement. If not, amend accordingly and have them reviewed. Sign sub contractors up before they commence work on a call in matter. ▪ Appoint contact persons who will be the main contacts for the local authority for the Statement of Work. This could be a senior consents planner. A back up person is also required. <p>You may also consider:</p>

- Briefing the elected councillors on the general EPA process and specifically on the matter being called in.
- Ensure the appropriate delegations and a process with elected members is established in the event that council decides to lodge its own submission. Timing will be tight for this.
- Whether your council may be a submitter to the matter and whether a contractor will need to be engaged to prepare the submission or provide some of the services to the EPA eg preparation of the Key Issues Report.
- Ensure appropriate delegations are in place to enable Councils to suggest BOI members; preparation of a Key Issues report.

Actions for council before signing the Relationship Protocol

- Consider the template protocol and the changes you may want made before signing. Engage with the EPA and work through the matters before you sign.
- Ensure appropriate delegations are in place to sign the Relationship Protocol.
- The Relationship Protocol is a generic document and intended to cover a situation were a council wants to lodge its own submission on a matter. Ensure, however, you are comfortable with the wording of the protocol.
- Appoint a Relationship Manager. This person will be the primary contact for the EPA and will be expected to keep an overview of the project for the council and to engage with the EPA at that level.
- If council is to lodge a submission, appoint a Relationship Manager who can oversee the process but who is not directly involved in preparing the submission.
- Consider briefing elected members about the EPA and the relationship arrangements.



Environmental
Protection Authority
Te Mana Rauhi Taiao

Dated

2010

SERVICES AGREEMENT

ENVIRONMENTAL PROTECTION AUTHORITY

and

[INSERT NAME OF LOCAL AUTHORITY]

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PARTIES

- (1) **HER MAJESTY THE QUEEN IN RIGHT OF HER GOVERNMENT IN NEW ZEALAND** acting by and through the Secretary for the Environment of the Ministry for the Environment as the Environmental Protection Authority ("**EPA**")
- (2) [**INSERT NAME AND DETAILS OF LTA**], a local authority under the Local Government Act 2002 ("**Local Authority**")

BACKGROUND

- A. The Environment Protection Authority (EPA) has been established as a statutory office within the Ministry for the Environment pursuant to the Act.
- B. If a matter is not referred to a board of Inquiry or the Environment Court under Part 6AA of the Act, the local authority has the primary responsibility for processing the matter.
- C. As both the EPA and the Local Authority have roles to perform in relation to matters of national significance and otherwise under the Act, the Parties have entered into a non-binding relationship protocol which sets out an agreed approach to the Parties' respective roles and relationships under the Act.
- D. The Local Authority also has the expertise and capacity to assist the EPA in compiling comprehensive and quality information to assist a board of inquiry or the Environment Court in determining matters of national significance and its role of determining applications for certificates of compliance.
- E. The EPA wishes to acquire the Services and the Local Authority agrees to provide the Services on the terms of this Agreement.

AGREEMENT

1. DEFINITIONS AND INTERPRETATION

1.1 **Definitions:** In this Agreement, unless the context requires otherwise:

"**Act**" means the Resource Management Act 1991;

"**Agreement**" means this agreement and includes the schedules, any Statement of Work and any other document incorporated into a Statement of Work by reference;

"**Commencement Date**" means the date of execution of this Agreement;

"**Confidential Information**" means all information (regardless of the form of disclosure or medium of storage):

- (a) relating to the Services or the terms of this Agreement; and

(b) obtained by a Party from the other Party; and

(c) which might reasonably be expected by either Party to be confidential in nature;

Comment [L1]: Consider expanding the definition, by adding "and (d) for the avoidance of doubt does not include information that relates to a matter that is in the public arena."

"**Force Majeure Event**" has the meaning given in clause 17.1;

"**Governmental Agency**" includes any state or government and any governmental, local governmental, semi-governmental, judicial, statutory or regulatory entity, authority, body or agency or any person charged with the administration of any Law;

"**GST**" means goods and services tax chargeable, or to which a person may be liable, under the GST Act;

"**GST Act**" means the Goods and Services Tax Act 1985;

"**Intellectual Property Rights**" includes copyright, and all rights conferred under statute, common law or equity in relation to inventions (including patents), trade marks, designs, circuit layouts, domain names, rights in databases, confidential information, trade secrets, know-how, and all other proprietary rights, whether registered or unregistered, and all equivalent rights and forms of protection anywhere in the world, together with all right, interest or licence in or to any of the foregoing;

"**Law**" includes any rules of common law, statute, regulation, order in council, bylaw, ordinance or other subordinate or secondary legislation in force from time to time;

"**Matter**" has the same meaning as the definition in section 141 of the Act;

"**Party**" means a party to this Agreement including its personal representatives, successors and permitted assignees;

"**Personnel**" means the Local Authority's and each Subcontractor's personnel (including their employees and contractors) used to provide any Services;

"**Services**" means the services (including any relevant deliverables) to be provided by the Local Authority under this Agreement, as set out in a Statement of Work;

"**Service Fees**" has the meaning given in clause 9.1;

"**Statement of Work**" means a statement of work entered into by the Local Authority and the EPA in accordance with this Agreement for the provision of Services in the form set out in Schedule 1 or like effect;

"**Subcontractor**" means any third party, other than the Local Authority, appointed in accordance with this Agreement by the Local Authority to perform any of the Services; and

"**Working Day**" means any day except:

(d) a Saturday, a Sunday, Good Friday, Easter Monday, Anzac Day, Labour Day, the Sovereign's birthday; and Waitangi Day; and

- (e) a day in the period beginning on 20 December in any year and ending with 10 January in the following year.

1.2 **Interpretation:** In this Agreement, unless the context requires otherwise:

- (a) all **amounts** payable under this Agreement are expressed exclusive of GST and in New Zealand dollars. If GST is payable on any amount it will be added to that amount and will be payable on each such amount at the time the amount itself is payable;
- (b) references to **clauses** and **schedules** are to clauses of and schedules to this Agreement;
- (c) **derivations** of any defined word or term shall have a corresponding meaning;
- (d) a **document** (however described and including this Agreement) includes that document as amended or replaced from time to time;
- (e) a reference to a **gender** includes the other gender;
- (f) the **headings** to clauses are inserted for convenience only and shall be ignored in interpreting this Agreement;
- (g) the word **including** and other similar words do not imply any limitation;
- (h) any **obligation falling due** for performance on or by a day other than a Working Day shall be performed on or by the Working Day immediately following that day;
- (i) an **obligation not to do something** includes an obligation not to allow or cause that thing to be done;
- (j) an **obligation not to unreasonably withhold consent or approval** includes an obligation not to unreasonably condition or delay such consent or approval;
- (k) if a **Party** comprises more than one person, each person's liability is joint and several;
- (l) a **person** includes any individual, company, corporation, firm, club, partnership, joint venture, association of persons (corporate or not), trust or Governmental Agency (in each case, whether or not having separate legal personality);
- (m) the **plural** includes the **singular** and vice versa;
- (n) the **recitals** to this Agreement under the heading "Background" do not form part of this Agreement and are for interpretation purposes only; and
- (o) a reference to a **statute** includes all regulations and other subordinate legislation made under that statute. A reference to a statute, regulation or other subordinate legislation includes that statute, regulation or other subordinate legislation as amended or replaced from time to **time**.

Comment [L2]: Consider whether this clause should be deleted, so that the Agreement is limited to the EPA's current role, and not any expanded role as a result of Phase 2 of the RMA reforms.

1.3 **Precedence:** If there is any conflict between the body of this Agreement (clauses 1 to 20) and the schedules (including any Statement of Work), the Statement of Work will prevail.

2. NATURE OF SERVICES

2.1 The Parties acknowledge and agree that:

- (a) if the Minister for the Environment directs under the Act that a matter be determined by a board of inquiry or the Environment Court, section 149G(3) requires the EPA to commission relevant local authorities to prepare a report on key issues in relation to matters of national significance (“**s149G Report**”);
- (b) when necessary the EPA will engage the Local Authority to produce a s149G Report on terms to be agreed in a Statement of Work by the Parties;
- (c) the EPA may also require other services in order to:
 - (i) support the EPA in compiling comprehensive and quality information to assist a board of inquiry or the Environment Court in determining a matter of national significance;
 - (ii) facilitate any request from a board of inquiry seeking to commission reports or services in relation to a matter of national significance; and
 - (iii) assist the EPA in determining applications for certificates of compliance that are lodged with the EPA under section 139 of the Act; and
- (d) subject to clause 2.1(a), the Local Authority is under no obligation to perform services unless it agrees to do so in a Statement or Work;
- (e) any Services required and/or agreed to under this Agreement are critical to enable the EPA and/or a board of inquiry to meet timeframes imposed on it under the Act; and
- (f) the performance of the Services under this Agreement does not prevent the Local Authority from making a submission (in support, opposition or taking a neutral stance) on any matter of national significance.

Comment [L3]: There is no requirement in the RMA for terms to be agreed in a Statement of Work. A local authority may want to have an exchange of letters in relation to the provision of this report, and the removal of clauses 2.1(a) and (b). If included, the S 149G report is subject to all obligations in this agreement.

Comment [L4]: Local authorities may want to clarify whether this is an advisory role to the EPA, or whether it relates to the provision of reports under sections 42A, 41C(4), 92(2) and 149(2). If the BOI requests information to be provided by the local authority, consider whether this should be covered by the Agreement.

Comment [L5]: This comment can only apply to consultancy services. If there is a statutory requirement to provide a report (such as the section 149G(3) report) it must be provided. Further, if the BOI requests information from the local authority, it may need to be provided irrespective of whether there is a Statement of Work in place.

3. TERM

3.1 **Initial Term:** This Agreement will commence on the Commencement Date and will continue for a period of [two years] from Commencement Date, unless it is terminated in accordance with this Agreement (“**Initial Term**”).

3.2 **Renewal:** On the expiry of the Initial Term this Agreement will automatically renew for a further [two year] term unless either Party gives notice at least one month prior to the expiry of the Initial Term of its intent not to renew the Agreement.

Comment [L6]: Consideration should be given to a review clause because the usability of the Agreement is yet to be tested. **Review: A review of the Agreement will take place at least three calendar months prior to the expiry of the Initial Term. If, as a result of the review, the Parties agree that changes are required to be made to the Agreement, the Parties will enter into a variation to record the amended terms and conditions of the Agreement”.**

4. SERVICES

4.1 Commission of Services:

- (a) The EPA will commission, and the Local Authority will agree to provide, services as agreed between the parties from time to time in a Statement of Work.
- (b) The Parties may enter into this Agreement prior to agreeing on a particular Statement of Work. The Parties agree that clauses 3, 11,12, and 16-20 apply for the duration of this Agreement, and that all other clauses apply when a Statement of Work is agreed between the Parties and continue while Services are being performed under any Statement of Work.
- (c) Nothing in this Agreement shall create or be considered to create an expectation that the EPA will seek services from the Local Authority or that the Parties will enter into any Statements of Work during the term of this Agreement other than, where required, a s149G Report.
- (d) The Local Authority acknowledges that, except where the EPA is required (by the Act or by a board of inquiry) to commission services from the Local Authority, the Local Authority is a non-exclusive provider of services and the EPA may itself provide, or appoint any other person to provide, identical or similar services.

Comment [L7]: The clauses on termination are quite onerous. A local authority may not want to sign up to the agreement in the absence of a Statement of Work. Alternatively, a local authority may wish to have these clauses not take effect prior to agreeing a particular Statement of Work.

4.2 Incorporation of Statements of Work:

- (a) This Agreement incorporates each Statement of Work annexed to this Agreement on execution of this Agreement, if any (and such Statements of Work need not be separately executed).
- (b) During the life of this Agreement, where the EPA requires, and the Local Authority agrees to provide, Services, the Parties will enter into a Statement of Work which will form part of this Agreement.

4.3 Statements of Work requirements: Each Statement of Work must:

- (a) be in writing in the form set out in Schedule 1;
- (b) specify that subject to clause 1.3, it is subject to and governed by this Agreement;
- (c) describe the Services being provided under that Statement of Work which may include any of the deliverables set out in Schedule 2 (provided that the Parties acknowledge that Schedule 2 is intended to be non-exhaustive and is included in this Agreement to give an indication of the type of services and deliverables which are within the scope of this Agreement and therefore may, from time to time, be sought by the EPA);
- (d) include a pre-estimate of Service Fee, payable by the EPA to the Local Authority for the Services; and

Comment [L8]: Local authorities may want to insert the words "or like effect", to allow flexibility over what is included in the Statement of Work.

(e) be signed by a person with the authority to sign on behalf of each Party.

5. CONFLICT OF INTEREST

5.1 **Potential for conflict:** The Parties acknowledge the multiple roles that the Local Authority may perform in relation to a matter of national significance (including making its own submission); and consequently that there is potential for a conflict between the Local Authority's role as submitter and its engagement by the EPA to perform Services under this Agreement.

Comment [L9]: If the Agreement is also to cover reports commissioned by the EPA and the BOI, these could be specifically referred to in this clause

5.2 **Process:** To mitigate any actual, potential or perceived conflict:

(a) in each Statement of Work:

(i) the Local Authority will confirm whether or not it is aware of any conflict of interest which interferes or may interfere with the Local Authority's ability to perform the Services set out in that Statement of Work; and

Comment [L10]: 5.1 identifies that a local authority may make its own submission. Clause 5.2 requires councils to be explicit about the potential for conflicts of interest - the EPA should be kept informed about whether a submission will be lodged by the local authority.

(ii) the Parties will acknowledge any identified actual, potential or perceived conflict of interest and how that conflict will be managed during the performance of the Services by the Local Authority;

(b) the Local Authority will immediately notify the EPA of any actual, potential or perceived conflict of interest that arises during the performance of its Services and which interferes or may interfere with the Local Authority's ability to perform the Services; and

The Relationship Agreement (section 3.2) requires that the role of a local authority performing services should be kept distinct from participation as a submitter. We consider that a local authority can provide technical services eg advice about the completeness of an application and preparation of a "key issues" report with limited scope and also prepare a submission without conflict of interest. Sensitivity will, however, be required .

(c) the Parties will work together to manage and resolve any conflict under clause 5.2(b) that does arise in such manner as agreed between the Parties in the circumstances.

6. LOCAL AUTHORITY'S GENERAL OBLIGATIONS

6.1 **General obligations:** In providing the Services, the Local Authority shall:

(a) act with reasonable care, skill and diligence;

(b) provide all personnel, processes and resources required to provide the Services in accordance with this Agreement;

(c) respond to any reasonable requests for information made by the EPA in relation to the Services within a reasonable time frame; and

(d) comply with all relevant Law and the Local Authority's applicable health and safety procedures, policies and guidelines.

6.2 **Cost recovery:** The Local Authority acknowledges that:

- (a) the EPA is entitled to recover its actual and reasonable costs in exercising its functions and powers under the Act from relevant applicants (including the cost of the Services under this Agreement);
- (b) relevant applicants have the ability under the Act to object to its requirement to pay costs,

and, accordingly, the Local Authority agrees to perform the Services in accordance with the relevant Statement of Work and use its best endeavours to provide such Services efficiently and economically in order to mitigate the risk of applicants objecting to the imposition of cost recovery under the Act.

Comment [L11]: See clause 9 in relation to the EPA paying the local authority's fees for performing work under the Agreement. The fact that the EPA is responsible for cost recovery may be one reason for including the section 149G(3) report in the Agreement – as it would avoid argument about how a Council would recover its costs from an applicant

7. EPA'S OBLIGATIONS

7.1 The EPA shall:

- (a) provide any information and assistance that is reasonably necessary to enable the Local Authority to perform the Services within a reasonable time frame; and
- (b) comply with all relevant Law.

8. SUBCONTRACTING

8.1 **Subcontracting:** In performing the Services, the Local Authority may subcontract third parties provided that the

- (a) relevant subcontractors are identified in the relevant Statement of Work; or
- (b) the parties otherwise agree in writing that the Local Authority can subcontract an identified third party.

Comment [L12]: This provides the ability for the local authority to subcontract and provides flexibility so the contractors do not have to be identified prior to signing the Agreement.

A council should consider engaging preferred suppliers who have already agreed or will agree to the terms. A new contract which includes the specific provisions will be needed (Clauses 5, 6, 10, 11 and 13).

8.2 **Effect of subcontracting:**

- (a) The Local Authority will ensure that each of its subcontractors grants the EPA the same rights and agrees to fulfil the same obligations to the EPA as set out in clauses 5,6,10, 11, and 13.
- (b) If the Local Authority does not comply with clause 8.2(a), the entry by the Local Authority into a subcontract will not relieve the Local Authority from liability for the performance of any obligations under this Agreement.

Comment [L13]: As drafted, the Agreement does not anticipate the application of any discount policy. This clause will need to be reviewed in the event a discount policy is adopted by the EPA.

9. FEES AND PAYMENT

9.1 **Service Fees:** The fees for the Services to be provided pursuant to this Agreement are based on the applicable rates set out in Schedule 3 plus disbursements, up to the maximum amount specified in the relevant Statement of Work ("**Service Fees**").

Comment [L14]: Councils should consider referencing the "actual and reasonable costs" and not rely on the pre-estimated service fee.

9.2 The parties acknowledge that any amount specified in the Statement of Work represents a genuine pre-estimate of the Service Fee. If, during the performance of the Services, the Local

Comment [L15]: the actual and reasonable costs incurred by the Local Authority based on...

Authority considers that it will or may exceed, the estimated Service Fee the following will apply:

Comment [L16]: capture "the actual and reasonable costs" here.

- (a) the Local Authority will notify the EPA as soon as reasonably practicable;
- (b) the Parties will, as soon as reasonably practicable, discuss the Service Fee estimate, actual costs incurred to date and anticipated further costs;
- (c) the Parties will, acting reasonably, agree a revised Service Fee provided that unless the Parties agree a revised Service Fee the EPA is not responsible for the payment of any amount in excess of the Service Fee set out in the relevant Statement of Work.

Comment [L17]: This provision appears unreasonable, given that the RMA allows the EPA to recover all actual and reasonable costs from the applicant. The EPA has the ability to provide further estimates to the applicant.

If this clause remains in an agreement, the Council may want to consider whether there is any ability to recover costs directly from an applicant (although this is not clear).

9.3 **Rates:** The Fees will be based on the applicable rates as set out in Schedule 3. The Local Authority may update the Schedules of rates by giving no less than 20 Working Days' written notice of any change prior to changes taking effect, provided that the Local Authority may not give notice of a change in rates more than once in a calendar year during the Term.

9.4 **Invoices:** The Local Authority may issue an invoice to the EPA on or before the 20th Working Day each month for the Service Fees relating to any Services provided by the Local Authority in the previous month. Each invoice must:

- (a) be in the form of a valid tax invoice for GST purposes;
- (b) be in a form, and delivered by the means of communication, reasonably requested by the EPA from time to time; and
- (c) describe in adequate detail the Services that are the subject of the invoice and the timing of the provision of such Services
- (d) specify whether the invoice is interim or final.

9.5 **Additional invoice information:** The Local Authority shall provide such information as the EPA reasonably requests relating to any amount invoiced or proposed to be invoiced by the Local Authority under this Agreement.

9.6 **Payment:** The EPA shall pay to the Local Authority the amount payable in respect of each invoice issued under clause 9.3 by the 20th day of the month following the month to which the invoice relates.

9.7 **Disputed invoices:** If the EPA disputes any amount in an invoice issued under clause 9.3 the EPA shall:

- (a) notify the Local Authority as soon as reasonably practicable, identifying the amount in dispute and the reasons for the dispute; and
- (b) pay any balance of the invoice which is not in dispute by the due date.

Comment [L18]: consider adding the following sentence to (b): **Such payment shall not constitute full and final settlement.**

Also need to clarify how any disputes are resolved – presumably in accordance with the dispute resolution process in this agreement.

10. RECORDS AND PROCEDURES

10.1 **Records:** Each Party shall keep full, accurate and up-to-date records relating to the performance of the Services by the Local Authority under this Agreement.

10.2 **Procedures in relation to cost recovery:** In the event of any relevant applicant objecting to the imposition of cost recovery under the Act, the Local Authority agrees to, at no cost to the EPA:

- (a) make available to the EPA to inspect and copy all relevant records (subject to any confidentiality requirements); and
- (b) provide any reasonable assistance required to the EPA in order for the EPA to address the objection.

Comment [L19]: Consider deleting this phrase. Such a review should not be at no cost to the EPA. A council is still required to provide "reasonable assistance" but certain costs i.e large photocopying costs and the potential for airfares etc should be at the expense of the EPA.

Comment [L20]: Consider whether it is appropriate to include an additional clause here re cost recovery for staff time or subcontractor's time in complying with paragraphs (a) and (b).

11. CONFIDENTIALITY

11.1 **Confidentiality:** Each Party will:

- (a) keep the Confidential Information confidential at all times;
- (b) not disclose any Confidential Information to any person other than its employees or third parties to whom disclosure is necessary for the purposes of fulfilling obligations under this Agreement;
- (c) effect and maintain adequate security measures to safeguard the Confidential Information from access or use by unauthorised persons; and
- (d) ensure that any employees or third parties to whom it discloses Confidential Information are aware of, and comply with, the provisions of this clause 11.1.

Comment [L21]: The issue with cost recovery is important, as a hearing may be necessary, and there may be an expectation that the local authority would be available throughout the hearing, including potentially giving evidence.

11.2 **Exceptions:** The obligations of confidentiality in clause 11.1 do not apply to any disclosure of Confidential Information:

- (a) required by Law, including the Official Information Act 1982 and the Local Government Official Information and Meetings Act 1987;
- (b) to the extent that such disclosure is necessary for the purposes of carrying out the Services;
- (c) where such information has become public other than through a breach of the obligation of confidentiality in this clause 11 by one of the Parties, or its employees or authorised third parties, or was disclosed to one of the Parties on a non-confidential basis by another person.

12. OFFICIAL INFORMATION

12.1 The EPA and the Local Authority acknowledge that any information held by the Local Authority is subject to the Local Government Official Information and Meetings Act 1987 ("LGOIMA") and

any information held by the Ministry is subject to the Official Information Act 1982 (“OIA”). If the EPA and the Local Authority receives a request from a third party relating to this Project or documentation concerning this Deed, then the EPA or the Local Authority, as the case may be, shall give the other Party reasonable opportunity to comment on whether or not there are good or conclusive reasons for withholding the information pursuant to LGOIMA or the OIA, but the Parties acknowledge that the Party who is required to respond has the final decision on whether or not the information is to be released pursuant to LGOIMA or the OIA.

13. INTELLECTUAL PROPERTY RIGHTS

13.1 **Ownership:** Except to the extent a Statement of Work expressly provides otherwise, the following ownership arrangements for Intellectual Property Rights will apply:

- (a) all Intellectual Property Rights of a Party or any of its licensors in works that are not developed or created under or in connection with this Agreement (“**Existing Intellectual Property Rights**”), but are used for the purposes of this Agreement, will continue to be owned by that Party or the relevant licensor; and
- (b) all new Intellectual Property Rights that arise in relation to works that are developed or created under or in connection with this Agreement, including all Intellectual Property Rights in modifications, adaptations and additions to works in which there are the Existing Intellectual Property Rights will be owned by the Party that developed or created the relevant works.

13.2 **Licence:** In all cases where the EPA would otherwise breach the Local Authority's Intellectual Property Rights by using any works supplied to the EPA under this Agreement, the Local Authority grants to the EPA a royalty free, non-exclusive, perpetual and irrevocable licence to use those works in the manner contemplated by this Agreement and the Act.

13.3 **Third Party Licence:** In all cases where the EPA would otherwise breach a third party's Intellectual Property Rights by using any works supplied to the EPA under this Agreement, the Local Authority will ensure that the EPA is granted a royalty-free, non-exclusive, perpetual and irrevocable licence, to use those works in the manner contemplated by this Agreement and the Act.

13.4 **Contemplated use:** Unless the relevant Statement of Work provides otherwise, it is contemplated by this Agreement that any report provided by a Local Authority to the EPA may be copied, and that all or part of it may be published by the EPA or otherwise disclosed to third parties.

13.5 **Local Authority warranty:** The Local Authority warrants, undertakes and represents to the EPA that neither the supply of the Services nor the EPA's possession or use as contemplated by this Agreement of any information or materials supplied under this Agreement will infringe the Intellectual Property Rights of any third party.

Comment [L22]: This intellectual property clause allows the EPA to make use of any IP that belongs to the local authority. In particular, the local authority may have developed report templates that it is using to provide the services to the EPA. It will be important that the EPA can use those reports, but that the local authority retain the rights to any IP in those reports. This outcome is achieved by clause 13.

Comment [L23]: The licence should be perpetual and irrevocable. It basically allows the EPA to use the report that is provided by the local authority (or its subcontractors). This licence would allow the EPA to put it on the relevant BOI website. If the licence was revocable, the EPA would need to remove the report etc.

Comment [L24]: Local authorities should be able to give this warranty. It should know when it is relying on copyrighted information in the preparation of the report/consultancy services.

14. WARRANTIES

14.1 Each Party warrants, undertakes and represents to the other that:

- (a) it has obtained all authorisations and has done all things necessary in order to enter into this Agreement and to perform its obligations under this Agreement;
- (b) to the best of its knowledge and belief it is not aware of anything which will, or might be reasonably expected to, prevent or impair that Party from performing all of its obligations under this Agreement, in the manner and at the times contemplated by this Agreement; and
- (c) to the best of its knowledge and belief all information provided by it to the other under or in relation to this Agreement is true, accurate and not misleading in any respect (including by omission).

Comment [L25]: Needs proviso to clause (a) "to the best of its knowledge and belief".

15. LIABILITY

15.1 **Exclusion:** Neither party shall be liable to the other party for any:

- (a) loss of profit, loss of revenue, loss of business opportunity, or damage to goodwill; or
- (b) any indirect, consequential or special loss or damage.

Comment [L26]: See discussion at front of guidance about liability.

Comment [L27]: The intention of this clause is that neither party is liable to the other for loss. To ensure this intention is explicitly stated, clause 15.1 needs to be reworded to state neither party shall be liable to the other party for any "loss including but not limited to...". As drafted, the clause provides for uncapped liability for direct loss, but no liability for indirect loss.

16. TERMINATION

16.1 **Termination for cause:** Either Party may terminate this Agreement immediately by notice to the other Party if:

- (a) the other Party commits a material breach of this Agreement and fails to remedy that breach within 10 Working Days after receipt of notice requiring the breach to be remedied; or
- (b) the other Party assigns or transfers this Agreement or any rights or obligations under this Agreement without the prior written approval of the non-defaulting Party (which the non-defaulting Party may withhold at its sole discretion).

16.2 **Termination without cause:**

- (a) Either Party may terminate this Agreement at any time by giving the other Party at least 20 Working Days' prior notice provided that there are no services outstanding under any Statement of Work between the parties.
- (b) The Parties may terminate this Agreement or a particular Statement of Work by mutual agreement if a conflict of interest arises under clause 5 which the Parties believe, acting reasonably, cannot be resolved or managed.

16.3 **Consequences of termination:** On and following termination or expiry of this Agreement for any reason the termination or expiry shall be without prejudice to either Party's rights and remedies in respect of any breach by either Party of this Agreement, where the breach occurred before the termination or expiry of this Agreement.

17. **FORCE MAJEURE**

17.1 **Force Majeure Event:** "**Force Majeure Event**" means, in relation to either Party:

- (a) a circumstance beyond the reasonable control of that Party including earthquake, epidemic, fire, flood, riot, terrorism or war; or
- (b) lock-outs, strikes and other industrial disputes (in each case, whether or not relating to that Party's workforce and whether or not beyond the reasonable control of that Party).

17.2 **No breach:** Except as set out in clause 17.3, a Party (the "**affected Party**") shall not be liable for any failure or delay in performance of any obligations under this Agreement to the extent such failure or delay is due to a Force Majeure Event, provided that it:

- (a) notifies the other Party of the nature and extent of the Force Majeure Event as soon as reasonably practicable;
- (b) uses reasonable endeavours to mitigate the effect of the Force Majeure Event and to carry out its obligations under this Agreement to the extent reasonably practicable; and
- (c) resumes full performance as soon as reasonably practicable.

17.3 **Exclusions:** Clause 17.2 shall not relieve a Party of any failure or delay in performance of any obligations under this Agreement to the extent such failure or delay is due to:

- (a) that Party's lack of funds for any reason;
- (b) that Party's failure to take precautions which, having regard to all the matters known to it before the Force Majeure Event, it ought reasonably to have taken, but did not; or
- (c) the failure of a contractor or supplier of that Party, except to the extent such failure is itself caused by a Force Majeure Event and the contractor or supplier would meet the requirements for relief under this clause 17 if this clause 17 applied to such failure.

17.4 **Corresponding obligations:** The other Party shall be relieved of its corresponding obligations to the same extent the affected Party is relieved of its obligations due to this clause 17.

17.5 **No requirement to settle:** Nothing in this clause 17 shall be construed to require any Party to settle a lock-out, strike or other industrial dispute by acceding against its judgement to demands made to it.

17.6 **Termination:** If the Force Majeure Event prevails for a continuous period of more than six months, either Party may terminate this Agreement by giving 10 Working Days' notice to the other Party. On the expiry of the notice period, this Agreement will terminate. Neither Party

shall have any liability to the other in respect of termination of this Agreement due to a Force Majeure Event, but such termination shall be without prejudice to rights and liabilities which have accrued prior to termination.

18. DISPUTE RESOLUTION

- 18.1 **Dispute resolution process to apply:** Subject to clause 18.6, no Party may commence any proceedings relating to any dispute between the Parties unless the Party has taken all reasonable steps to comply with this clause 18.
- 18.2 **Dispute notice:** If there is a dispute between the Parties in relation to this Agreement, either Party may give the other Party notice of the nature and details of the dispute.
- 18.3 **Negotiation:** Within 10 Working Days of receipt of the notice of dispute, senior managers of the Parties shall meet to endeavour to resolve the dispute.
- 18.4 **Mediation:** If the dispute is not resolved within 20 Working Days of receipt of the notice of dispute, either Party may by notice to the other Party refer the dispute to mediation. The mediation will be conducted in Wellington (if requested by the EPA) under the LEADR New Zealand Incorporated ("**LEADR**") standard mediation agreement. If the Parties do not agree on a mediator or the mediator's fees within 5 Working Days of receipt of the notice of mediation, the mediator shall be appointed or the fees set by the chair of LEADR (or his/her nominee) at the request of either Party. The Parties shall bear the mediator's fees equally.
- 18.5 **Continued performance:** While any dispute remains unresolved each Party shall continue to perform this Agreement to the extent practicable, but without prejudice to their respective rights and remedies.
- 18.6 **Urgent relief:** Nothing in this clause 18 will preclude a Party from seeking urgent interlocutory relief before a court.

19. NOTICES

- 19.1 **Writing:** Each notice under this Agreement (each a "**notice**") shall be in writing and delivered personally or sent by post, email or facsimile.
- 19.2 **Addresses:** Each notice shall be sent to the address of the relevant Party set out in clause 7 or to any other address from time to time designated for that purpose by at least five Working Days' prior notice to the other Party.
- 19.3 **Receipt:** A notice under this Agreement is deemed to be received if:
- (a) **Delivery:** delivered personally, when delivered;
 - (b) **Post:** posted, three Working Days after the date of posting;
 - (c) **Email:** sent by email, when actually received in readable form by the recipient;

Comment [L28]: The focus of clause 18 is on litigation, rather than resolution through discussion. As drafted, clause 18 is broad enough to include disputes about invoices or the provision of services. It may be preferable to have a process which first involves discussion at the managerial level, and then resolution at CEO level.

In the context of a call-in, the timeframes in clause 18 are too long to enable the resolution of a dispute about the provision of any services.

Litigation or arbitration would also not be appropriate in relation to the provision of services, as these processes take time and money, and are likely to significantly exceed the costs for both the EPA and Local Authority.

One option would be to insert a separate process for resolving disputes about invoices or services, and make it clear that Clause 18 does not apply.

If the EPA adopts a discount policy, and that policy applies to the Local Authority, it may be necessary to include a process for addressing the apportionment of fault for not meeting a deadline.

Comment [L29]: The local authority may want provision for "*read receipt*" to confirm that it has been received. Otherwise, a follow-up call or some other form of confirmation would be required to know that it has been "actually received".

(d) **Facsimile:** sent by facsimile, upon production of a transmission report by the machine from which the facsimile was sent which indicates the facsimile was sent in its entirety to the facsimile number of the recipient designated for the purposes of this Agreement,

provided that any notice deemed received after 5 pm or on a non-Working Day shall be deemed to have been received on the next Working Day.

20. GENERAL

20.1 **Time of the essence:** The Parties agree that time is of the essence in the performance of their respective obligations under this Agreement.

20.2 Amendments:

(a) No amendment to this Agreement will be effective unless it is in writing and signed by the Parties.

(b) The Parties agree that if the Act is amended so as to change the role or function of the EPA or local authorities in respect of matters of national significance, nothing in this Agreement will apply to those new roles or functions, unless and until the Parties agree on the scope of their respective roles or functions and amendments to this Agreement.

20.3 **Assignment:** The Local Authority shall not assign or transfer any of its rights or obligations under this Agreement without the prior written consent of the EPA (which consent may be withheld in its sole discretion).

20.4 **Costs:** The Parties shall each bear their own costs and expenses incurred in the negotiation, preparation of this Agreement.

20.5 **Entire agreement:** This Agreement constitutes the entire agreement of the Parties and supersedes all prior agreements, arrangements, understandings and representations (whether oral or written) given by or made between the Parties, relating to the matters dealt with in this Agreement.

20.6 **Further assurances:** Each Party shall, at its own expense, sign and deliver any documents, and do all things, which are reasonably required to give full effect to the provisions of this Agreement.

20.7 **Relationship of Parties:** Nothing in this Agreement is intended to, or shall be deemed to, establish any partnership or joint venture between the Parties, constitute any Party the agent or employee of the other Party, nor authorise any Party to make or enter into any commitments for or on behalf of any other Party.

20.8 **Remedies cumulative:** The rights and remedies provided in this Agreement are cumulative and not exclusive of any rights or remedies provided by this Agreement or Law.

- 20.9 **Severance:** If any provision of this Agreement is or becomes illegal, invalid or unenforceable in any respect, that provision shall be read down to the extent necessary to make it legal, valid and enforceable or, if it cannot be read down, be deemed severed from this Agreement. Such change shall not affect the legality, validity and enforceability of the other provisions of this Agreement.
- 20.10 **Survival:** Following expiry or termination of this Agreement, clauses 13 (*Intellectual Property Rights*), 15 (*Liability*), 11 (*Confidentiality*) and 16 (*Termination*) together with other provisions that are by their nature intended to survive, will remain in effect.
- 20.11 **Waiver:** No waiver of a right or remedy under this Agreement or at Law (a "**right**") will be effective unless the waiver is in writing and signed by that Party. No delay or omission by a Party to exercise any right shall constitute a waiver of that right. Any waiver of a right will not constitute a waiver of any subsequent or continuing right. No single or partial exercise of a right shall restrict the further exercise of that or any other right.
- 20.12 **Governing Law and jurisdiction:** This Agreement is governed by New Zealand Law and the Parties irrevocably submit to the non-exclusive jurisdiction of the New Zealand courts in any proceedings relating to it.
- 20.13 **Counterparts:** This Agreement may be executed in any number of counterparts (including facsimile or scanned PDF counterpart), each of which shall be deemed an original, but all of which together shall constitute the same instrument. No counterpart shall be effective until each Party has executed at least one counterpart.
- 20.14 **Deed:** Notwithstanding the description of this Agreement as an agreement, the Parties intend that it shall take effect as a Deed.

EXECUTED as a deed

EXECUTED as a **DEED** for and on)
behalf)
of **ENVIRONMENTAL**)
PROTECTION AUTHORITY)

by its Authorised Signatory)

Signature

Name of authorised signatory, in the presence of

Witness signature

Full name

Address

Occupation

EXECUTED as a **DEED** for and on)
behalf)
of **[LOCAL AUTHORITY]**)
)

by its Authorised Signatory)

Signature

Name of authorised signatory, in the presence of

Witness signature

Full name

Address

Occupation

[Note: Execution blocks to be adjusted as necessary to meet the requirements of the Public Bodies Contracts Act 1959 and relevant delegations]

Comment [L30]: See comments in the introductory paragraphs at **Clause 1.4 Delegations**. The requirements of the Property Law Act 2007 also need to be considered – in particular, whether there should be 2 signatories who are councillors

SCHEDULE 1
STATEMENT OF WORK

Statement of Work

Local Authority: [insert name]

Background:

- A. The EPA and Local Authority are party to an agreement for the supply of services ("the Agreement").
- B. The EPA wishes to engage the Local Authority, and the Local Authority agrees, to provide the services set out in this Statement of Work.

SIGNED by the Parties:

For and on behalf of the EPA: Signature:	For and on behalf of the Local Authority: Signature:
Name:	Name:
Position:	Position:
Date:	Date:

Comment [L31]: Local authorities will also need to ensure that they have correct delegations in place to sign the SOW, where it is signed subsequent to the signing of the Agreement.

THE PARTIES AGREE:

1. **Interpretation:**

(a) Words have the same meaning when used in this Statement of Work as defined in the main body of the Agreement.

(b) "Start Date" means [].

2. **Agreement:** This Statement of Work, and any other document incorporated in it by reference, is incorporated into, and therefore subject to and governed by the Agreement.

3. **Precedence:** If there is any conflict between this Statement of Work and the Agreement, this Statement of Work will prevail.

4. **Contact persons:** The main contact persons for the purposes of this Statement of Work are:

EPA	Main Contact	Backup Contact
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Name:

Title:

Phone:

Mobile:

Email:

Local Authority	Main Contact	Backup Contact
------------------------	---------------------	-----------------------

Name:

Title:

Phone:

Mobile:

Email:

5. **Conflict:** [Address any conflicts issues here. Use either of the following paragraphs]

The Local Authority confirms that it is not aware of any conflict of interest which interferes or may interfere with the Local Authority's ability to perform the Services set out in this Statement of Work.

Or

The Parties acknowledge the following actual, potential or perceived conflicts of interest [... identify and outline basis for management of conflicts – note that depending on when the SOW is agreed, this may need to include reference to the fact that the LA wants to make a submission and how any conflict will be managed]]

Comment [L32]: This statement may also need to be amended to reflect that at the date of signing that the LA is undecided about whether it will be making a submission – particularly if the matter is not public. This statement can then set out how the process will be managed if the project is called in, and if it does make a submission.

6. **Services:** The Local Authority agrees to provide the Services as set out in this section 5.

[Describe the type and scope of service to be provided to the EPA by the Local Authority in as much detail as necessary. Include:

- a more detailed description of the project/purpose*
- refer to any applicable documents and, if necessary, incorporate any documents by reference of attaching to this Statement of Work*
- if relevant, specify the standards to which the services must be provided*
- if Services are ongoing, complex etc., insert here any reporting requirements*

Comment [L33]: This reference is incorrect.

Examples:

The Local Authority will provide weekly project management status reports in the form set out in Appendix 1 to this Statement of Work.

and/or

The contact persons of the Parties will meet [weekly] (or with such other frequency as determined by the EPA) to discuss progress and the status of outstanding Deliverables and Services under this Statement of Work.]

Comment [L34]: You should carefully consider what you consider to be appropriate reporting requirements and the form of these reports

Comment [L35]: Consideration should be given to where such meetings take place – if the LA is expected to meet in Wellington, it will have cost consequences (which could be significant over the life of a call-in project).

7. **Subcontractors:** The Local Authority will use the following subcontractors:

[Insert name of relevant subcontractor and role in relation to Services]

Comment [L36]: Your subcontractors will need to sign a contract with you (the council) which reflects the provisions of the Services Agreement. It is likely that your standard contracts will need to be amended. This is discussed above at para 1.12.

8. **Deliverables:** The following table sets out the agreed Deliverables, delivery dates and applicable rates for completion of each deliverable.

Deliverable	Delivery Date
--------------------	----------------------

<i>Describe as above.</i>	

Services and Deliverables will be performed by:

Name	Role/title	Hourly rate (excl. GST)	Estimated number of hours
<i>Insert names of key personnel to perform services. If names not known ensure Role/title column completed.</i>			

9. **Records:** *[specify specific records that must be kept in terms of time recording, explanation of tasks undertaken etc]*

10. **Service Fee:** The Service Fee payable on the basis of the applicable rates and estimated number of hours (as above) and disbursements (as set out below) is up to [\$] plus GST.

11. **Disbursements:** The Local Authority is entitled to recover the following disbursements:

Item	Cost (excluding GST)
<i>List any applicable disbursements (e.g. travel)</i>	

Comment [L37]: It will be difficult to provide an accurate estimate for work for an entire project – particularly if a LA is engaged early on, and has no background knowledge about a project. The RMA allows for the recovery of reasonable costs, and does not expect a one-off estimate to be provided. A local authority may want to include a clause about further estimates and reviews of the Service Fee.

If no items are specified, any disbursements incurred by the Local Authority will be deemed to be included in the Service Fee unless the disbursement is agreed to by the EPA prior to being incurred by the Local Authority.

12. **Warranty:** The Local Authority warrants to the EPA that it has the expertise, resources and capacity to perform its obligations as agreed in this Statement of Work.

13. **Term:** This Statement of Work will commence on the Start Date and continue until the Services and Deliverables are provided unless terminated in accordance with the Agreement.

SCHEDULE 2

SCOPE OF SERVICES AND DELIVERABLES

Part A: Optional Services

The EPA may engage the Local Authority to provide any or all of the following Services:

1. Pre-lodgement

Undertake tasks and provide advice to the EPA on pre-lodgement actions and processes as agreed.

2. Lodgement

- Provide advice on adequacy and completeness of matter lodged with EPA (including the AEE).
- Provide advice about the need for further information or report

3. Service and notification where Minister makes direction that matter be referred to board of inquiry or Environment Court under section 142 or 147 of the Act.

Provide information so EPA can serve a copy of public notice of the matter on owners and occupiers of subject site, adjoining land owners and occupiers and submitters (if previously notified by the local authority).

4. Certificate of compliance where person makes an application to the EPA under section 139 of the Act

Provide advice on, and assess content of, application for certificate of compliance, including assessment of the proposed activity against the relevant plan provisions,

5. Related applications received after referral made

Section 149ZB and 149ZC (EPA processes further matters that relates to a matter of national significance that has already been referred to BOI or the Environment Court).
Provide

- advice on adequacy and completeness of matter (including the AEE)
- advice about the need for further information or report
- advice about whether the application must be notified
- information so EPA can serve notice on relevant persons

6. Boards of Inquiry

Provide advice as required by a board of inquiry.

LGNZ Guidance on Services Agreement Template and Relationship Protocol based on January 2010 MfE documents

Comment [L38]: Consider whether a Council wants to sign up to provide this advice when it has yet to decide what its role will be at any hearing.

Part B: Mandatory Services

Where the EPA is required to commission the Local Authority to produce a s149G Report

SCHEDULE 3

RATES

[to insert]

Comment [L39]: Local authorities will probably want to include their standard fee schedule here.



Environmental
Protection Authority
Te Mana Rauhi Taiao

Dated

2010

RELATIONSHIP PROTOCOL

ENVIRONMENTAL PROTECTION AUTHORITY

and

[INSERT NAME OF LOCAL AUTHORITY]

PARTIES

- (1) **HER MAJESTY THE QUEEN IN RIGHT OF HER GOVERNMENT IN NEW ZEALAND** acting by and through the Chief Executive of the Ministry for the Environment acting as the Environmental Protection Authority ("**EPA**")
- (2) [**INSERT NAME AND DETAILS OF LTA**], a local authority under the **Local Government Act 2002** ("**Local Authority**")

Comment [L40]: The Services Agreement is signed by the Secretary for the Environment. It would seem appropriate for the Relationship Protocol to also be with the Secretary for the Environment

1. BACKGROUND

Comment [L41]: Local authorities may want to consider the content of the Relationship Protocol generally. The background section largely overlaps with section 3.

1.1 **Establishment of EPA:** The EPA was established under the Resource Management Act (as amended by the Resource Management (Simplifying and Streamlining) Amendment Act 2009) ("**Act**") and is operational from 1st October 2009. The EPA is an office within the Ministry for the Environment. The Secretary for the Environment has and may exercise all the powers and perform all the functions and duties of the EPA.

Comment [L42]: Councils may want to specifically limit the relationship to Phase 1 EPA. This may be important if the role of the EPA widens.

1.2 **Role of the EPA:** The EPA has been established to administer, and make recommendations to the Minister for the Environment ("**Minister**"), regarding the processing of nationally significant consent applications, requests for plan changes, notices of requirement and to provide secretarial and support services to boards of inquiry appointed under the Act. As part of this role the EPA is concerned to ensure that the decision-maker has comprehensive and high quality information to inform its decision.

1.3 **Role of Minister for the Environment:** The EPA receives a matter that may be of national significance and makes a recommendation to the Minister regarding the processing of that matter. The Minister then decides whether to refer a proposal to a board of inquiry or to the Environment Court or to a local authority.

1.4 **Role of a board of inquiry or the Environment Court.** If the Minister refers a matter to a board of inquiry or the Environment Court, the board or Court is responsible for holding public hearings and determining the matter. The EPA will provide secretarial and support services to a board of inquiry.

1.5 **Role of local authorities:** Local authorities have a primary role under the Local Government Act 2002 to promote the social, economic, environmental and cultural well-being of communities in the present and for the future. Local authorities have more specific roles under the Act, including specific functions under Part 4 of the Act, the role of a consent authority under Part 6 and an obligation to develop and enforce observance of relevant policy statements and plans. If a matter is not referred to a board of inquiry or the Environment Court under Part 6AA of the Act, the local authority has primary responsibility for processing the matter. As a result of the local authorities' functions, duties and roles, they have knowledge of process, local plans and issues

and access to data and information that can assist to inform the process for determining proposals of national significance.

- 1.6 **Relationship with local authorities:** The amendments to processes for determination of matters of national significance and the establishment of the EPA alters existing roles, responsibilities and processes under the Act for processing and determining proposals of "national significance". This change will be assisted by the establishment of a common understanding and close working relationship between the EPA and local authorities.

2. PURPOSE OF THIS PROTOCOL

- 2.1 **Purpose:** The purpose of this Relationship Protocol ("**Protocol**") is to record an understanding between the EPA and the Local Authority on their respective roles and relationship in the circumstances of a proposal of "national significance" under the Act, including:

- (a) acknowledging each other's roles and functions as set out in section 3 of this Protocol;
- (b) recognising that the EPA must commission the Local Authority to provide a report on key issues and that the EPA may commission other services from the Local Authority to support the process; and
- (c) establishing a basis to work together to ensure that both parties deliver a high quality process and outcome.

- 2.2 **Legal effect:** Nothing in this Protocol is legally binding.

3. ROLES AND RESPONSIBILITIES

- 3.1 **Statutory functions:** The EPA and the Local Authority each recognise and acknowledge that in relation to the consideration and determination of matters of "national significance" under the Act:

- (a) the EPA has statutory functions, powers and/or obligations to perform;
- (b) the Local Authority has statutory functions, powers and/or obligations to perform;
- (c) if the Minister directs that a matter be determined by a board of inquiry or the Environment Court, the EPA must commission a report from the Local Authority;
- (d) the EPA may wish to commission the Local Authority to provide other services to assist in ensuring that a board or Court has comprehensive and high quality information about a matter before making its decision; and
- (e) the Local Authority may:

- (i) be an interested party in any application before the EPA by being an applicant or by making a submission (in support of, opposition to, or taking a neutral stance) in relation to the matter as it considers necessary); and/or
- (ii) have arrangements or agreements in place with other local authorities or the relevant applicant involved in a matter of national significance;

Comment [L43]: Local authorities may want to delete the reference to "arrangements". A LA may have an arrangement with an applicant to provide essential services, such as water and wastewater if a matter proceeds. However, this is the LA with a different hat on, not the LA as regulatory authority.

3.2 Services: The parties understand that:

- (a) aside from the report required to be commissioned under section 149G of the Act, the Local Authority is under no obligation to provide services at any time;
- (b) the parties will agree the terms for the provision of services in a separate agreement; and
- (c) the performance by the Local Authority of any services:
 - (i) is undertaken by the Local Authority in its capacity as an expert in the field of services sought;
 - (ii) is, and must be kept, distinct from the Local Authority's participation as a submitter on a matter of national significance;
 - (iii) does not limit or affect the exercise by the Local Authority of its statutory functions under the Act or any other relevant legislation;
 - (iv) is undertaken by the local authority on the basis that its costs will be paid by the EPA and recovered by the EPA from the applicant.

Comment [L44]: Local authorities may however have obligations to provide information to a BOI where it is a submitter or otherwise involved in proceedings

Comment [L45]: We do not consider that a local authority can provide technical advice on the completeness of an application, prepare a key issues report and also participate as a submitter while meeting this clause. The EPA needs to be informed of these roles and how the potential for conflicts of interest will be managed.

4. RELATIONSHIP

4.1 Performance of roles and functions: When performing their respective roles and functions, the parties will:

- (a) subject to confidentiality, notify the other party in the event that either party becomes aware of any proposal or possible proposal of "national significance";
- (b) establish appropriate points of contact between their personnel; and
- (c) conduct themselves in the manner set out in paragraph 4.2.

4.2 Relationship principles: The parties will conduct themselves, subject always to fulfilling their respective statutory functions, at all times in a manner consistent with the following objectives and principles:

- (a) the establishment of a relationship based on mutual trust and good faith;

Comment [L46]: Suggest redraft this to limit this to regulatory functions only. If the council submits on the application this will be an inappropriate clause, particularly (e) and (f).

(b) the parties' intention to co-operate in relation to all matters of national significance before the EPA, and:

(i) to identify and apply best practices for EPA processes in relation to matters of national significance; and

(ii) where appropriate, to draw on existing processes used by the Local Authority under the Act;

(c) respect and fairness in all dealings and communications between the parties;

(d) recognition of the value of early engagement in pre-lodgement processes to facilitate a better process;

(e) a commitment to co-operate where appropriate, and a willingness to take mutual steps, to both avoid and resolve differences, and identify solutions; and

(f) a commitment to sharing information and keeping each other informed in relation to a particular proposal and processes.

Comment [L47]: A LA may want to clarify what is intended by this clause – it is not clear whether they will be expected to further develop existing processes, and if so, who will bear the costs. It may be possible to acknowledge existing processes and use them, rather than develop new processes

Comment [L48]: Clauses (e) and (f) may not be appropriate if council submits on an application.

5. PRIMARY CONTACTS

5.1 **Primary contacts:** The primary contact for each party is as follows:

EPA:

Name: [insert EPA manager]

Address: [insert address]

Contact: [insert phone, fax, mobile details]

Local Authority:

Name: [insert name & title]

Address: [insert address]

Contact: [insert phone, fax, mobile details]

(together, the “**Primary Contacts**”)

5.2 **Role:** The Primary Contacts will serve as the primary point of contact with the other party in order to facilitate and maintain a good working relationship. Each party may replace its Primary Contact or appoint an acting Primary Contact from time to time on giving written notice to the other party's Primary Contact.

6. REVIEW

6.1 Either party may request a meeting with the other for the purposes of discussing the operation of this Protocol. If either Party requests such a meeting, the parties will, at their own cost, meet as soon as reasonably practicable for both parties and in a location or manner (for example, telephone conference) to be agreed by the parties.

Comment [L49]: A LA may want to have a limit on the number of reviews that could take place, particularly as this clause requires them to bear the costs involved.

7. CHANGES TO PROTOCOL

7.1 Any changes to this Protocol shall be made in writing, agreed by the parties and signed by persons authorised to do so on behalf of each of the parties and such changes shall be attached to and form part of this Protocol.

EXECUTION

Signed by:

Signed by: