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1 October 2019

Submission on proposed Marine Protection Rules Parts 102 and 131
Ministry of Transport and Maritime New Zealand
Submitted via info@transport.govt.nz and feedback.guidance@maritimenz.govt.nz

PEPANZ Submission: Proposed Marine Protection Rules Parts 102 and 131

Introduction

1. The Petroleum Exploration and Production Association of New Zealand ("PEPANZ") represents private sector companies holding petroleum exploration and mining permits, service companies and individuals working in the industry.
2. This document constitutes PEPANZ's submission on the:
    - proposed changes to proposed amendments to Marine Protection Rules Parts 102 and 131[1] and
    - proposed guidelines which support proposed Marine Protection Rule Part 102[2].
3. We note the submission deadline of 1 October 2019.

Executive Summary

i. ***We support higher financial assurance requirements provided market standard insurance is accepted***
PEPANZ has engaged on many iterations of proposals to significantly increase the monetary levels of offshore financial assurance since 2014.
Our support for higher financial assurance requirements has always been on the critical proviso that 'market standard insurance' will be accepted by the regulator as a means of demonstrating financial assurance (as it is in other comparable jurisdictions).

ii. ***Context relating to the Amendment Bill and uncertainty about the ultimate legislative settings***
We are concerned that this consultation process requires us to submit on proposed Marine Protection Rules before the Maritime Transport (Offshore Installations) Amendment Bill has been passed. Having to submit on the Rules before the enabling legislation is confirmed means we cannot know if the Rules are in fact consistent with the enabling legislation or *ultra vires*.

iii. ***We support the ability for the Director to accept market standard wording***
We support the ability for the Director to accept market standard wording, as *provided for in* Rule 102.8A(4)(a). We are however unclear on the interplay between that section and Rule 102.8A(3), which may be used by the Director to prevent an owner using market standard wording.

iv. ***Liabilities for dumping of waste***
Related to dumping and Rule 102.8A(4), we want to ensure that the assurance requirements will not capture potential decommissioning/abandonment liabilities (because abandoning structures constitutes dumping), which incidentally are managed by the EPA.

v. ***Some concepts and terms need greater specificity***
A number of concepts or terms in the proposed Rules need further specification to provide certainty and these are addressed in the body of the submission.

[1] https://www.transport.govt.nz/sea/financial-security-regime-for-offshore-installations/
[2] https://www.maritimenz.govt.nz/public/consultation/part102/documents/draft-guidance-certificates-insurance-installations.pdf

vi. ***Unit of Account***

The proposed rule requires that assurance be provided in NZD. Insurance policies should be set in USD (United States Dollars) as the US currency is used in practice.

vii. ***The method for calculating potential impact of hydrocarbon on the shoreline should be outlined in the Rule***

Although the Guideline provides specificity on calculating shoreline impact of spills, the rule itself should provide certainty around calculations and thresholds (using the material in the current guideline).

viii. ***The transitional provisions appear to be workable but could be expressed in a more accessible manner***

ix. ***The guidance should not use the word 'must' as it is not binding***

Background

4. The Maritime Transport Act 1994 ("MTA") imposes a strict, unlimited liability regime for owners in the event of incidents causing harm to third parties. We support this liability framework. As a way to demonstrate that owners can meet their liabilities, financial assurance has been required although traditionally at levels well below what operators in fact insure for.
5. PEPANZ has engaged on many iterations of proposals to significantly increase the monetary levels of offshore financial assurance since 2014. PEPANZ supported the decision in September 2017 to increase levels up to $600 million with the assurance requirement determined under a risk assessment framework. This new regime however was not brought into force due to guidance being needed to finalise the regime. Our support for higher financial assurance requirements has always been on the critical proviso that 'market standard insurance' will be accepted by the regulator as a means of demonstrating financial assurance (as it is in other comparable jurisdictions).
6. Regulatory practice in New Zealand to date has meant that non-standard cover has been required at the in-force level of ~$27 million (this cover required so-called 'MTA Endorsements' on insurance policies to cover the liabilities under the MTA). At smaller sums, bespoke policies with 'MTA Endorsements' have generally been obtainable to date but are very unlikely to be able to be obtainable at larger amounts and this has been our key concern.

Submission on the proposed Marine Protection Rules

Context relating to the Amendment Bill and uncertainty about the ultimate legislative settings

7. We submitted on the Maritime Transport (Offshore Installations) Amendment Bill on 29 August 2019[3], and express some concern about the current process which requires us to submit on the critically important proposed Marine Protection Rules before seeing the final shape of the Bill. At the time of writing, that Bill remains before select committee consideration and officials have been unable to advise us on its direction. This is frankly very unfair to submitters, because having to submit on the Rules before the enabling legislation is confirmed means we cannot know if the Rules are in fact consistent with the enabling legislation or *ultra vires*. This approach is unlikely to be consistent with with good legislative practice as provided for in the Legislation Design and Advisory Committee's Guidelines[4].
8. If Parliament changes that bill, it may affect what is appropriate or required in Marine Protection Rules. We consider a more prudent process would be open consultation on the proposed Marine Protection Rules until at least the Transport and Infrastructure Select Committee had reported-back the Bill to the House of Representatives. As stated in our submission on the Amendment Bill, we prefer that the MTA require that market standard wording be accepted, and that the Marine Protection Rules simply specify examples of that but that the Director does not have discretion to require non-standard cover.

Timing is unclear and guidance needs to be finalised

9. There is no formal indication of when the regime will come into effect. The Maritime Transport (Offshore Installations) Amendment Bill states that the Act comes into force on 1 November 2019, but the timing on the Rule is not indicated. We also note the statement on the Transport website that "The regime will be further supported by industry guidance developed by Maritime New Zealand, which will be finalised once the Bill and the changes to the rules are completed." We assume that the regime cannot be implemented until that Guidance has been developed, as was the case with the Marine Protection Rule 102 which was signed into law but not brought into force in September 2017.

We support the ability for the Director to accept market standard wording

10. We support Rule 102.8A(4)(a), which allows the Director to treat assurance requirements as satisfied if:
    - well-control liabilities are covered by market standard wording as found in Section C of 'EED 8/86', and
    - non-well liabilities are met in the manner outlined in Appendix 6.

[3] https://www.pepanz.com/dmsdocument/116

[4] See Guidelines at Chapters 1 and 14 particularly.

11. We are however unclear on the interplay between Rule 102.8A(4)(a) and Rule 102.8A(3), which "without limitation" allows the Director to assess the insurance or other financial security. We are slightly concerned that Rule 102.8A(3) be used by the Director to prevent an owner using market standard wording as envisaged by Rule 102.8A(4)(a).
12. Rule 102.8A(4) merely enabling and is not a binding requirement. Our preference is that Rule 102.8A(4)(a) should always take priority, i.e. if market standard wording is used this must be accepted by the Director. This is why we submitted on the Maritime Transport (Offshore Installations) Amendment Bill saying that the eventual Amendment Act should require the Director to accept market standard wording (while allowing the Rules to specify examples of such cover, e.g. EED 8/86).
13. We support Rule 102.8A(4)(b) and Appendix 6 as it relates to extending pollution coverage beyond wells to include other facility assets. However, it is not technically correct for Appendix 6 to refer to 'market standard' as there may be alternate wordings which ultimately provide the same cover. We recommend using wording along the lines of ""EED 8/86 endorsed to extend coverage to include pollution arising from other insured facility assets".

Liabilities for dumping of waste

14. Related to dumping and Rule 102.8A(4), we want to ensure that the assurance requirements will not capture potential decommissioning/abandonment liabilities (because abandoning structures constitutes dumping), which incidentally are managed by the EPA. Because it is worded as matter dumped *from* a structure, it reads as if it will *not* apply to decommissioning and abandonment (which we support), but this should be carefully considered by officials to avoid unintended consequences.

Points requiring further specificity

15. A number of concepts or terms in the proposed Rules need further specification to provide certainty. We identify such points below and ask that officials consider whether further clarification or specificity may be warranted in itself or alternatively in guidance (noting that guidance is informal and is, except in the potential case of 'legitimate expectation', unenforceable).
    a. Rule 102.8(c)(ii) refers to "the location of each installation to be covered by a certificate of insurance". Presumably the location referred to is the planned location of drilling. This should be clarified either in the rule or in guidance.
    b. Rule 102.8(c)(iii) refers to "the nature of the hydrocarbon being explored or mined". Especially in the less certain case of exploration, this should be referred to as "the expected nature".
    c. Rule 102.8(c) refers to "each offshore installation". We understand from the proposed guidance that an owner with multiple installations must only provide assurance for the greatest single exposure. We support this if our understanding is correct.
    d. The Transitional provisions state that "new installation means a regulated offshore installation referred to in Rule 102.7 that was not operating in New Zealand immediately before the commencement date". The term "operating" should likely be further expanded on to refer to when drilling has commenced, i.e. at the point of spudding. That is because a rig may be *en route* or in-country at ports but not drilling and therefore posing no risk in terms of well control.

Joint ventures

16. Rule 102.8B(a) refers to "the name of the owner of the regulated offshore installation and the principal place of business of that owner". Given most operations are joint ventures, it may make sense to say "owner or owners".

Unit of Account

17. The proposed rule requires that assurance be provided in NZD. Insurance policies should be set in USD (United States Dollars) as the US currency is used in practice.

Calculating potential impact of hydrocarbon on the shoreline

18. "Potential shoreline impact depends hugely upon how the amount of shore is calculated, so we support making the calculation method clear. Page 10 of the guideline states one of the key outputs of a model is "total length (km) of shoreline oiled above clean-up threshold (10g/m2)". However, the new scaled framework in the rule, Schedule 1, Appendix 5 does not contain this threshold and only has "Score A: Total length of shoreline oiled". The rule itself should provide certainty around calculations and thresholds rather than just relying on guidance, so after "*Score A: Total length of shoreline oiled*" it should add "*above clean-up threshold (10g/m2)*" as per the guidance.

Transitional provisions

19. The transitional provisions appear to be workable. However, we, along with operators, have found the current wording difficult to understand and recommend that they be written in a more clear manner. We relay below what we understand the provisions to mean:

a. Certificates already issued at commencement date remain valid and therefore current until their expiry date determined under the previous rule;

b. applications in process immediately before the regulations commence are assessed under the prior regime;

c. after the regulation comes into force, existing installations have a one year period to choose whether an application is assessed under the new or previous rule;

d. for new installations, applications after the regulation comes into force will be decided under the previous rule if submitted within three months, and under the new rule thereafter;

e. if an application was decided under the previous rule (as part of the above transitional provision), the financial assurance is valid for the shortest of the period of the validity of the financial security, 12 months, and the first anniversary of the regulations.

Submission on the proposed Guideline for Marine Protection Rule Part 102

Consistency of terms

20. The Guideline should use terms consistent with those in the Rule. The proposed rules use "Well Containment Contingency Plan" whereas the guidance uses "Well Control Contingency Plan".

Use of the term "must" in guidance

21. The Guideline uses the word "must" but this is unlikely to be appropriate. The guidance uses the word "must" a lot even when is not mandated by the regulations or rules. For example, page 3 of the proposed guideline guidance states "The Director has determined that the owner **must** format the approved plan as a PDF with: one volume consolidating the oil spill contingency plan; one volume consolidating the well control contingency plan (if applicable to the installation); and one volume containing all additional information" [emphasis added].

Modelling requirements

22. We would like to ensure that the text on model end points and outputs on page 10 of the proposed guideline has been reviewed by a company that carries out modelling in order to ensure it is consistent with their usual approach. Examples of such firms are Metocean or RPS.