25 January 2013

Commerce Committee Secretariat
Parliament Buildings
WELLINGTON 6011

Dear Sir/Madam

Submission on the Crown Minerals (Permitting and Crown Land) Bill - Supplementary Order Paper dated 27 November 2012

Details

This submission on a Supplementary Order Paper ("SoP") to the *Crown Minerals (Permitting and Crown Land) Bill* ("the Bill") is from the Petroleum Exploration and Production Association of New Zealand ("PEPANZ").

We wish to appear before the committee to speak to our submission.

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PEPANZ represents private sector companies which hold petroleum exploration and mining permits, service companies and individuals working in the industry. PEPANZ members account for more than 95% of New Zealand's hydrocarbon production.

Submission

Overarching comments

PEPANZ's focus in policy matters is ensuring New Zealand has a high-quality and stable regulatory environment to attract and retain quality investment in petroleum exploration and production. We support high standards and strict rules that give industry and New Zealanders confidence. We value stability and consistency of application. The *Crown Minerals Act 1991* ("CMA") is a central part of the regulatory regime and its provisions are fundamental in shaping perceptions of the regulatory environment for petroleum in New Zealand.

Part 1 of this submission is focussed on the SoP, which was released publicly on 27 November 2012. We welcome and appreciate the opportunity to comment on an important SoP such as this at the Select Committee stage. Also, since we provided our submission on the introduction version of the Bill we have had the opportunity to consider and comment on the draft *Minerals Programme for Petroleum*. In considering this document and its relationship with the Bill we have uncovered issues with some provisions in the Bill. We are taking the opportunity in Part 2 of this submission to also draw these to the attention of the Committee.

Good health and safety practice in the upstream petroleum sector is vital and PEPANZ supports all practical efforts to improve it. We support expanding the scope and strengthening the petroleum specific *Health and*

Safety in Employment (Petroleum Exploration and Extraction) Regulations 1999 and the proposal in the Bill for the Minister to consider an applicant's health, safety and environmental credentials before awarding a permit under the CMA. We supported the establishment of the High Hazards Unit. PEPANZ is also collaborating with the Ministry of Business, Innovation and Employment ("MBIE") and unions on the development of a Code of Practice for Health and Safety Representatives in the upstream petroleum sector.

PEPANZ supports the intent of the SoP but has concerns with some of the proposed provisions, in particular clause 21. PEPANZ is not clear how overlapping legislative regimes in the ways proposed is going to improve health and safety regulation, practices or outcomes in the upstream petroleum sector. If government considers the various regulatory changes already being pursued will be insufficient (and we do not take this view) then it should address this directly rather than implementing overlapping health and safety ("H&S") requirements in the CMA.

Resourcing implications must also be considered. PEPANZ is concerned the additional and overlapping responsibilities for regulators that would result from the provisions in the SoP could adversely affect the ability of regulators to undertake their primary responsibilities. For example, in the absence of further resourcing there is a risk that giving the Health and Safety Regulator further legislative tasks under the CMA will simply reduce its ability to undertake site inspections and the like. This outcome would seem counter to the objectives of the SoP.

Whilst the SoP proposes extending some of the regulatory recommendations of the Royal Commission on the Pike River Coal Mine Tragedy to permit holders of all minerals under the CMA, we note these regulatory provisions won't necessarily apply to all coal mines as a substantial proportion of coal resources in New Zealand are not Crown owned. This is one reason why the focus of health and safety initiatives should remain on laws and processes that apply comprehensively.

Please note that PEPANZ's comments on the SoP relate solely to the potential application of these proposed provisions to the petroleum sector. We are not commenting on the appropriateness of applying these same requirements to other minerals and recognise the fundamentally different H&S regulations applying to the different extractive sectors.

Part 1 - Clause by clause comments on proposed amendments to the Bill contained in the SOP

In this part of our submission PEPANZ has provided comments on each clause of the SoP. We have only provided specific recommendations (in bold) where we do <u>not</u> support the proposed clauses as currently drafted. Underling has been used for emphasis in some places.

Amendments to clause 8

Definition of "good industry practice"
PEPANZ considers the definition of "good industry practice" should be sufficiently broad to enable the Minister to consider salient matters and activities when making relevant decisions under the CMA. This logically includes activities such as petroleum drilling and production, which tend to be key parts of petroleum permit work programmes.

PEPANZ recognises the current definition of "good industry practice" in the Bill is problematic, particularly the use of both "matters" and "activities". Given the activities of petroleum drilling and production are regulated under the *Health and Safety in Employment (Petroleum Exploration and Extraction) Regulations*,

then if "good industry practice" does not include such matters or activities it would have a somewhat limited scope.

The simplest solution to this problem would be simply to remove the words "or activities" at line 6 on page 9 of the Bill. This would make clear that all relevant activities would be considered (e.g. drilling). This would address the potential confusion concerning the meaning and scope of "good industry practice", which PEPANZ identified in its submission on the draft *Minerals Programme for Petroleum*.

The proposed solution in the SoP, removing the words "health, safety, or" would mean that good industry practice could include matters or activities regulated under health and safety laws but would except those matters and activities regulated under environmental law. This remains problematic from a drafting perspective as activities such as petroleum drilling and production are of course also regulated under environmental law and so the same problem remains as identified above.

Recommendation 1: reconsider the drafting of "good industry practice" to ensure it covers relevant activities undertake by permit holders.

Definition of "Health and Safety Regulator"
PEPANZ supports including the proposed definition of "Health and Safety Regulator". We understand based on comments by the Acting Minister of Labour in late 2012 that administration of the *Health and Safety in Employment Act* will likely be transferring from MBIE to a new agency.

Definition of "regulatory agency"
PEPANZ supports replacing the current paragraph (d) under the definition of regulatory agency with "the Health and Safety Regulator".

PEPANZ recognises a case for agencies other than the four already specified in (a) to (d) could be made but considers there is value in keeping the definition of regulatory agency limited to those agencies with the most significant regulatory roles relating to the relevant industries. We recognise there may be a case for having a different definition of regulatory agency for the petroleum and minerals sectors given the different regulatory frameworks and practical contexts pertaining to each.

PEPANZ questions the rationale for including the Department of Conservation as a "regulatory agency". The Department will be relevant to petroleum activities in some circumstances such as where an activity is undertaken on conservation land (rare for petroleum activities) or offshore seismic surveys are undertaken. However, unlike the agencies listed under paragraphs (a) to (d) the Department is not a regulator per-se in the sense that it is not administering regulations.

Recommendation 2: consider further the appropriateness of including the Department of Conservation as a "regulatory agency".

Amendments to clause 18

Section 29A(2)(a)(iii)
PEPANZ supports redrafting section 29A(2)(a)(iii) by removing the words "in respect of the proposed activities". They appear unnecessary.

Section 29A(2)(b)
PEPANZ supports the proposed redrafting of new section 29A(2)(b). The proposed changes would make this section simpler and clearer.

Section 29A(2)(c)
PEPANZ supports including "or mining" in section 29A(2)(c).

Section 29A(3)(b)
PEPANZ supports the proposal to include [in section 29A(3)(b)] the requirement to take the views of the Health and Safety Regulator into account when considering, in the case of a petroleum exploration permits, whether the proposed operator has or will have the capability and systems necessary to meet the health, safety, and environmental requirements of all specified Acts for relevant activities. The Minister would logically take the views of the Health and Safety Regulator into account on many occasions and so making this mandatory seems sensible.

Further consideration must however be given to what is expected from these other regulatory agencies in terms of "views" [refer 29A(3)(b) of the Bill]. For example on what basis would the Health and Safety Regulator be expected to reach a "view" on a potential operator if that company has never before operated in New Zealand. Given these are serious matters any "views" should be well considered and not based on superficial information. How regulators would be resourced to undertake this work also needs to be considered.

Amendments to clause 21

Section 33(1)(aa)
The proposed inclusion of new section 33(1)(aa), requiring permit holders to comply with the *Health and Safety in Employment Act 1992* and regulations made under that Act ("H&S regime"), is a response to a recommendation provided in the report of the Royal Commission into the Pike River Coal Mine tragedy. The reasoning for this recommendation is briefly outlined in the Commission's report as follows:

> "Compliance with the Health and Safety in Employment Act 1992 and regulations should be a general condition of mining permits. This would give a clear signal of the importance placed on safe mining operations by the Crown. Failure to comply could be grounds for revocation of the permit."[1]

The Pike River report does not outline the rationale for this recommended change to legislation further. We note the report refers to this only in relation to mining permits and given the report's context it would seem the Commission is referring specifically to underground coal mining permits. In contrast the proposal in the SoP would extend this to all prospecting, exploration and mining permits issued under the CMA for all minerals (including petroleum). PEPANZ supports the objective outlined above but in the absence of any further policy rationale is unclear as to the specific regulatory issue this proposal is trying to address in relation to the upstream petroleum industry.

PEPANZ has the following concerns with the proposed inclusion of new section 33(1)(aa) as currently drafted:

- it would be duplicative and unnecessary as the H&S regime is already legally binding, provides the H&S regulator with substantial powers, and has penalties for non-compliance;
- it would not be compatible with aspects of the CMA framework;
- it would make non-compliance with the H&S regime subject to offences and penalties under both H&S law and the CMA, which is an unusual legal approach and disproportionate in comparison with the treatment of other sectors;

[1] From paragraph 36 on page 321 of the report of the Royal Commission on the Pike River Coal Mine Tragedy.

- linking compliance with health and safety laws to potential revocation of a permit creates investment uncertainty, particularly in the absence of any clear policy or threshold regarding when it might be exercised;
- it would be applied in effect retrospectively to existing permit holders as it was not in effect when they committed to their permits; and
- it would create a legislative responsibility overlap that is currently not resourced for and risks simply increasing paperwork rather than improving regulatory oversight of health and safety matters.

We explain these points more comprehensively in the following paragraphs. We hasten to add that our views on this clause are in no way influenced by any suggestion that health and safety is not extremely important and that health and safety laws must always be complied with. Good health and safety practice is at the core of the petroleum industry.

Section 9 of the CMA states that compliance with the CMA does not remove the need to comply with all other applicable Acts, regulations, bylaws and rules of law. The requirements under the H&S regime are legal requirements in their own right and non-compliance can be subject to enforcement action and penalties. Strong powers exist under the H&S regime such as the ability for an inspector to shut down an activity with a prohibition notice. Specific regulations already apply to the upstream petroleum sector (e.g. drilling and production facilities) and these are currently being upgraded to align with international best practice. Resourcing of the regulator (the High Hazards Unit) has been upgraded substantially to enable improved oversight. This is all appropriate and broadly consistent with international best practice for the petroleum sector.

The CMA is a regulatory framework designed to allocate rights to prospect, explore and mine all types of Crown owned minerals (from aggregates to gold, coal and petroleum). Given the application of its generic provisions across a range of extractive sectors it is not well configured to address specific issues for individual mineral types or specific activities.

PEPANZ is concerned that making compliance with the H&S regime a specific responsibility for permit holders under section 33 of the CMA would not be compatible with key aspects of the CMA. Obligations on permit holders under the CMA generally relate to proactively doing things (e.g. fulfilling work programme commitments to undertake seismic surveys or drill wells, filing reports, paying royalties etc.). If a permit holder does not do something by the due date they are expected to do it as soon as possible. Permit holders who do not do things are initially notified of their failure and are at risk of penalties under the CMA and potentially revocation of the permit under section 39 of the CMA if they fail to remedy their non-compliance.

In contrast major non-compliance with the H&S regime, which is presumably the primary concern here, often relates to a company passively omitting to do something that leads or contributes to workers being harmed. Non-compliance is often only determined after an event. Once an event has occurred there would often be no ability to remedy this non-compliance as it would require winding back the clock. This inability to remedy non-compliance is a subtle but fundamental difference that reflects the different nature of the obligations under the CMA and H&S regimes. In this respect making compliance with the H&S regime a specific responsibility for permit holders under the CMA is not compatible with aspects of the CMA.

Making compliance with one legal regime a condition under another creates the potential for penalties and sanctions under two different laws for the same thing, seemingly a form of double jeopardy. In this case non-compliance with the H&S regime could lead to penalties under both that regime and under the CMA. This is an unusual legal construct and would treat permit holders under the CMA disproportionally to other

sectors. If for example the operator of a factory or a construction site does not comply with H&S regime then they are rightly subject to intervention, enforcement and penalties under that law, however, they would not generally be subject to a second set of penalties for the same non-compliance under another legal regime.

PEPANZ considers making compliance with the Health and Safety in Employment Act 1992 (and regulations made under it) a requirement for permit holders under the CMA would add a new aspect to investment uncertainty for the petroleum sector and increase perceptions of sovereign risk. At present, non-compliance with the H&S regime would not put into question the status of the petroleum exploration or mining permit under the CMA. The proposed inclusion of section 33(1)(aa) would make a breach of the H&S regime something that could also trigger revocation under section 39 of the CMA, putting at risk any investments made under a permits. As we explained in our first submission on the Bill, the proposed changes to section 39 would give little guidance to the Crown in relation to whether to revoke a permit for non-compliance with the permit or the CMA. The SoP gives no guidance as to when this power to revoke would be exercised in relation to non-compliance with the H&S regime. If the policy intent is that this revocation power would only be used in extraordinary circumstances then this should be made clear in the primary legislation.

The amounts expended by permit holders under petroleum exploration and mining permits can be very significant. The level of investment is such that it is imperative to protect and secure the underlying right which underpins these investments, namely, the exploration or mining permit itself. This is a key aspect of ensuring a favourable perception of sovereign risk in New Zealand and encouraging investment.

PEPANZ's concern is that the proposal to expand the possible grounds for revocation of a permit will have a cost in terms of increased investment uncertainty, which is likely to be material because the potential financial loss could be very large. The uncertainty is related to both the likely inability to remedy H&S non-compliance after the fact, and the absence of guidance in the CMA as to when this revocation power might be exercised in relation to non-compliance with the H&S regime. The uncertainty derived from such changes to the regulatory regime is cumulative and contributes to an overall heightened perception of the commercial riskiness (relative to other jurisdictions) of investing and operating in New Zealand.

We note also that section 33(1)(aa) would be applied in effect retrospectively to existing permit holders as it was not in effect when they committed to the obligations and responsibilities in their permits. This type of change is not consistent with creating a stable environment to encourage quality investment.

Our final concern is practical in nature. The Health and Safety Regulator already has the power to intervene at a facility if required on health and safety grounds and so it is not apparent when involving New Zealand Petroleum & Minerals ("NZPM") would be necessary to achieve this outcome. Importing H&S matters into section 33 of the CMA would create a legislative responsibility overlap that is currently not resourced for at either end (NZPM or the Health and Safety Regulator) and risks simply increasing paperwork rather than improving regulatory oversight of health and safety matters.

PEPANZ's view is that the best approach would be to not include proposed section 33(1)(aa) in the Bill. However, should section 33(1)(aa) be progressed, and applied to petroleum permits, then the Committee must further consider this proposed clause. In particular the following:

- whether the legal obligations it would create are compatible with the framework of the CMA, and key provisions such as section 39:
- whether permit holders being potentially liable for penalties under two legal regimes for the same breach of H&S laws is appropriate; and
- in what sort of circumstances could non-compliance with the H&S regime trigger revocation proceedings under the CMA?

Recommendation 3: either

- **do not include proposed section 33(1)(aa) in the Bill; or**
- **consider carefully the purpose of this clause, its compatibility with the framework of the CMA, the appropriateness of double penalties, in what sort of circumstances would non-compliance with the H&S regime trigger revocation proceedings under the CMA and then redraft the clause accordingly.**

Section 33AA
The stated objective of this clause is to:

> "ensure that any requirements of the Health and Safety in Employment Act 1992 or regulations made under that Act that are required to be met before an activity can be commenced or recommenced are in fact met before the activity is commenced or recommenced"

PEPANZ supports this objective but has concerns with the practical application of this proposed section as currently drafted. Whilst the SoP is a response to the report of the Royal Commission on the Pike River Coal Mine Tragedy we note this clause does not respond to a specific recommendation in the report.

Whilst it is not explicit the effect of proposed new section 33AA would be to create an approval right (in some ways a new type of permit) that does not currently exist and would have not have a clear legal origin in the H&S regime. The focus of the H&S regime applying to the petroleum sector is on-going engagement between operators and the regulator regarding certain higher-risk activities. The obligations are on the operator to conduct operations safely with the regulator able to intervene when, and to the extent, it considers necessary (e.g. ask questions, undertake inspections, issue prohibition notices). Furthermore once an activity has commenced the Health and Safety Regulator continues to monitor and can undertake inspections as necessary. This is an on-going process and is consistent with international regulatory practice for the upstream petroleum sector. It is not a regime where the Health and Safety Regulator is regularly formally approving activities to be undertaken by operators prior to their commencement.

This raises the issue of what would constitute an "activity" under proposed section 33AA. The word "activity" is used in its natural sense in the CMA and the Bill in various contexts but is not a defined term. It is not used extensively in the regulations applying to the upstream petroleum sector, with more specific terms used for particular activities of interest such as "well-drilling operations". Under exploration and mining permits the petroleum industry undertakes many different kinds of activities. These range from what would be generally seen as significant milestones, such as undertaking a seismic survey, drilling an exploration well or starting a new production plant, to comparatively modest actions such as reprocessing

existing seismic data or conducting a workover operation on a mature production well. This creates two issues in relation to proposed section 33AA.

First some activities that would be conducted under a petroleum permit such as seismic surveys or data reprocessing are not subject to specific involvement by the Health and Safety Regulator as they are not high-hazard activities. This needs to be clearly recognised in the drafting as at present they would seem to be captured, which we presume is not the intent.

The number of situations in which the regulator formally accepts something, such as the safety case for a new production facility, are only a fraction of the total number of activities requiring interactions between the regulator and an operator. Based on the context it appears the activities designed to be captured by 33AA are those significant milestones which carry material health and safety risks and where the Health and Safety Regulator is required to exercise a discretion. This would include accepting safety cases for drilling rigs and new production facilities. Otherwise this proposed provision would require the Health and Safety Regulator to effectively approve or permit activities under the CMA that they are not required to explicitly approve under the H&S regime, which would seem counter to the explicit design of this part of the H&S regime.

Proposed section 33AA would also indirectly extend some regulatory approval timelines for operators. For example, operators submit a drilling notification to the Health and Safety Regulator a certain number of days in advance of drilling a well for the regulator to review and it is up to the regulator to get back to the operator within that timeframe or they can proceed. Proposed section 33AA would mean that only once that notification timeframe had expired could the operator approach the Health and Safety Regulator to ask it to confirm to the chief executive (presumably NZPM in practice) its satisfaction that the H&S regime had been complied with (noting the problems with this discussed above), for NZPM to then notify the operator of this, thereby completing the circle. Even if the two government agencies are efficient then this is likely to add at least a few days to the regulatory process for operators and if they aren't it could add substantial periods. This could create significant costs for operators.

It must also be recognised that this additional responsibility and process would have resourcing implications for both the Health and Safety Regulator and NZPM. These would be more manageable should the scope be focussed on those situations where the Health and Safety Regulator is required to make an explicit decision, such as to accept a safety case for a drilling rig.

Overall this proposed new section seems unnecessary given the power already afforded to the Health and Safety Regulator under the H&S regime. Should it progressed PEPANZ considers that it must be amended to address the issues identified.

Recommendation 4: either

- **do not include proposed section 33(AA) in the Bill; or**
- **redraft it to define clearly what constitutes an "activity", focussing on those points under the H&S regime where the Health and Safety Regulator is required to exercise an active discretion, such as to accept a safety case.**

Section 33AB

Proposed section 33AB would require the Health and Safety Regulator to notify the chief executive of MBIE, presumably NZPM in practice, where they had reasonable grounds to suspect that a permit holder had

contravened or failed to comply with the H&S regime. It is not clear from the Explanatory Note what the particular purpose of this notification would be. Given this notification would relate only to suspected non-compliance then it would presumably not of itself drive a compliance process or initiate a revocation process based on a contravention of proposed new section 33(1)(aa), the substance of which we have commented on above.

PEPANZ supports constructive inter-agency interaction on health and safety matters but considers further consideration should be given to what this clause is trying to achieve.

Recommendation 5: consider the purpose and drafting of this clause.

Section 33B(3)
PEPANZ supports the inclusion of proposed new section 33B(3).

Amendments to clause 28

Section 41C(4)
PEPANZ supports proposed new section 41C(4) although it creates a new bureaucratic step relating to the transfer of operators. As with proposed section 30AA this provision has the issue that it requires the Health and Safety Regulator to be explicitly satisfied, or not satisfied, that requirements under the H&S regime have been met. However given the nature of those requirements this is not a position the regulator is explicitly required to reach under the H&S regime. As such it creates a new kind of permit relating to the H&S regime, which has its legislative basis in the CMA regime.

It must also be recognised that in the early stages of an exploration permit the Health and Safety Regulator might have little or no direct involvement in the relevant activities such as desktop research, data reprocessing or seismic surveying. In this context it is not clear if it would have anything to be "satisfied" about. The clause requires redrafting to address this.

Recommendation 6: redraft this clause to recognise that in some circumstances the Health and Safety Regulator may have little or no direct involvement in early activities such as desktop research, data reprocessing or seismic surveying.

New clause 28A

Section 43
As we outlined in our submission on the draft *Minerals Programme for Petroleum*, PEPANZ supports this drafting change to section 43.

We note the same change (replacing "good exploration or mining practice" with "good industry practice") is also required in clauses (3) and (4) of section 44.

Amendments to clause 35

Section 90AA
PEPANZ supports the proposed drafting changes to section 90AA.

Amendments to clause 38

Section 90F
PEPANZ supports the proposed inclusion of section 90F.

Part 2 - Other comments on the Bill

Since we provided our submission on the introduction version of the Bill we had the opportunity to consider and comment on the draft *Minerals Programme for Petroleum*. In considering this document and its relationship with the Bill we have uncovered some further issues with the Bill. We are taking the opportunity in this submission to also draw these following matters to the attention of the Committee.

- Removing section 30(8) removes the ability for two permit holders to willing agree to overlapping activities.
- Proposed new section 115C does not enable existing permits to move to the new royalty provisions to be provided in regulations.
- The "dealing" definition should be clarified as to whether it is intended to refer to gas sale agreements, overriding royalty agreements, or both.

Removing section 30(8) removes the ability for two permit holders to willing agree to overlapping activities.

PEPANZ commented on proposed changes to section 30(7) and (8) in the context of potentially eroding existing permit holders rights through the grant of overlapping interests.

Section 30(8) also serves an important purpose in that it allows two persons to separately explore/mine in the same permit area for the same mineral where they agree to do so. This provides appropriate flexibility for permit holders to arrange their affairs to maximise the development of the available resources (consistent with the fundamental purpose underlying the Act).

There are also some technical reasons why section 30(8) should be retained. The current Act and the Bill expressly envisage exploration and mining permits being granted over the same permit areas for minerals activity on the one hand and petroleum activity on the other hand (and this is common in practice currently) - it would be anomalous to allow this but not allow two (say) petroleum explorers to separately work the same permit areas at the same time where they agree to do so. There are examples of situations where petroleum permits have been granted to two separate persons/companies over the same land area.

The Bill purports to confer on the Minister the ability to grant strata permits. The utility of this provision will be limited if section 30(8) is not retained as it would not appear possible for the Minister to grant permits over different strata (e.g. deep and shallow) in the same land area without section 30(8).

Recommendation 7: retain section 30(8).

Proposed new section 115C does not enable existing permits to move to the new royalty provisions to be provided in regulations.

PEPANZ welcomes the certainty provided by keeping permits on the royalty regimes they were originally issued but questions whether preventing permit holders from voluntarily opting into new royalty regimes is unnecessarily restrictive. We recommend that permit holders be given the opportunity to move to a new royalty regime should they choose to do so. Should government choose to offer specific royalty incentives in future then it would seem able to specifically exempt earlier permits from taking advantage of these if that was the policy intent.

Recommendation 8: amend section 115C to give permit holders the ability to opt-in to new royalty regimes.

The “dealing” definition in proposed section 41B should be clarified

The definition of “dealing” in proposed section 41B(4) requires clarification. The “dealing” definition refers to “agreements which impose an obligation that relates to the proceeds of production”. This language has historically been interpreted to refer to overriding royalty agreements not petroleum sales agreements. If the intention is to catch certain types of gas sale agreements, namely those not at arms-length or fair market value as well (as appears to be the case based on the discussion document and Cabinet papers), that should be made clear.

Recommendation 9: clarify the definition of “dealing” in section 41B.

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