12 October 2012

Committee Secretariat
Transport and Industrial Relations
Parliament Buildings
WELLINGTON 6011

Dear Sir/Madam

Submission on the Marine Legislation Bill

Details

This submission on the Marine Legislation Bill ("the Bill") is from the Petroleum Exploration and Production Association of New Zealand ("PEPANZ" or "the Association").

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

I can be contacted at 04 494 8974 and email (andrew.saunders@pepanz.com).

PEPANZ represents private sector companies holding 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, are the operators of all current offshore petroleum production facilities, and hold many offshore petroleum exploration permits.

Submission

Our comments in this submission are focussed on Part 2 of the Bill, which concerns the transfer of regulation of discharges and dumping from the *Maritime Transport Act 1994* to the *Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012* ("the EEZ Act"). We also provide some comments on Part 1 of the Bill.

The Association supports in principle the transfer of the dumping and discharge regulatory functions from Maritime New Zealand ("MNZ") to the Environmental Protection Authority ("EPA"), provided this results in more integrated management of the environmental effects of activities and equal, or improved, efficiency and certainty of process.

The application and effect of the provisions in the Bill will depend largely on the content of regulations to be made under the Bill. Regulations will determine for example whether certain discharges are subject to permitted activity rules or require an individual marine consent. The implications of these distinctions are severe and without knowing the content of these regulations it is very difficult to assess the effect of the Bill on the petroleum industry.

We have in some places discussed the adverse consequences for industry activities or processes as if they were to be classified as "discretionary" when in fact it may turn out to be managed as a permitted activity, thereby avoiding those problems we have discussed. This makes our submission more complex than it would otherwise need to be, however, we consider this necessary given the uncertainty and possible consequences involved.

Context for the upstream petroleum industry

Discharges from "offshore installations", which include fixed petroleum installations and mobile drilling rigs, are currently regulated under the *Maritime Transport Act 1994* and more specifically under *Marine Protection Rules Part 200 - Offshore Installations – Discharges* ("Part 200").

Discharges from offshore petroleum activities that are subject to this regulation include:

- discharges of production and displacement water (water that comes from the petroleum reservoir with the oil/gas and is either processed to remove contaminants to meet international standards and then discharged into the sea, or re-injected back into geological formations)
- discharges of chemicals involved in drilling, production, and maintenance activities (includes drill cuttings with adhered drilling fluids)
- discharges associated with the functioning of a drilling rig or permanent installation such as processed human waste, cooking waste and deck drainage

Dumping is currently regulated under the *Maritime Transport Act* and more specifically under *Marine Protection Rules Part 180 - Dumping of Waste and Other Matter* ("Part 180"). Dumping is potentially relevant to the petroleum industry in relation to the disposal of structures at the end of life (decommissioning) and to equipment that is more sensibly left on the seabed than removed for disposal on land.

Fundamental changes to regulation of discharges

The provisions of the Bill would substantially alter the current regulation of discharges under Part 200. Operators currently prepare Discharge Management Plans, consult specific relevant persons and submit them to MNZ for acceptance at least two months prior to undertaking any activity. The level of certainty and timeline provided in this process has proved workable in relation to both permanent installations and for exploration/appraisal drilling by mobile drilling rigs.

In contrast, under the provisions of the Bill, various discharges could either be a "permitted" and controlled by regulation or a "discretionary" and require a marine consent under the EEZ Act. Given this approach we do not see how the requirements and processes currently provided for discharges under Part 200 could be replicated under the EEZ Act as amended by the Bill. For instance it is not clear whether there would be a role for a document like the current "Discharge Management Plan" required under Part 200.

Regulating relevant discharges as a permitted activity under appropriate regulations would be able to give a high level of certainty to operators and stakeholders and keep compliance costs low and timeframes short. We consider that the relevant matters currently provided for in Part 200, including those related to international obligations, could sensibly be provided for in permitted activity regulations.

In contrast, if a marine consent is required, then operators do not have certainty of outcome and each application is subject to a process involving public hearings potentially taking six months (or longer if

appealed) and which is estimated by the Ministry for the Environment to cost at least $350,000.[1] This would be unworkable for petroleum exploration and appraisal activities due to the timeframes associated with contracting a rig. We have made more detailed comments on this below in relation to clause 107 of the Bill.

Given this stark difference in regulatory outcome between permitted activity status and discretionary activity status, and without knowing the potential content of regulations, it is impossible to assess the impact of the Bill on the upstream petroleum industry in terms of workability and costs. The Bill is only likely to achieve the objectives outlined on page 7 of the explanatory note (specifically "this adjustment provides greater certainty and reduced compliance costs for industry") if relevant discharges are managed as permitted activities under regulations.

Integration of processes under EEZ Act

The EEZ Act as amended by the Bill appears to envisage separate consents being necessary under the EEZ Act: "marine consent" for those restricted activities listed in under section 20 of that Act, "marine discharge consent" and/or a "marine dumping consent" under proposed new subpart 2 of Part 2 of the EEZ Act. It is not clear whether for a single proposed activity there would be one merged process or up to three separate processes regarding applications, submissions, advice, reports, evidence, information and hearings for marine consents.

If these are for the same activity (or operation), which is likely for marine consents and marine discharge consents, then to try and achieve the objectives outlined for the Bill (notably reducing compliance costs for industry and avoiding inefficiencies from duplicating processes) it would be important to process them together. The Bill makes no apparent reference to this. Whilst the EPA may be able to merge these processes on an administrative basis it would be desirable to explicitly facilitate this in the legislation (as, in a slightly different context, has been done in the EEZ Act itself in the cross boundary consent provisions between RMA and EEZ jurisdictions, refer Part 3 – subpart 3 of the EEZ Act).

Given that Discharge Management Plans under Part 200 are currently not subject to a public process, the EPA should similarly be given discretion as to whether marine discharge consent applications need to be publicly notified. Notification should depend on the nature and extent of the application. This would enable the regulator to ensure that the costs and time involved remain commensurate with aspects such as the environmental effects and uniqueness of an application. It would also enable where appropriate the industry to obtain approvals swiftly and so be able to make timely commercial decisions without jeopardising the environmental protection aims under the Bill.

Transition of discharge functions to the EEZ Act

We note the transitional and grandfathering provisions provided in clause 111 of the Bill. These appear to sensibly provide for existing Discharge Management Plans to apply until their end of their term.

These provisions do not however address what happens to an activity operating under a Discharge Management Plan that is due to expire soon after the new subparts of the EEZ Act are brought into force, or new activities involving discharges that might commence in the same period where the discharges are not permitted activities. What is permitted will not be determined until regulations are made and the Bill therefore needs to provide for either eventuality.

[1] Ministry for the Environment, "Managing our oceans, a discussion document on the regulations proposed under the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Bill", May 2012, page 22.

The transfer of discharge management needs to be able to provide for the situation where the lead time for an application for a discharge marine consent under the EEZ Act (approximately six months with risk of longer due to appeals on points of law) could exceed the time available following enactment of the new regime. It would be an unacceptable outcome if an operator was required to delay a project, with all the consequences this might entail, due simply to the transfer of these functions from one government agency to another.

We note that "planned petroleum activities" through to May 2014 are subject to a transitional regime under section 166 of the EEZ Act. This section does not appear to have been drafted in specific anticipation of the Act applying to the administration of discharges. It would however seem to apply if the transfer of discharges occurs before the EEZ Act comes into force. If the policy intent is to manage all discharges controlled currently under Part 200 as permitted activities, then it would be unnecessary to extend section 166 to explicitly cover the regulation of discharges under the EEZ Act. However, if the intention is that any discharges that might be associated with planned petroleum activities were to require a marine consent, then for the same reasons as apply under the EEZ Act already, we recommend section 166 of the Act should be expanded to cover these matters equally.

Clause by clause comments

Clause 2

We support Part 2 of the Act being able to be brought into force by Order in Council and for different provisions to be brought into force on different dates so that a workable transition in the administration of discharge and dumping can be achieved.

Clauses 40 -47

We note that clauses 40 to 47 of the Bill expand current provisions and include new provisions relating to the transfer of oil at sea. This part of the Bill would extend this aspect of the *Maritime Transport Act* regime to the EEZ and amongst other things extend the Director of MNZ's powers to enable the prohibition of an oil transfer if the Director believes on reasonable grounds that the transfer will pose an unreasonable threat of harm to the marine environment. The implications of these wide-ranging powers on industry will depend on how they are applied in practice by MNZ.

Clause 62

We note that a new Part 26A ("Civil liability for pollution of marine environment from marine structures") is being proposed to replace the current provisions now contained in Part 25 of the *Maritime Transport Act*. These new sections largely repeat the drafting of the current sections and we understand this redrafting is not intended to alter the current situation regarding the application of civil liability for pollution of the marine environment from marine structures.

Clause 90

Definition of dumping

We note that the definition of "dumping" proposed to be included in the EEZ Act would apply to abandonment of a structure but not to the abandonment of a pipeline, which would continue the current treatment of pipelines under section 257 of the *Maritime Transport Act*.

Definition of harmful substance

The proposed definition of "harmful substance" is "any substance specified as a harmful substance by regulations made under this Act". This is similar to the approach under the *Maritime Transport Act*

currently, whereby "harmful substance" means "any substance specified as a harmful substance for the purposes of this definition by the marine protection rules". We note the effect of this definition will depend on what is specified in regulations and whether this changes from what is currently specified under maritime protection rules.

Definition of "marine discharge consent" and "marine dumping consent"
The Association has no concerns with the proposed definitions of "marine discharge consent" and "marine dumping consent". However given that these are both deemed to be a type of "marine consent", there may be a need to give a specific name to the type of marine consents issued under current section 62 of the EEZ Act in relation to restricted activities specified in section 20. Otherwise there will be no way of distinguishing marine consents relating to restricted activities outlined in section 20 of the EEZ Act, which are known simply as "marine consents" and are currently the only type, from what will become a wider class of marine consents that also includes marine discharge consents and marine dumping consents.

Clause 96
Clause 96 replaces the whole of Part 2 of the EEZ Act and inserts an entire new subpart 2 into the Act concerning restrictions and prohibitions on discharges and dumping. We note that as well as making consequential changes to subpart 1 there are also some changes to the drafting of the EEZ Act that appear to be independent of the transfer of discharge and dumping functions. The rationale for these changes is not outlined in the explanatory note.

Amended section 22
We note that the chapeau to section 22 of the EEZ Act has been modified with the words "and continue" removed. The reason for this change is unclear and does not appear to be related to the purpose of this part of the Bill, namely the transfer of discharge and dumping functions. We recommend these words be reinstated.

New sections 24A, 24B and 24C
We support the intent of this clause, which largely supplants current section 226 of the *Maritime Transport Act*.

The policy rationale for the different drafting and scope of clauses 24B(1)(a) and 24C(1)(a) is not clear, specifically why the words "within the exclusive economic zone" are included in 24B(1)(a) but not in 24C(1)(a). We also note that the scope of new section 24A and new section 24C appear to largely overlap given the definition of "structure" includes "offshore installations".

Amended section 25
Although we agree with the general intent of this clause, and the expanded language in section 25(1), this is not directly related to the transfer of discharge and dumping functions and the rationale for altering the current drafting of the EEZ Act is unclear.

Clause 97
There are some spelling errors in this clause requiring attention.

Clause 100

New section 29A
This provision sets out the regulation making powers in relation to discharges and dumping. In relation to the dumping of specified waste it allows for it to be only prohibited or allowed with a marine consent, there

is no provision for any dumping to be permitted. This would seem to preclude flexibility in dealing with small items being left on the seabed.

Clause 103

New section 34A

This provision sets out the matters to be considered by the Minister when developing regulations relating to discharges and dumping.

Proposed new section 34A(3) would provide that:

> "(3) The Minister must take into account—
>
> "(a) the matters described in section 33(3), except paragraphs (c), (g), (h), and (j); and

This would mean the Minister would not be required to take into account the following matters in section 33 of the EEZ Act:

> (c) the effects on human health that may arise from effects on the environment
>
> (g) the economic benefit to New Zealand of an activity
>
> (h) the efficient use and development of natural resources
>
> (j) best practice in relation to an industry or activity

These proposed regulation making powers are inconsistent with the decision making powers for discharges and dumping in proposed new section 87D(2)(a) and their omission upsets the balanced approach provided in the EEZ Act. In that section the exclusion of the above four sub-clauses applies only to decisions on dumping and not to decisions on discharges, in relation to which only sub-clause (c) is excluded. It is not apparent why the Minister would not be required to take these matters into account when developing regulations for discharges, along with the many other matters listed in the section, including New Zealand's international obligations. It would be appropriate to apply the same approach to the development of regulations for activities , and for the discharges associated with those activities, particularly when they are controlled under the same legislation.

We also have comments on new section 34A(3)(b). We do not understand the rationale for excluding the application of sub-clause (c) relating to effects on human health in existing section 33(3) and then including a very similar clause in the form of proposed new section 34A(3)(b). If however there is a specific reason to do so then proposed new section 34A(3)(b) needs to be redrafted.

New section 34A(3)(b), which replicates the words of the proposed new section 87D on consideration of consent applications (refer sub-clauses (2)(a)(ii) and 87D(2)(b)(ii)), should not be applied in relation to the development of regulations for discharges because discharges that are permitted under regulation will not require "consent". Sub-clause (3)(b) needs to be redrafted and probably spilt into separate sub-clauses to recognise that marine consents may or may not be relevant to regulations concerning discharges, depending on whether they relate to permitted activities or discretionary activities.

We recommend that:

- proposed new section 34A(3) be amended so that when developing regulations relating to discharges the Minister be required to take into account all the matters listed in section 33(3) of the EEZ Act including paragraphs (c), (g), (h), and (j); and
- if there is a specific reason to except section 33(3)(c) and include a specific clause on human health effects then proposed new section 34A(3)(b) should be redrafted to recognise that the "the effects of the discharge or dumping on human health if consent is granted" is only relevant to regulations concerning discretionary discharges.

Clause 107

Clause 107 inserts a new Subpart 2A into Part 3 of the EEZ Act (new sections 87A to 87I).

New section 87C

This clause imposes the hearing and decision making process for marine consent applications under the EEZ Act to applications for discharge and dumping marine consents.

Applying the process set out in sections 40 to 58 of the EEZ Act to applications for discharge related consents would result in a very different process to that currently applying to discharges under the *Maritime Transport Act* and Part 200. The length of the process would likely be increased from as short as 2 months to around 6 months (longer if appealed), public submissions and a hearing would be introduced, and the basis for decision making would be substantially modified and broadened. The result of this would be reduced certainty for operators and potentially much higher costs, which is at odds with the objectives outlined in the text on page 7 of the explanatory note referred to above.

As noted above this increased timeframe, cost and reduced certainty would have adverse implications for all operators or developers of relevant petroleum activities but would be simply unworkable in relation to petroleum exploration and appraisal undertaken from mobile drilling rigs. This is because of the incompatibility of the sequencing required for these regulatory approvals and the contractual processes associated with mobilising a rig.

Bringing an offshore drilling rig to New Zealand requires a contractual commitment that involves multi-million dollar mobilisation costs and day rates of hundreds of thousands of dollars. Operators sometimes group together to form a "rig club" to share the mobilisation costs of bringing a rig to New Zealand. In such a situation each operator needs to make a largely unconditional commitment to the mobilisation of the rig.

Given the uncertainty of outcome involved with securing a marine consent it would not be possible for a prudent operator to contract a drilling rig before securing a marine consent for discharges, but until a specific rig had been contracted it would not be possible to get the rig-specific details that might be required for the consent, and which are currently required under Part 200. This is a major concern for the petroleum industry if discharges associated with petroleum exploration (and appraisal) are not to be managed as permitted activities under regulations.

Making the marine consent process workable for these situations by making it similar to the current Part 200 process would require substantial changes to the process provided under sections 40 to 58 of the EEZ Act. Given the scale of change require we have not proposed specific drafting changes. Changes would need to include both increasing the certainty associated with decision making through providing clear criteria and rules and shortening the timeframe for a decision. Under Part 200 a discharge management plan only needs to be submitted 2 months prior to undertaking activity and only certain persons are required to be consulted in its development.

Given that the approval of Discharge Management Plans is currently not a public process under Part 200, if petroleum exploration and appraisal well marine discharges are to be managed as discretionary activities, the EPA should equally be given discretion as to whether marine discharge consent applications should be publicly notified. Notification should depend on the nature and extent of the application and the value of it being publically notified. This will enable the industry to obtain approvals more quickly and so be able to make timely commercial decisions without jeopardising the environmental protection aims under the legislation.

We also note that the reference to "section 85B" in 87C(1) appears to be an incorrect cross-reference, it should instead read "section 87B".

New section 87F

We note that the decision making criteria provided in relation to dumping consents in new section 87F(2) are different to those currently provided in under the *Maritime Transport Act* and Part 180, specifically rule 180.8. New section 82F(2)(c) provides that the EPA must refuse an application for a marine dumping consent if:

> "the EPA considers that dumping the waste or other matter is not the best approach to the disposal of the waste or other matter in the circumstances."

We consider that further criteria is required to guide a decision by the EPA as to whether dumping is the "best approach". Whilst there is a reference to "in the circumstances" there is no explicit requirement to consider whether the proposal is the best viable option, or to consider the environmental, practical or economic merits of various options. There is a risk that the EPA could decide that dumping is not the best approach in given situation but there are in reality no other viable approaches, or those approaches have greater environmental consequences, perhaps outside of the EEZ.

We consider the concept of "best practical option" provided currently under Part 200 in relation to discharges and outlined as follows could provide a better model for decision making on dumping applications:

> "**best practicable option** means the best method of preventing or minimising adverse effects on the environment having regard to, amongst other things—
>
> (a) the nature of the discharge or emission and the sensitivity of the receiving environment to adverse effects;
>
> (b) the financial implications and the effects on the environment of that option when compared with other options; and
>
> (c) the current state of technical knowledge and the likelihood that the option can be successfully applied:"

New section 87H

This provision applies to both marine discharge consents and marine dumping consents. It however has different implications for the treatment of discharges and dumping, which we will discuss separately.

The maximum 35 year term for consents aligns with the term of marine consents under the EEZ Act and with consents under the RMA. It does not however align with the maximum duration of mining permits under the Crown Minerals Act, which is 40 years. Aligning with this maximum timeline could streamline the consenting of offshore petroleum production facilities, without causing any apparent problem elsewhere.

The same rationale applies to all marine consents under the EEZ Act given that activities under the Crown Minerals Act are likely to make up a large proportion of the activities regulated under the EEZ Act.

Our understanding in reading that Bill is that dumping can only be a discretionary or prohibited activity under the provisions of the Bill and so any dumping would have to be pursuant to a marine consent. New section 87H limits the duration of a dumping marine consent to a maximum of 35 years. The relevant part of the definition of "dumping" in the Bill states that "In relation to a ship, an aircraft, or a structure, its deliberate disposal or abandonment". Disposal or abandonment entails a permanent outcome, not something that needs to be consented again, whether after 35 years or otherwise. We note that under the *Maritime Transport Act* and Maritime Protection Rules Part 180 there is no maximum duration on dumping permits.

We recommend that where dumping entails "disposal" or "abandonment" the marine dumping consent has no duration, it is a one-time decision with on-going (i.e. permanent) application. Dumping that entails "storage" would logically be dealt with differently and it might be appropriate for this to be subject to a maximum duration.

From a drafting perspective we consider it would be logical that new section 87H be split into multiple provisions as marine consents for discharges and dumping are fundamentally different, and dumping for disposal/abandonment and storage are also different in nature.

Clause 111

New section 164B

We support existing discharge management plans being continued on the same terms and conditions once the Bill is passed. However given the different basis of a discharge management plan, which is developed by an operator and approved by MNZ, and a marine consent, which is issued by the EPA based on an application from an operator, simply applying the provisions of the Act may not be the most appropriate way of grandfathering these plans. Please also note our comments above on transitioning the administration of discharges from the *Maritime Transport Act* to *the EEZ Act.*

Yours faithfully

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