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Submission on the exposure draft of the Exclusive Economic Zone and Continental Shelf (Environmental Effects—Decommissioning Plans) Regulations 2020

Ministry for the Environment
Submitted by email to Natalie.Stewart@mfe.govt.nz

# PEPANZ Submission: Exclusive Economic Zone and Continental Shelf (Environmental Effects—Decommissioning Plans) Regulations 2020

## 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 upstream petroleum industry.
2. This document constitutes PEPANZ's submission to the Ministry for the Environment ("MfE") on its exposure draft of the Exclusive Economic Zone and Continental Shelf (Environmental Effects—Decommissioning Plans) Regulations 2020. This was released to us on 5 June 2020.
3. This submission is in three parts. It first expresses serious concern about implications from the lack of a definition for decommissioning, then makes further specific questions on individual regulations, and ends with some other comments on timeframes and the role of the plan compared to the consent.
4. Before getting into the specifics of the submission, we wish to register surprise that PEPANZ was not engaged at all following close of submissions in September 2018[1]. Such a step would have helped ensure the proposals are workable, especially given the regulations apply solely to the upstream oil and gas sector which we represent.
5. We are very keen to work constructively with officials on the key issues raised in this submission so that there is a regime that is workable for operators and which collectively meets the needs of industry, communities, iwi, government and the taxpayer.

## Part 1. Comments on the definition of decommissioning

### The need for a definition of decommissioning

6. The exposure draft consultation is seeking comment on the workability and clarity of the regulations, and our utmost concern from this perspective is the lack of a definition of decommissioning.

[1] For the reader's reference, our submission of 2018 can be found at https://www.pepanz.com/dmsdocument/88

7. In September 2018, PEPANZ submitted that a definition for decommissioning is necessary given the construction of the EEZ Act, specifically section 38.[2] [3] This section of the EEZ Act requires that any activity "undertaken in connection with the decommissioning of an offshore installation... .... must include an accepted decommissioning plan that covers the activity".
8. This is an unequivocal and firm legal requirement, which requires that the Environmental Protection Authority ("EPA") consider whether an application constitutes decommissioning activities, and therefore whether a decommissioning plan is needed.
9. In the absence of a statutory definition, the broad dictionary definition of decommissioning will prevail and this will include many activities that the Cabinet paper and its recommendations do not want in scope of the regulations, as this paper explores later.
10. The draft regulations have not included a definition of decommissioning and the covering email from MfE on 5 June states:

> "There are limitations to what is within scope of the Regulations. We are unable to provide a definition for decommissioning within the Regulations, and we are also unable to provide a list of the activities we consider trigger the need for a plan. We will release guidance to accompany the Regulations, which will provide clarity around this matter and others. You can refer back to the Cabinet paper for clarification in the interim."

11. The email does not explain what the "limitation" is that has meant a definition has not been included. Nor does the email, or any of the official papers that have been released, directly respond to the points raised in PEPANZ's submission in terms of why a definition in regulations is required. Instead, MfE simply says that future guidance will provide clarity, without providing any further specificity or acknowledging the inherent weakness of guidance (being that guidance is not binding and the operational agencies sole duty is to implement the law as it stands).

### Our understanding of why a definition has not been included

12. We now understand that there may be a legal issue which means that a definition of decommissioning in the regulations to narrow their scope is not practical, as it could not legally preclude the EEZ Act from applying to activities that meet the general dictionary definition of decommissioning. The fact that this was not communicated may mean that submitters will assume that the barrier is a policy preference or issue and not a legal one.
13. More specifically, we understand that the inability to practically define decommissioning is because secondary legislation cannot override an Act of Parliament. If this is the case, then given the importance of a clear and workable regime we would expect that the most appropriate tool, from a legal perspective, would be to amend the EEZ Act to define decommissioning to achieve the policy intent.
14. We note the current example of urgent RMA Fast-Tracking bill being administered by MfE as precedent for quickly addressing issues in legislation. An alternative to a definition in the Act would be be to entertain the possibility of a King Henry VIII provision to allow the executive to narrow the application of the Act by regulation, although we appreciate this should only be used where there are strong and compelling reasons and it would not be our first preference.
15. Another option (although possibly still impractical due to the Act not providing for subordinate tools to narrow the scope of regulations) would be to develop Policy Statements under section 37A of the EEZ Act. Policy Statements have the benefit of being statutory tools (i.e. not having the inherent weakness of guidance) and providing the 'room' to state, in a comprehensive

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[2] The relevant paragraphs are 1-10 and the submission can be found here: https://www.pepanz.com/dmsdocument/88

[3]

(3) If the application relates to an activity that is to be undertaken in connection with the decommissioning of an offshore installation used in connection with petroleum production, or a structure, submarine pipeline, or submarine cable associated with such an installation,—

(a) the application must include an accepted decommissioning plan that covers the activity; and

(b) the proposed carrying out of the activity must be in accordance with that plan.

manner, "objectives and policies to support decision-making on applications for marine consents". None of the official papers released or correspondence from MfE indicates that this was considered.

### Cabinet material relating to why a definition is appropriate

16. The following material from the Cabinet paper indicates that both PEPANZ and Government agree that a definition and managed scope of the regulations is needed. We were especially surprised at the lack of definition for decommissioning given that the Cabinet ENV Committee policy paper[4] made the following specific statements and ended with a firm recommendation. Paragraphs 22-24 of the Cabinet paper are worth quoting in full below and then exploring further.

> 22. Installations include fixed steel, concrete gravity, floating and subsea installations (eg, well heads, production manifolds, drilling templates) but for the purposes of these regulations, I propose it does not include any part of an offshore installation which is located below the surface of the seabed (eg, wells and well casings).
>
> 23. This distinction is necessary to ensure that the plugging and abandonment (P&A) of wells does not in itself require a decommissioning plan. Given the risk that poorly maintained wells pose to the environment, it is desirable that P&A occurs as soon as reasonably possible. I propose the decommissioning plan must include information about all active, suspended and previously abandoned wells, to ensure the EPA (and other relevant marine management agencies) have a complete picture of the infrastructure that is to be decommissioned, and any wells that may still be active and therefore subject to a future process.
>
> 24. I do not propose to set out a list of activities for the decommissioning of an offshore installation in the regulations as it is not possible to know what all of these might be in the future. However, I propose that the regulations are drafted in such a way as to be clear about the activities that the decommissioning plan requirements apply to. If there is no decommissioning plan requirements for P&A, then this activity will not be caught by these regulations.

17. We support the policy intent of para 22, which is that subsurface infrastructure should not be included in scope of the regulations so that they do not require a decommissioning plan. Para 24 goes on to say that a list of activities (akin to a definition) is not proposed, and although we are not supportive of that decision, para 24 goes on to provide some relative comfort by saying that the regulations will be drafted in a way to be clear about what the regulations apply to. This is affirmed in the Cabinet decisions arising from recommendations 4 and 5, which obtained policy decisions that intend to carve out certain activities from the scope of the regulations. We fully support those decisions and copy them below:

> 4 **Agree** these regulations will not include requirements for:
>
> 4.1 any activities to be undertaken at an offshore petroleum installation or on its associated structures, cables and pipelines while that installation is still being used for petroleum production
>
> 4.2 activities already considered and granted under a marine consent (eg, deposit of drill cuttings)
>
> 4.3 any activities associated with reusing the offshore petroleum installation to serve a purpose other than that for which it was originally intended
>
> 5 **Agree** that for the purposes of these regulations 'installations':
>
> 5.1 include fixed steel, concrete gravity, floating and subsea installations (eg, well heads, production manifolds, drilling templates)
>
> 5.2 do not include any part of an offshore installation that is located below the surface of the seabed (eg, wells and well casings)

18. Despite Cabinet's policy decisions, the regulations do not give effect to the policies proposed in paras 22-24 or the Recommendation 4 or 5. There is nothing in the regulations to exempt the

[4] https://www.mfe.govt.nz/more/briefings-cabinet-papers-and-related-material-search/cabinet-papers/final-policy

plugging and abandonment of wells or activities undertaken while petroleum production is still underway as proposed by the Cabinet paper.

19. The regulations do not deliver on the policy intent clearly directed in the Cabinet paper, and are therefore in our view not fit for purpose and should not be signed off by the Cabinet LEG Committee until they deliver the policy intent. We are not satisfied that guidance can be relied on to bridge the gap between policy decisions and operational practice.
20. Lastly, Appendix 7 of the Cabinet paper provides a summary of submissions and briefly addresses the matter of a definition. The excerpt below identifies some of the issues identified by submitters, but the regulations have no content that addresses or resolves them.

> ***What to define as a decommissioning activity***
>
> ***Do you agree with the Government's proposal not to specifically list the activities for which section 38(3) applies? (question 1)***
>
> Submitters generally agreed with our proposal not to specifically list activities given the need for flexibility, although some considered a non-exhaustive list could be useful. However, all submitters considered that the term 'decommissioning' needed to be defined either within the regulations or through a guidance document. Submitters were concerned that decommissioning plans would be required for activities that are not intended to be 'true' decommissioning (such as plugging and abandonment of wells, which is a requirement under Health and Safety Regulations 2016, or repair and maintenance activities during normal operations).
>
> A number of submitters supplied an example list of exceptions and definitions as templates.



21. We would be pleased to work with officials to help develop policy that achieves Cabinet's intent.

## PART 2. DETAILED COMMENTS ON SPECIFIC REGULATIONS.

### Regulation 7

22. The the word 'well' should likely be disassociated from 'decommission' given the Cabinet paper in Recommendation 5.2. This may be especially important without a definition of decommissioning. The following changes could also be made:
    a. Reg 7(a)(i) – delete the word "decommissioning" and replace with "plugged and abandoned";
    b. Reg 7(d) – delete the word "decommissioning" and replace with "plugging and abandonment"; and
    c. Reg 7(e) - delete and replace with: "explain why the decommissioning plan does not provide for the equipment [i.e. deleting "or well"] to be decommissioned or any wells to be plugged and abandoned."

### Regulation 7(c) and 7(d)

23. Regulation 7(c) and 7(d) states that a decommissioning plan must:

> (c) describe the equipment (if any) that is related to the offshore installation or infrastructure, but whose decommissioning is not provided for in the decommissioning plan; and
>
> (d) describe each active, suspended, or abandoned well (if any) that is related to the offshore installation or infrastructure, but whose decommissioning is not provided for in the decommissioning plan; and

24. This framing does not seem to align with the fundamental requirement in section 38(3) of the EEZ Act[5] which requires that any activity "undertaken in connection with the decommissioning of

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> (3) If the application relates to an activity that is to be undertaken in connection with the decommissioning of an offshore installation used in connection with petroleum production, or a structure, submarine pipeline, or submarine cable associated with such an installation,—
>
> (a) the application must include an accepted decommissioning plan that covers the activity; and
>
> (b) the proposed carrying out of the activity must be in accordance with that plan.

an offshore installation... ..... must include an accepted decommissioning plan that covers the activity".

25. That is to say, the EEZ Act does not provide the flexibility for an operator to avoid obtaining a decommissioning plan for decommissioning activities that they do not want to obtain a plan for. The very construct of the Act prevents this.

### Regulation 9(3)

26. The headline refers to 'Communication', but the first line refers to 'activities' which is a wider term. Should 'activities' be replaced with 'communications'?

### Regulation 11(3)

27. In the third line, after the words "… the description of maintenance activities" the words "(if any)" should be added in case maintenance is not required.

### Regulation 11(3)

28. A new component could be added so the regulation is workable if operators do not have perpetual maintenance obligations. Under a new regulation 11(3)(c) this could say something to the effect of "an estimate of the deadline (if any) for when those maintenance activities will cease".

### Regulation 12(2) and (3)

29. 'Comparative assessment' is a defined term, but both regulations reduce it to just 'the assessment'. Perhaps using the term in full would provide more clarity.

### Regulation 14

30. This regulation states:

> "For preliminary consultation with an iwi authority, the EPA may be satisfied that subclause (1)(b) is met only if the information demonstrates that the owner or operator who undertook the consultation—
>
> (a) considered ways, and took steps, to foster the development of the authority's capacity to respond to an invitation to consult ..."

31. This was not consulted on as part of the discussion document. This unexpected regulation effectively establishes a requirement for operators to offer an iwi authority resourcing. It assumes that 'fostering the authority's capacity' must always be considered, even where the authority does not face capacity constraints. It sets up an incentive for iwi authorities to downplay their capacity to obtain resourcing.
32. Given this regulation relates solely to decommissioning, it risks creating significant inconsistencies within the EEZ Act for the approach to consultation and engagement. That is, non-decommissioning petroleum activities and decommissioning of non-petroleum activities are to be consulted under a different framework. A different onus on operators and iwi authorities arising solely from a decommissioning-related regulation seems both inappropriate and unreasonable.
33. In many cases, relationships with persons undertaking decommissioning activities and iwi authorities are well developed and fostered in the spirit of mutual respect and confidence. The regulation's wording risks considerably changing this long-established principle and relationships beyond the EEZ Act and other similar regulations with consultation and engagement requirements, including the RMA. We also note that the term "iwi authority" could potentially include a very wide group. This is because there may be many iwi authorities asserting rights over the relevant area and there could be a range of issues arising from new expectations to develop the capacity within each of these iwi authorities.
34. The first line of Reg 14(2) says "an iwi authority" but could be replaced with "a relevant iwi authority".

### Regulation 19(5)

35. Regulation 19(5) provides that the "The EPA may not withhold information under this regulation if, in the circumstances of the particular case, the public interest in making the information available outweighs the importance of avoiding the offence, disclosure, or prejudice."
36. Conceptually we support this policy, but it is unclear how the "public interest" is determined and how it relates to protections under the Official Information Act 1982. We are concerned that the test established in this regulation restricts the EPA's ability to withhold information beyond what is necessary under the OIA. Important reasons to consider withholding information that should be given weight are commercial sensitivity or confidentiality agreements or obligations (including with groups being engaged with).

### Regulation 24(2)(c)(i)

37. This regulation suggests that any dumped or abandoned infrastructure cannot be allowed to move, i.e. "will not move". However, Regulation 12(4)(a)(ii) appears to contemplate that some abandoned material may move. Could Regulation 24 be made consistent with Regulation 12?

### Regulation 24(2)(a)

38. Regulation 24(2)(a) states that the decommissioning plan must demonstrate that "the dumping or abandonment will comply with New Zealand's international obligations". The EEZ Act continues and enables the implementation of New Zealand's obligations, and we submit that, to the fullest extent possible, it should do this internally rather than relying on external considerations. We question the appropriateness of imposing on operators an effective obligation to fully understand and consider the multitude of international conventions that New Zealand has acceded to. It would be more appropriate for the relevant policy considerations to be explicitly outlined in the regulations.
39. Although done subtly and not explicitly, the current drafting of the regulation effectively amounts to incorporation by reference of new or amended international conventions. Section 15.2 of the Legislation Guidelines states that "Incorporation by reference should be used only if there are clear benefits to doing so or it is impractical to do otherwise."[6]

### Regulation 24(2)(d)

40. Regulation 24(2)(d) requires that for a dumped material a decommissioning plan demonstrate that "reusing or recycling the material that is to be dumped or abandoned" is "impracticable or would cause an unreasonable risk the environment". Does that mean not 'practicable' as defined in Reg 3, or does it mean the dictionary definition of impracticable? If the former, should Regulation 24(d) instead say "… would not be practicable or would cause…" (i.e. change impracticable to not practicable).
41. Our key underlying point is that for this regulation to be workable, it is important that cost can be considered as part of recycling being "impracticable".

## PART 3: OTHER COMMENTS

### Timeframes in regulations

42. Timeframes are not prescribed for the different parts of the process and this makes planning difficult. Specifically:
    - Reg 13 and 20 specifies no timeframe for giving public notice;
    - Reg 16 specifies no maximum timeframe for submissions; and
    - Regulation 15 on the key matters report also has no timeframe and one could be considered here too.

[6] http://www.ldac.org.nz/assets/documents/abd05c2ba9/Legislation-Guidelines-2018-edition-2019-01-16.pdf

### Decommissioning Plan vs the Marine Consent

43. We have long understood that the decommissioning plan should describe, at a high level, "what" will be decommissioned (essentially what will be removed and what may be left in place). This contrasts with the subsequent decommissioning marine consent which will consider precisely "how" this will be given effect, and which will deliver a consent with conditions to manage effects. That is to say, the marine consent should not re-engage in the already settled question of what the decommissioning operation proposes to do. However, the relative roles and levels of detail between the plan and consent is not specified in the regulations. In the absence of this specification, we are concerned that the process will be unclear for applicants and the regulator alike.

## CONCLUSION

44. We would welcome the opportunity to discuss any aspect of this submission with officials.