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Submission on the Notice of Intention to Redefine and Vary Marine Mammal Sanctuaries to Protect Hector's and Maui Dolphins

Department of Conservation
Submitted by email to dolphintmp@doc.govt.nz

PEPANZ Submission: Notice of Intention to Redefine and Vary Marine Mammal Sanctuaries to Protect Hector's and Maui Dolphins

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 on the Notice of Intention to Redefine and Vary Marine Mammal Sanctuaries to Protect Hector's and Maui Dolphins. PEPANZ submitted on the policy consultation in August 2019[1] and has actively engaged with the seismic surveying code of conduct since its inception in 2012[2].

Executive summary

i. PEPANZ cannot support the extension of the sanctuaries and prohibitions on seismic surveys. PEPANZ supports evidence-based, well-reasoned and costed policies, and we are not opposed to reasonable environmental protection. In this case, there is insufficient evidence to show that relevant dolphins are present in the proposed extensions. Furthermore, prohibition on seismic surveying is disproportionate with its effects.

ii. We do not consider the Minister of Energy and Resources should consent to the Minister of Conservation's proposals. This is because the proposals are wholly inconsistent with the purpose of the Crown Minerals Act ("CMA") and go beyond what is necessary to achieve the conservation objective sof the Marine Mammals Protection Act 1978 ("MMPA"). There may therefore be judicial review risk if the proposals are brought into force.

iii. There are constitutional matters to consider given significant decision-making is proposed within the pre-election period.

iv. There is no definition of seismic surveying, meaning that low energy activities will be unreasonably captured by the regulations.

v. Should the Minister of Conservation choose to proceed with her intentions as notified in the Gazette, some amendments are necessary to allow a wider range of activities associated (but not executed directly within) with Crown Mineral permits.

[1] https://www.pepanz.com/dmsdocument/115
[2] https://www.pepanz.com/dmsdocument/42

Submission

3. PEPANZ supports evidence-based, well-reasoned and costed policies and places a high value on sound public policy analysis, both in terms of government policy and the views that we ourselves put forward. PEPANZ has long been on record as supporting marine protected areas where they are informed by science and where the trade-offs between conservation and foregone resources are well understood. Consequently, we do not support the proposed extended marine mammal sanctuaries and the heavy-handed and disproportionate proposal to ban seismic surveys.

West Coast North Island Marine Mammal Sanctuary

4. We cannot support the Minister's intention to extend the West Coast North Island Marine Mammal Sanctuary. The case has not been made to demonstrate the presence of relevant dolphin subpopulations in the extended area. We note an official paper which states "there is no evidence of current resident sub-populations in the TAKA (Taranaki to Kapiti) or 'North Island other' areas"[3].
5. We understand that there have been no sightings of Hector's and Maui dolphins in the proposed extended sanctuary. The proposed extensions are based on habitat modelling that predicted that Hector's and/or Maui dolphins could theoretically be in these areas, because of similarities of water depth and general habitat. However, it seems that experts do not know why Hector's and Maui dolphins live in their current habitats, which means that extrapolations are unreasonable.

Prohibition on seismic surveying within the new/extended sanctuaries

6. The Gazette Notice proposes to prohibit seismic surveying within the sanctuaries. A prohibition is a disproportionate regulatory response to the low risks posed by seismic surveying.
7. There is no justification for the total banning of seismic in the sanctuaries, especially when:
    a. there is no evidence that the extended sanctuary contains any Hector's or Maui dolphins in it;
    b. DOC has acknowledged that the oil and gas industry has never caused a Hector's or Maui dolphin death;
    c. after many decades of seismic surveying and many research projects (both in New Zealand and world-wide) there is no clear evidence that sound from exploration activities in normal operating circumstances has permanently harmed marine mammal species; and
    d. of all the cetaceans, Hector's and Maui dolphins are the least likely to be impacted by seismic surveying.[4]
8. There is already a well-established Seismic Surveying Code of Conduct[5] which could be made compulsory in the territorial sea and this is more reasonable and proportionate than an outright ban.
9. An over cautious lens is being applied to this topic, whereby environmental protection is heavily favoured where there is uncertainty. However, we consider that the precautionary principle,

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[3] p14, Spatial risk assessment of threats to Hector's and Māui dolphins https://www.fisheries.govt.nz/dmsdocument/35007

[4] As stated in our submission on the previous consultation:

> "Official documents acknowledge that Māui and Hector's dolphins communication is classified as a high-frequency. Although many other species of dolphins communicate with whistles, Māui and Hector's dolphins use short, high frequency clicks, at a frequency of around 125 kHz7 (i.e. 125,000 Hz). These frequencies are orders of magnitudes higher than the frequencies produced by a marine acoustic source, which are below 200 Hz. For this reason, official documents refer to research showing that the probable frequency-specific sensitivity of Hector's dolphin means that the risk of auditory impairment from seismic surveys is low."

[5] *2013 Code of conduct for minimising acoustic disturbance to marine mammals from seismic survey operation.* https://www.doc.govt.nz/our-work/seismic-surveys-code-of-conduct/code-of-conduct-for-minimising-acoustic-disturbance-to-marine-mammals-from-seismic-survey-operations/

properly applied, should look to find how activities can be *allowed* in the face of uncertainty. We again note comments in 2015 from the Chief Science Advisor Sir Peter Gluckman, who said that the Precautionary Principle is "being wrongly framed as a reason for abstention and inaction" when it "was initially intended as a framework FOR ACTION in the face of scientific uncertainty – that is, not using the absence of evidence as reason not to act."[6]

The decision-making role of the Minister of Energy and Resources

10. Under section 22 of the Marine Mammals Protection Act 1978, the consent of the Minister of Energy and Resources is required before the Minister of Conservation may establish new sanctuaries (given minerals are affected). For the reasons outlined below we consider that the Minister of Energy and Resources should not give consent for this proposal.
11. Decision-making between the Minister of Conservation and Minister of Energy and Resources should balance the relevant purposes of the MMPA and the CMA. With the MMPA focussing on "protection, conservation, and management of marine mammals" it is appropriate for it to manage effects on Hector's and Maui dolphins, and the CMA's purpose is to promote exploration and development. If marine mammal sanctuaries and associated rules are to balance both objectives, they should manage effects in a manner no more restrictive than necessary so as to allow mining activities to still occur.
12. Compulsory use of the Seismic Survey Code of Conduct in the territorial sea would manage effects while allowing petroleum operations to continue, and PEPANZ could accept this.
13. The MMPA does not outline any statutory criteria for the Minister of Energy and Resources when considering whether to grant consent. We understand that this means that the purpose of the CMA will be a key consideration for the Minister of Energy and Resources. The rest of this section goes into some detail about relevant provisions in the Crown Minerals regime.
14. Section 1A of the CMA states:

> **1A Purpose**
>
> (1) The purpose of this Act is to promote prospecting for, exploration for, and mining of Crown owned minerals for the benefit of New Zealand.
>
> (2) To this end, this Act provides for—
>
> (a) the efficient allocation of rights to prospect for, explore for, and mine Crown owned minerals; and
>
> (b) the effective management and regulation of the exercise of those rights; and
>
> (c) the carrying out, in accordance with good industry practice, of activities in respect of those rights; and
>
> (d) a fair financial return to the Crown for its minerals.

15. The Petroleum Programme 2013, which is the statutory interpretation of the CMA, adds further definition to this, where it states in section 1.3(4) that:

> An underlying premise in the Act is that the government wants other parties, such as public and private corporations, to undertake prospecting for, exploring for and mining of Crown-owned minerals, including petroleum. The government does not wish to undertake these activities itself, although it may from time to time undertake seismic survey or other prospecting activities for the purpose of providing information to promote interest in New Zealand's petroleum estate.

16. Section 1.3(5) and (6) of the Petroleum Programme goes on to say:

> The Minister interprets the words "promote prospecting for, exploration for, and mining of Crown owned minerals" as requiring the Minister and the Chief Executive to:
>
> (a) ensure that parties interested in prospecting for, exploring for, and mining petroleum are able to do so as readily as possible within the mandate and provisions of the Act
>
> (b) publicise and encourage interest and investment in prospecting for, exploring for, and mining New Zealand's petroleum resources.
>
> An important component of promoting prospecting, exploration and mining is minimising sovereign risk[9] for investors by providing for a stable and coherent regulatory regime for petroleum.

17. Section 1.3(6) of the Petroleum Programme and the footnote respectively state:

[6] See page 5-6 The place of science in environmental policy and law. Peter Gluckman. 2015. https://www.pmcsa.org.nz/wp-content/uploads/Salmon-Lecture_Final.pdf

> An important component of promoting prospecting, exploration and mining is minimising sovereign risk[9] for investors by providing for a stable and coherent regulatory regime for petroleum.
>
> [9] "Sovereign risk" is the risk that the government may unexpectedly change significant aspects of its policy and investment regime and the legal rights applying to investors to the detriment of investors.

18. From these sections of the CMA and Programme we consider the Minister of Energy and Resources has a direct and statutory interest in both minimising sovereign risk and in ensuring that the Crown's petroleum estate can be developed, so as to realise an economic return on its asset through royalty payments (with the co-benefits of economic development and energy security).
19. In light of the above, the Minister of Energy and Resources should consider the foregone exploration and production opportunities when considering whether to consent to new marine mammal sanctuaries with rules to prohibit seismic surveying. The official papers do not show that this trade-off has been quantified in any way.
20. Lastly on this topic, we note that a previous decision – given effect through the Crown Minerals (Petroleum) Amendment Act 2018 - was widely acknowledged to be inconsistent with the purpose of the CMA. However, this should not be used as precedent for doing so in relation to disproportionately restrictive sanctuaries. The Crown Minerals (Petroleum) Amendment Act 2018, which restricts the granting of new petroleum exploration permits, was made despite the clear purpose statement in the CMA. This inconsistency was addressed through a specific section in the Amendment Act stating that the prohibition provisions apply "despite anything to the contrary in this Act (including section 1A) [i.e. the purpose statement]".
21. The exploration ban was, in the constitutional sense, able to be passed due to the sovereignty of parliament. In contrast to this broad power, a Minister of the Crown (and fellow Ministers with statutory consenting roles) must act wholly in accordance with the law when proposing to exercise a tertiary power such as making the sanctuary and rules. The purpose of promoting exploration and development, therefore, cannot be disregarded.

Definition of seismic surveying

22. There is no definition of seismic surveying. This may cause problems by defaulting to a broad interpretation thereby including within scope of the regulations all activities and not just the ones intended for prohibition. This could include low-energy activities that the current Seismic Survey Code of Conduct classifies as Level 3 surveys.

The exemptions

23. The Gazette notice proposes some exemptions to the ban on seismic surveys within the marine mammal sanctuaries. If a ban is to proceed (which we oppose), we support grandfathering provisions to exempt existing operations. However, we have serious concerns about the workability of the exemption regime as covered below.

Extensions of Land

24. Holders of Crown Mineral permits may apply for an Extension of Land to extend the area of their permit. Statutory criteria for this are established in the Petroleum Programme. The right to Extensions of Land for existing Petroleum Exploration Permits was retained under the Crown Minerals (Petroleum) Amendment Act 2018 which prevents new exploration permits being granted.[7] To preserve the rights of these permits, as well as the rights of mining permits and

[7] This understanding is based on the below reading of the Amendment Act.
- S36(2)(b) allows the minister to grant an extension of land.
- S36(2A) was inserted by the Crown Minerals (Petroleum) Amendment Act 2018, providing that there can be no extension of petroleum permit land outside onshore Taranaki.
- Schedule 1 of the CMA contains savings and transitional provisions. Clause 23(1) of Schedule 1 provides that the CMA (including s36) continues to apply to existing permits as if the Amendment Act had not been enacted.
- Clause 22 of Schedule 1 defines Amendment Act as the Crown Minerals (Petroleum) Amendment Act 2018, and "existing permit" as a permit for petroleum that exists immediately before the commencement of the Amendment Act.

licences, it is crucial that the exemption from the seismic ban be associated with the Crown Minerals permit in its entirety including to any Extensions of Land that are granted.

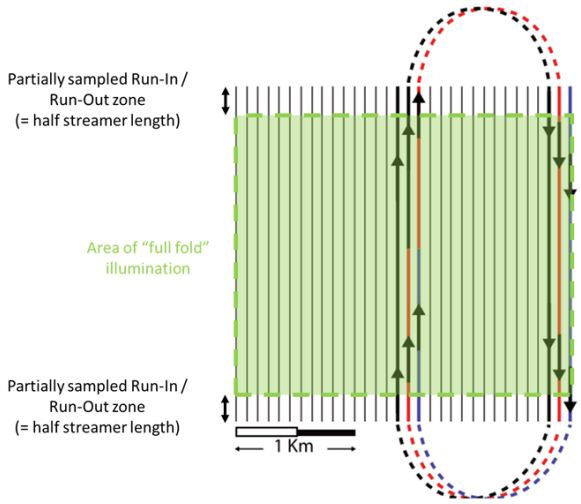
Mining operations outside a Crown Minerals permit

25. Both within the current marine mammal sanctuary and the proposed extension there are important pieces of petroleum infrastructure such as pipelines that may sit separately to the Crown Minerals permit. Seismic or bathymetric surveys may be needed to understand the area surrounding this infrastructure for the purpose of maintenance.
26. In addition, if exploration efforts make discoveries then production may involve pipelines to shore (there are exploration permits off the east coast of the South Island so this is relevant to the Banks Peninsula Sanctuary as well as the proposed West Coast North Island sanctuary). Before pipelines are installed, it may be necessary for seismic surveys of the area to be undertaken.
27. Any prohibition on seismic surveying in relation to the above activities could effectively amount to an unintentional ban on the entire petroleum activity that is reliant on the seismic survey.
28. If the prohibition is to be advanced (which we do not support), then our next best solution is that the Minister amend the exemptions so that they apply not strictly only to the permit but to all activities *relating to* the permit. If a list of activities is sought, the definition of Mining Operations in the CMA could be a useful starting point.

The need for surveys to slightly extend outside the permit

29. The exemptions for surveys within existing permits needs to provide 'running room' because the seismic acquisition may need to take place outside of the permit area (for example due to the length of the 'streamers' which carry the acoustic receivers).
30. As shown below in Diagram 1, the area covered by the vessel movements is larger than the area covered by the processed (i.e. fully sampled) data, which is shown in green. At the beginning and end of each seismic line is the partially sampled run-in / run-out zone, and the width of this zone is equal to half of the streamer length. Most seismic surveys today use an eight kilometre streamers array, and the run-in / run-out zone is four kilometres at each end. Beyond the run-in/ run-out zone is the vessel turning circle, which usually extends for up to three streamer's length (e.g. another 24 kilometres if using an eight kilometre streamer.

Diagram 1: Example of how seismic surveying extends may beyond the permit area



31. Limiting seismic surveys strictly within existing permits may compromise future acquisition of seismic surveys in existing permits within the sanctuaries. This will have significant impact on

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This means that for permits which were existing on 13 November 2018, then s36 applies *as it was on 12 November 2018*. On that date, s36(2A) did not exist, so there was no restriction to Extensions of Land only for onshore Taranaki.

future management of permits and oil and gas fields, and this should be accounted for in the exemption regime.

Decision-making processes pre-election

32. Finally, we are concerned about the proposed timeframes for analysis of submissions and decision-making. We understand that the Government intends to bring the new sanctuaries and decisions into force closely before the General Election in September 2020.

This raises important questions in relation to the Cabinet Manual's policies on decision-making before an election.

33. Para 6.5 states:

> Before and after a general election it may be difficult for Cabinet and Ministers to take decisions, for several reasons:
>
> (a) The period before a general election is usually characterised by a period of reduced decision-making capacity at the ministerial and Cabinet level, while Ministers are occupied with the election campaign.
>
> (b) Some decision-making constraints apply in the three months before an election (see paragraph 6.9).

Given the proposals are industry-shifting and serious in consequence, we query whether it is appropriate that Ministers "occupied with the election campaign" should make such decisions with "reduced decision-making capacity".

34. Para 6.9 states:

> In the period immediately before a general election, the government is not bound by the caretaker convention unless the election has resulted from the government losing the confidence of the House (see paragraphs 6.21 – 6.40 for information about the caretaker convention). Successive governments, however, have chosen to restrict their actions to some extent during this time, in recognition of the fact that an election, and therefore potentially a change of government, is imminent.

35. Para 6.11 states:

> In practice, restraints have tended to be applied from about three months before the general election is due or from the announcement of the election (if the period between the announcement of the election and polling day is less than three months).

36. Together paras 6.9 and 6.11 suggest that it may be inappropriate and unconventional to make significant policy decisions a few weeks away from the General Election.

37. Cabinet Committees do not meet after the House rises (scheduled for 6 August 2020) and we understand that the cabinet paper may be taken directly to Cabinet. However, it is well established that most serious discussions about policy occur at the committee, and that Cabinet is typically used to sign off on what happened at committee.