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Ministry for the Environment
PO Box 10362
Wellington 6143

Submission: consultation draft of EEZ and Continental Shelf (Environmental Effects - Permitted Activities) Regulations 2013

Introduction

This document constitutes the Petroleum Exploration and Production Association of New Zealand's (PEPANZ) submission in respect of the consultation draft of the *Exclusive Economic Zone and Continental Shelf (Environmental Effects—Permitted Activities) Regulations 2013* ("the draft regulations") released for comment on 6 May 2013.

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 and include all the operators of petroleum activities in the EEZ.

We recognise that while these draft regulations are focussed on prospecting and exploration, a key part of petroleum exploration (i.e. drilling) is to be the subject of a separate consultation in coming months. Accordingly in this submission we focus on those matters covered by the draft regulations that are of relevance to the petroleum industry: seismic surveying and seabed sampling type activities. We have also raised the maintenance and on-going operations of existing structures associated with petroleum production. This activity with low environmental impacts will take place in the EEZ off Taranaki but is not currently provided for in the regulations.

This submission is in two sections:

- Section 1 – Key issues
- Section 2 – Clause by clause comments

Section 2 – Key issues

Incorporating the DoC Seismic Code by reference

PEPANZ was involved in the development of the Department of Conservation's ("DoC") *2012 Code of Conduct for Minimising Acoustic Disturbance to Marine Mammals from Seismic Survey Operations* ("the Seismic Code"). The Seismic Code was developed as a voluntary code with the expectation that it might form the basis of regulations in future.

The Seismic Code is generally not a document that translates well into a regulatory requirement to comply with given its discursive style and varying degrees of prescription and with some of the key aspects explained in an associated reference document. This is not meant as a criticism of the Seismic Code as it was not written to be regulation. Nonetheless, requiring compliance with a document such as the Seismic Code is inherently problematic from a legal perspective.

We also note that the Seismic Code provides a quasi-approval power to DoC[1] without a clear basis or process associated with it. This seems to have proved workable so far when operators voluntarily choose to sign up to the Seismic Code but is highly problematic from a legal perspective if the Code is simply incorporated by reference as currently proposed. This would create a situation where a loosely defined discretionary approval process conducted by one government agency under a voluntary code forms the basis of a permitted activity under a legal regime administered by a different government agency.

The Seismic Code has been in place for less than a year (since July 2012) and has been applied to the five seismic surveys undertaken since then, all in offshore Taranaki in the first half of this year. This experience and use of the Seismic Code over recent months has revealed issues with the detail of the code as currently written that could be highly problematic and costly for operators, and which are unnecessary to delivering environmental outcomes.

An example is that the Seismic Code as currently drafted carries the potential to impose considerable costs in standby time prior to even commencing a seismic survey. Under the Seismic Code, pre-start-up sighting is deemed not valid until amongst other things the local sea conditions reach 3 or less on the Beaufort scale (7 to 10 knots of wind). This is highly problematic for the most part as sea states of Beaufort 3 or less during daylight can be rare in many areas around New Zealand. This single requirement could if imposed literally lead to some surveys being delayed for many days with a cost to the operator in the hundreds of thousands of dollars per day. The intent of this provision could be achieved in other ways whilst significantly reducing the likelihood and/or duration of delays but this would require amendment of the Seismic Code.

Given the currently voluntary nature of the Seismic Code it has proved possible to apply some flexibility in its application whilst still meeting the objectives of it. This would not be possible if the Seismic Code was incorporated by reference as proposed. Therefore whilst PEPANZ is broadly comfortable with much of the content of the Seismic Code, simply incorporating it by reference as proposed would risk imposing substantial operational challenges and unnecessary costs on operators with no corresponding environmental benefits. Accordingly we do not support this approach.

Finally as currently drafted seismic surveys would be subject to both the Seismic Code (by way of clause 7) but also the requirements of clause 6 (prospecting and exploration) as seismic surveys are covered by the definition of “prospecting” as they are a form of geophysical surveying. This needs to be addressed

We note that simply incorporating the Seismic Code by reference seems to be the only option that has been considered and was approved by Cabinet in December 2012. There are however other possible options that would meet the same environmental objectives whilst reducing some of the regulatory design problems and potential costs. Some options which would be more aligned with conventional regulatory practice include:

- Requiring seismic surveys to comply with relevant regulations to manage adverse effects of seismic activity on marine mammals made under the Marine Mammals Protection Act 1978 and incorporating a statement that until such time regulations to this effect are enacted, adherence to the Seismic Code is an acceptable means of demonstrating compliance with the condition.
- Imposing a permitted activity condition stating that seismic surveys are permitted subject to the person undertaking it taking all practicable steps to avoid or minimise adverse effects on marine mammals, and then incorporating a statement that adherence to the Seismic Code is an acceptable means of demonstrating compliance with the condition.

[1] Refer section 3.2 of the Seismic Code, specifically the last paragraph on page 7.

If the Government wishes to progress the current approach of incorporating the Seismic Code by reference then the following issues need to be addressed:

1. The Seismic Code must be reviewed, reworked and reissued within the next few months to address the key workability issues identified with it. This would need to occur by August 2013 to provide some certainty to industry in committing to seismic surveys for the 2013/14 summer. The regulations would have to then be amended to bring in the revised 2013 code or drafted from the start to allow this to occur automatically.
2. Simultaneous monitoring of adherence to the Seismic Code by DoC under the code itself and by the EPA under clause 9 of the draft regulations by the EPA needs to be avoided. Otherwise there is a risk of a duplication of agency activity with associated costs and confusion as well as unnecessary compliance costs for operators. We note that the December 2012 Cabinet paper stated at paragraph 29 that it was expected that "DoC and the EPA will formalise a process by which DoC informs the EPA of non-compliance with the Code so the EPA can investigate". In the absence of any non-compliance there is no apparent role for the EPA.

Recommendation 1: either:

A. implement one of the alternative regulatory design options identified above;

or

B. if the Seismic Code is to be incorporated by reference as proposed then immediately review and revise the Code by August 2013 to address the identified issues and then amend the regulations at that time to incorporate this updated Seismic Code.

Recommendation 2: Amend clause 9 of the regulations to ensure that only one government agency is responsible for monitoring seismic surveys conducted (presumably this would be DoC as it is responsible for the Seismic Code).

Maintenance of existing structures and pipelines and environmental monitoring

The only existing structures in the EEZ are located offshore Taranaki and are associated with petroleum production/development. These relate to four fields (Kupe, Maari, Maui and Tui) and comprise a total of four fixed platforms, two FPSOs and some associated subsea infrastructure and pipelines. This various infrastructure has been in place and operated for between 5 and 35 years.

An issue is that section 20 of the *Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012* (EEZ Act) provides that any alteration of a structure is an activity, which unless it is a permitted activity, requires a marine consent regardless of whether there is any environmental effect associated with the alteration. This provision is complemented by section 162 of the EEZ Act, which "grandfathers" existing activities and provides the ability for the EPA to rule that certain activities at existing structures have no more than minor effects and so do not require a marine consent. Other low-impact activities such as pipeline maintenance might also come within section 20 of the Act and so unless dealt with under section 162 or provided as permitted activities would require a consent.

How section 162 will be applied by the EPA has yet to be established and the EEZ Act gives little guidance. Neither does the EEZ Act set a de-minimus threshold and so any modification of an existing structure could require a ruling, even where there is no environmental effect. This would impose on-going compliance costs on operators and be administratively burdensome for the EPA, without delivering any obvious environmental or regulatory benefits.

A more certain approach would be for regulations for permitted activities to provide that on-going operations at and associated with existing structures and pipelines are permitted activities. Given on-going operation and maintenance of existing facilities is not likely to have material environmental effect we consider this would fit naturally with the idea of permitted activities under the Act. It would also be consistent with the proposed approach to submarine cables provided in clause 8(3) of the draft regulations.

A related issue is that these existing petroleum production operations have amongst their various regulatory approvals discharge management plans (DMP's) under the *Marine Protection Rules Part 200: Offshore Installations – Discharges* ("Part 200"). These plans require environmental monitoring and reporting (refer clause 200.25 of Part 200) and this can involve taking seabed samples. We realise these functions will be moved to the EPA at some point in the future but these plans will presumably remain in force for some time until the transition is fully worked through. This sampling is an activity that has at most minimal environmental impact and is logically therefore a permitted activity. Given it is carried out under another regulatory regime it should not be subject to any additional notification requirements under the draft regulations and should simply be deemed as a permitted activity like maintenance of submarine cables. To require a costly process under one regulatory regime to conduct environmental monitoring (with negligible effects) pursuant to another regulatory regime would seem absurd.

Recommendation 3: Provide that activities associated with on-going operations and maintenance of existing structures and pipelines is a permitted activity under the regulations.

Recommendation 4: Make environmental monitoring conducted in relation to a DMP under Part 200 a deemed permitted activity under the regulations.

Pre-activity notification

The pre-activity notification requirements in Schedule 1 require notice to be provided 2 months in advance of undertaking an activity. The primary purpose of this is to allow a month for operators to notify the EPA and relevant iwi (as identified by the EPA) and then collate any feedback received from iwi. We note this was agreed to by Cabinet in December 2012 but has not previously been commented on.

We comment also that with these requirements as currently drafted, the notification process could easily take 3 to 4 months to complete as the initial environmental assessment and sensitive environments contingency plan would need to be developed before the 2 months period.

This 2 month timeline might not be a major issue for some activities with long lead times and certain dates but would effectively prevent activities being undertaken at shorter notice. Given these are permitted and inherently low-impact activities it is not apparent why this two-month notification (and potential response) period is always required.

It would also seem impossible because of the mandatory 2 month notification timeline (with all details included) to notify the activity well in advance (i.e. when the activity is scoped) and then actually undertake it at relatively short notice (a couple of weeks) if for example a suitable research vessel becomes available. We suggest this is rectified as this lack of flexibility will reduce the ability to undertake activities efficiently in some circumstances and is unnecessary to achieve the policy intent.

We recommend that the notification process be streamlined to meet the intent behind the designation of "permitted activities". An example of a revised notification scheme would be along the lines of the following:

1) Send initial notification to the EPA of the activity as early as practicable - operators required to provide updated details to the EPA (e.g. confirmed vessel) as soon as practicable after. With this flexibility a 2 month period would be much less of a problem.

2) EPA to respond by providing a list of relevant iwi within 7 days.

3) Operator provides notification of activity with all details to EPA and relevant iwi 7 days prior to commencement of permitted activities.

Recommendation 5: Either provide a revised notification process as outlined above or allow operators to update the information provided to the EPA as part of the pre-activity requirements within 2 months of undertaking the activity.

Sensitive environments and permitted activities in Schedule 6

We note there are inherent challenges with the concept of "sensitive environments", particularly in the context of what can be very-low low impact activities (small scale sampling).

We note that the Ministry has commissioned a report from NIWA on sensitive marine benthic habitats and this has formed the basis of the Schedule 6 of the draft regulations. Given this has become publicly available today (17 May) PEPANZ or its members have no ability to comment on its contents at this time.

Cost recovery regulations

We understand that draft regulations on cost recovery will be provided to industry and stakeholders for comment in the near future. To allow meaningful input on these we request that industry and other stakeholders have at least two weeks to comment on the draft regulations.

Recommendation 6: Provide draft regulations on cost recovery to industry and stakeholders for comment, with at least two weeks for comment.

Section 2 - Drafting comments

Clause	Comment
Clause 3 - Interpretation	
"exploration"	It is unclear whether activities associated with drilling for petroleum are covered by this definition.
"permitted marine structure"	The use of "permitted marine structure" as a term is both defined in a circular way and will lead to confusion with both current structures that are grandfathered and future structures that are permitted to be there by a marine consent.
"prospecting"	Seismic surveys must either be clearly excluded from the definition of "prospecting", or it otherwise made clear in clause 6 that they are not subject to that clause. Otherwise seismic surveys would be subject to both the Seismic Code and the various overlapping requirements under clause 6 and

	the Schedules, which is not the policy intent as we understand it. "aerial surveying" is not of itself relevant to the matters covered by the EEZ Act in section 20 and so should be removed from the definition of prospecting and the scope of the regulations.
"sensitive environment"	Limb (a) refers to Schedule 6 which provides a long list of sensitive habitats, which is intended to be comprehensive, but then limb (b) provides a catch-all that provides no certainty and is highly subjective. The value of doing this in relation to "permitted" activities given the list already provided and the inherently low impact of the permitted activities status is not apparent.
Clause 5 – Permitted marine structures	Please note the comments above under "Maintenance of existing structures" in section 1. As noted above in relation to the definition of "permitted marine structures" we consider the terminology likely to be confusing. We also recommend the clause is moved below clause 8 and perhaps integrated with current clause 8(3).
Clause 6 – Prospecting and exploration	As outlined noted above in section 1, seismic surveys must either be clearly excluded or separated from the definition of "prospecting", or it otherwise made clear in clause 6 that they are not subject to its requirements. Otherwise surveys would be subject to both the DoC Seismic Code and the various overlapping requirements under the draft regulations, which is not the policy intent.
Clause 7 – Seismic surveys	See comments above in Part 1 of this submission.
Schedule 2	We suggest re-ordering 1(g) and (h) would aid clarity.
Schedule 3	The tenses in (2) and (3) of the table seem confused given the logbook presumably relates to what has already taken place.