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Submission on Amendment to Marine Protection Rule 102 and on the associated Guidelines for Applicants of Certificates of Insurance

Ministry of Transport and Maritime New Zealand

Wellington

By email to:
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PEPANZ Submission: Marine Protection Rule 102 and Guidelines for Applicants of Certificates of Insurance

Introduction

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 industry.

This document constitutes the PEPANZ's submission in respect of both the proposed amendment to *Marine Protection Rule 102* ("the Rule") and on the *Guidelines for Applicants of Certificates of Insurance* ("the Guidelines"), which were released by the Ministry of Transport and Maritime New Zealand as separate documents in February 2018.

PEPANZ previously submitted on the Ministry of Transport's discussion document on financial assurance options (in February 2017), and on the Ministry of Transport's draft Rule amendment (in July 2017). PEPANZ submitted to Maritime New Zealand three times on issues relating to guidelines in 2017.
his submission is made further to Todd's earlier submissions:
Because of the intrinsically related nature of the Rule and Guidelines, this submission covers both proposals.

Summary

- At the financial assurance levels proposed, the only practicable method available to owners is insurance. The Rule and Guidelines require strict liability cover and are therefore considered uninsurable at these sums, because strict liability coverage is not provided by market standard insurance policies.

- We have expressed concerns about insurability since this issue was first consulted on formally in 2017. The industry supports financial assurance at higher levels, but is concerned that it will not be possible to comply with under the Rule and Guidelines proposed.
- Underwriters have advised that, given the higher sums required and the strict liability coverage proposed, non-standard insurance will not be available. If unable to satisfy the financial assurance requirements, owners will be not be granted certificates of insurance and will be unable to continue operating.
- It is crucial that market standard insurance policies are acceptable. We propose specific reference to market standard insurance policy wording such as Operators Extra Expense E.E.D. 8/86be included in the Rule.
- As joint ventures are common, it is important for industry to review joint venture guidance before being able to provide final views on the workability of the proposed regime.
- Given these critical issues remain unresolved, the timing of the amended Rule coming into force on 1 June 2018 is unrealistic.

Part 1 – Comments on underlying issues with the Maritime Transport Act 1994

1. The Maritime Transport Act 1994 ("MTA") presents key issues by imposing strict, unlimited, and full third-party liabilities. We understand this regime was based on the strict liability regime for shipping, but without including the cap on liabilities that applies to shipping, and without the international convention that was developed for shipping liabilities.
2. This strict liability framework appears to have driven the government's preference for insurance requirements that provide corresponding strict liability cover. However, because the scope of liabilities under the MTA is not aligned with market standard products, it is essential that the Rule narrows the assurance requirements to what is available on the market,

Part 2 – Comments on proposed amendment to Marine Protection Rule 102

Proposal 1: to increase sum to maximum of NZD800 million

3. The proposal is to increase the maximum insurance requirement from NZD600 million to NZD800 million. PEPANZ is broadly comfortable with this increase (although notes it is not aligned with the NZD-equivalent ~$700 million cap in Australia), but only on the basis that certificates of insurance will be issued for market standard insurance policies.
4. We emphasise strongly that the industry *supports* financial assurance requirements that are significantly higher than the current cap of approximately NZD27 million, but the regime needs to be structured in a way that enables Owners to comply. Accordingly, it is essential that market standard insurance should be explicitly referenced as an acceptable form of financial assurance in the Rule itself. Inclusion in the Rule would provide certainty to both the regulator and the industry, whereas relying on Guidelines does not prevent the Director exercising discretion to impose onerous requirements in line with Part 26A of the Maritime Transport Act 1994.
5. Standard market insurance is acceptable to regulators in other jurisdictions in which our members operate. We note that well containment costs must also be insured, which will mean insurance policy limits will have to be even higher than NZD800 million proposed, to the extent the requirements are satisfied using a policy with a single combined limit.

Proposal 2: to bring the legislation into force on 1 June 2018, sooner than planned

6. When the amended Rule was signed into law in September 2017, it was intended to come into force in September 2018 once acceptable guidelines were developed. The *entry-to-force* date is now proposed for 1 June 2018. PEPANZ opposes this, on the basis that the fundamental question of insurability with market standard insurance is unresolved, and because there is no guidance on how the Rule will work for joint ventures.

7. Only two months remain until the planned start date, and with such significant unresolved issues, owners will not have insurance available to them to meet the requirements. We request that the regime comes into force no sooner than three months after all guidance is finalised, and then with a subsequent 12 month transitional period for existing operations. This should allow owners to implement new requirements as a part of their insurance renewal cycles.

Proposal 3: to require all operations to comply by 1 June 2019

8. Because the key issue of insurability remains unresolved and because we have not seen the important joint venture guidance, an *entry-to-force* date of 1 June 2019 likely provides insufficient time for industry to determine insurance requirements and to acquire insurance. It is also relevant that joint venture partners will have different dates for policy renewals, i.e. the insurance cycle needs to be accounted for.

Part 3 – Comments on the proposed Guidance

We express serious concern about the Guidelines because market standard insurance is not considered as acceptable

9. We express serious concern about the Guidelines, because the insurance policies contemplated envisage strict liability cover which is not covered by market standard insurance. The consequence is serious, because if owners cannot obtain certificates of insurance, they cannot continue to operate.

10. To demonstrate that Guidelines do not currently anticipate the Director accepting market standard insurance, we copy below some points from the section on "*What's acceptable"* from page 10 of the draft Guidance:

    a. "*The Director must be satisfied it [the insurance] provides public liability cover suitable to meet the specified liabilities under the MTA when a contract of insurance is relied on.*

    b. *"Owners relying on contracts of insurance need to make sure the policy covers statutory liabilities which are "strict liability" in nature.*

    c. "*One effective method for owners to make sure they are adequately insured is to get an MTA endorsement on their policies. An endorsement should override extensions and exclusions.*

We seek that market standard insurance is referenced in the Marine Protection Rule as being acceptable to Maritime New Zealand

11. To refine the scope of liabilities that must be covered with financial assurance (vis-à-vis the MTA's broad liabilities) and to provide certainty to regulators and industry alike, we consider it essential that reference to the acceptability of market standard insurance should be included in the Rule.

12. As stated in a previous submission from PEPANZ:

"It is fundamental to remember that the relevant insurance policies applying to the upstream petroleum sector are, like other types of insurance, subject to a set of terms and conditions that represent conventions developed over many years of practical and legal experience around the world. The global insurance and re-insurance market in turn is based on adherence with standard approaches. These market standards can evolve over time but this evolution is driven, and constrained, by the ongoing need to meet the different and interests of insurers [sic], insured parties and regulators in key jurisdictions.

"It is unrealistic and impractical for domestic regulators in small jurisdictions to require changes to market standard terms, because the provision of insurance to the assurance level proposed ($800m) relies on well-established international norms. Refining the scope of liabilities under Part 26A of the MTA is important but not sufficient to make Part 102 insurable if the regulator is unwilling to accept market standard policies.

Market Standard products are well-defined and accepted in other jurisdictions

13. In considering reference to market standard insurance in 2017, officials considered that "*it would be inappropriate to include an explicit reference to acceptable insurance policies in the rule. There is no clear definition as to "market standards", particularly as these are likely to change over time*"[1].

14. We point out that market standard insurances of this nature have in fact been in place for many decades. As a report prepared for the Government of Ireland states: "*The most common insurance policy form used for OEE is known as E.E.D. 8/86. "86" being the year this was developed. It has stood the test of time!"*[2]

15. It is important to note that in assessing the risk that parties are insuring, underwriters rely on classification societies (e.g. Bureau Veritas), to confirm that the insured operations comply with relevant standards. This is effectively an independent third-party verification of the insured risks.

16. The referenced report for the Government of Ireland[3] contains the following remarks which show that market standard/ customary insurance is acceptable in several jurisdictions:

    a. Australia

    "In the [event] that the insurance option is utilised to provide financial assurance, there is no specific requirement to provide a certificate from an insurance company or broker, evidencing that insurance is in place. [i.e. insurance being *in place* is adequate]

    b. Canada

    "Insurance policies should be considered that are customary among international petroleum exploration or production companies.

    c. State of Israel

    "Whatever is "customary" among oil or gas exploration and production companies

The proposals are not aligned with other jurisdictions

[1] Page 10, https://www.maritimenz.govt.nz/rules/part-102/Part102-Amendment-2017.pdf
[2] *Method for Assessment of Financial Indemnity/Insurance of Petroleum Authorisation Holders* (2017) Page 90, https://www.dccae.gov.ie/en-ie/natural-resources/publications/Documents/22/BRANDED%20Report%20Final%20A,%2029%20June%2017.pdf
[3] iBid

17. The government proposes something manifestly out of sync with other jurisdictions, without making a clear case for that and without reference to common international practice. Market standard products (e.g. [OEE EED 8/86 etc]), which are acceptable in other jurisdictions, manage risks to third-parties and provide first party cover for well containment.

18. We point out that even to the extent that some effects may not be covered by insurance (under standard exclusions), owners remain strictly liable under the MTA.

It is unclear in the Rule and Guidelines whether the cap on cover applies across multiple installations

19. We understand that insurance of up to NZD800 million can cover multiple offshore installations, but this is not covered clearly in the Guidance. We seek clarity on this, and because some parties are involved in multiple offshore installations this is a live issue that needs resolution.

Part 4 – Conclusion and next steps sought

20. Given the fundamental concerns expressed, we recommend the government releases another version of the Rule and Guidance that accounts for the points raised, to allow the petroleum and insurance sectors to provide further feedback.

21. This should, we consider, accept market standard insurance policies, and also provide guidance on how the certification process will work for joint ventures.