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Submission on proposed EEZ regulations 2013
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SUBMISSION ON 'ACTIVITY CLASSIFICATIONS UNDER THE EEZ ACT: A DISCUSSION DOCUMENT ON THE REGULATION OF EXPLORATORY DRILLING, DISCHARGES OF HARMFUL SUBSTANCES AND DUMPING OF WASTE IN THE EXCLUSIVE ECONOMIC ZONE AND CONTINENTAL SHELF'

Introduction

EDS is a public interest environmental law group, formed in 1971. It has a membership that consists largely of resource management professionals. The focus of EDS's work is on achieving good environmental outcomes through improving the quality of New Zealand's legal and policy frameworks and statutory decision-making processes.

EDS has a continuing and strong interest in marine management. In 2011, EDS released a policy paper titled *Governing our Oceans: Environmental Reform for the Exclusive Economic Zone*. This reviewed the international context for management of the exclusive economic zone (EEZ) and recommended changes to the New Zealand framework. We made comprehensive submissions on the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2011 (the Act) and 'Managing our Oceans: A Discussion Documents on the regulations proposed under the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Bill'. EDS welcomes the opportunity to comment on this Discussion Document.

Process

The non-notified discretionary activity status is proposed to be introduced to the Act through a Supplementary Order Paper (SOP). As a result, the public has not had an opportunity to submit on the amendment and it has not been subject to select committee scrutiny. EDS suggests that the amendment is arguably outside the scope of the Marine Legislation Bill (see section 17.3 of the Legislation Advisory Guidelines). The use of improper process to introduce a new activity status reduces the legitimacy of the consultation process currently being undertaken to consider the use of the activity status.

If submissions had been sought on the amendment included in the SOP, an alternative outcome may have been reached. For example, an alternative activity classification could have provided for notification to limited parties - enabling submissions to be lodged by any person representing a relevant aspect of the public interest, any person that has an interest in the application greater than the interests that the general public has, and the adjacent local authorities (analogous to the parties allowed to make further submissions under schedule 1, clause 8 of the Resource Management Act 1991). This would reduce the number of submissions received and the length of any hearing, while still ensuring groups representing the public interest could submit and test the evidence presented by the applicant.

Management of oil and gas exploratory drilling

The key issue in regard to the management of oil and gas exploratory drilling is the potential for this activity to result in a well blowout, with catastrophic consequences for New Zealand both environmentally and in terms of reputation. In comparison to oil and gas exploratory drilling, a number of the activities to be managed under the proposed regulation have smaller environmental effects which are simpler to manage. The risks of oil and gas exploratory drilling demand a robust risk management framework. However, the Discussion Document only briefly covers this issue and is entirely unsatisfactorily in this regard.

The Discussion Document refers to the Health and Safety in Employment Petroleum Regulations 2013 and the control measures put in place under these regulations, such as the requirement for a safety case (page 7). However those regulations are entirely focused on human health and safety and do not require the decision maker to have regard to environmental matters. In addition, human health and safety outcomes could be readily achieved in a manner that is inconsistent with protection of the environment (e.g. diverting an uncontrolled release of oil and other reservoir fluids away from the platform and out into the water). Therefore, the Health and Safety in Employment Petroleum Regulations 2013 cannot be relied upon to provide a robust risk management framework for oil and gas exploratory drilling.

The Discussion Document also refers to the $25 million minimum insurance requirement as avoiding, remedying, or mitigating the risk of oil spills (footnote 7 page 7). However, this sum is insignificant compared to the costs of the Deepwater Horizon spill ($14 billion)[1] and even the Rena shipwreck ($235 million)[2]. The inadequacy of the minimum insurance requirements demonstrates the importance of a robust risk management framework for oil and gas exploratory drilling.

The Discussion Document does not propose any risk management framework for oil and gas exploratory drilling. Instead, the approval of applications will be at the discretion of the EPA, with no standards against which applicants must be measured. EDS submits that the regulations must put in place a more robust risk management framework for oil and gas exploratory drilling that ensures applications are measured against robust standards for well integrity. The discretionary marine consent process cannot on its own provide adequately for this, particularly given the complexity of this area. There are a number of ways in which the regulations may be achieve this outcome. For example, a requirement for a safety case which satisfied environmental objectives or the application of Det Norske Veritas or ISO standards for environmental purposes. Such regulations would be within the scope of the Act, as section 27 of the Act allows regulations to prescribe technical standards, methods or requirements.

Discussion Document Questions

1a. Do you agree with the proposal exploratory drilling for oil and gas be classified as non-notified discretionary? If not, how should the activity be classified or regulated?

Section 33(3) of the EEZ Act sets out matters the Minister must take into account when recommending regulations. These include:

- Any effects on the environment of allowing an activity
- Any effects on existing interests of allowing an activity

[1] http://www.economist.com/blogs/schumpeter/2012/11/bp-and-deepwater-horizon-disaster
[2] http://www.nzherald.co.nz/bay-of-plenty-times/news/article.cfm?c_id=1503343&objectid=11079672

- The effects on human health that may arise from effects on the environment
- The importance of protecting the biological diversity and integrity of marine species, ecosystems, and processes
- The importance of protecting rare and vulnerable ecosystems and the habitats of threatened species
- New Zealand's international obligations
- The economic benefit to New Zealand of an activity
- The efficient use and development of natural resources
- The nature and effect of other marine management regimes
- Best practice in relation to an industry or activity
- The desirability of allowing the public to be heard in relation to the activity

The Discussion Document suggests that the non-notified discretionary classification has been added to the Act to *cover activities that, although regulator discretion is appropriate, do not warrant using the (notified) discretionary process (in terms of financial costs and uncertainty of process and timing).*[3] It states that *the costs to applicants and likely impact on investor certainty of the discretionary consenting process are disproportionate, given the nature of exploratory drilling and its likely impacts.*[4]

The discretionary process has a maximum timeframe of 140 days between lodgement and decision. There is a discretion to extend the timeframe where further information is required. Appeals to the High Court are available on points of law. The cost of assessing an application is estimated to be $250,000 to $1,500,000.

The non-notified discretionary process has a maximum timeframe of 60 working days between lodgement and decision. There is a discretion to extend the timeframe where further information is required. Appeals to the High Court are not available, although judicial review can be pursued. The cost of assessing an application is estimated to be $100,000 to $400,000.

The Discussion Document states that *Exploratory drilling activities generally last on average 30 to 40 days*. *Limited worldwide supply of drill ships and supply vessels, and the need to have investment decisions and contracts in place many months in advance of an activity, make investment certainty important…. The time-critical nature of the activity, puts a premium on a predictable timeframe [p12].* However, both of the processes above have similar uncertainties in the timeframe (requests for further information and appeals). Nevertheless, both processes have strict timeframes. It is submitted that the non-notified discretionary process does not add significantly to the predictability of the timeframe for an applicant.

The non-notified discretionary process is shorter and cheaper. However, this comes at the cost of removing the public's right to submit as well as removing the hearing process. These are significant costs and can lead to poor quality decision-making.

First, the removal of the public's right to submit will decrease public confidence in the regulatory process and reduce the applicant's 'public licence to operate'.

[3] Page 6
[4] Page 13

Secondly, the removal of the hearing process denies submitters the opportunity to test the evidence provided by the applicant. This is particularly important in an industry where information supplied by the applicant will often be complex and require expertise to decipher.

Thirdly, the reduced transparency of the process raises concerns that the regulator (the EPA) could become 'captured' by the industry. In the aftermath of the 2010 Deepwater Horizon oil spill it was discovered that a contributor to the spill was the 'regulatory capture' of the Minerals Management Service.

The Discussion Document states that the *greater process certainty will help to foster investor confidence in the regulatory regime* which will *help to encourage greater investment in exploratory drilling activities in New Zealand's EEZ and continental shelf.*[5] However, growing public opposition to the industry will be fostered by an inadequate regulatory regime. This will not encourage investment in exploratory drilling activities.

The Discussion Document disproportionately focuses on one of the matters required to be considered under s 33(3) of the Act - facilitating *the economic benefit to New Zealand of an activity.* In contrast, the Discussion Document barely comments on the other matters required to be considered under s 33(3) of the Act, including any *effects on the environment of allowing an activity; the importance of protecting the biological diversity and integrity of marine species, ecosystems and processes; the importance of protecting rare and vulnerable ecosystems and the habitats of threatened species; and the desirability of allowing the public to be heard in relation to the activity.*

EDS considers that the Discussion Document does not contain an adequate discussion of the matters required to be considered under s 33(3) of the Act. A number of these matters point to the inappropriateness of the proposed activity classification.

The Discussion Document states that the non-notified discretionary classification will provide for the protection of the environment in the EEZ and continental shelf as: the EPA retains discretion as to whether an application should be approved and can impose conditions; the EPA can seek expert advice about the effect on the environment to inform its decision; and the EPA may extend the timeframe to achieve an adequate assessment of the potential effects of a proposal.

However, removing the notification, hearing and appeal process will decrease the robustness of the decision making process. It relies solely on the EPA identifying all key issues and adequately assessing them. Given the complexity of the equipment and processes that may be used for deep-sea exploratory drilling, and the difficulty of adequately assessing and managing risk, it is not certain that the EPA will be able to do this in all cases. Providing for a public submission process enables additional matters to be raised and alternative scientific scrutiny to be applied to the application. This in turn supports better decision-making.

The Discussion Document fails to discuss the risks associated with exploratory drilling, except noting that a well blowout would have s*uch an event has low probability but a high potential impact on the environment and existing interests.*[6] The Discussion Document does not discuss whether the risks associated with exploratory drilling are lower than the risks associated with production drilling (which is a discretionary activity). There is no evidence presented to suggest that the risks are lower and it appears that the justification for a less rigorous activity status rests entirely upon reducing the onus of the process. It does not align with the purpose of the Act to treat activities with similar environmental effects in a different manner.

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[5] Page 13
[6] Page 12

EDS notes that section 32 of the Crown Minerals Act 1991 provides that the holder of an exploration permit has a qualified right to a mining permit. Therefore, mining will inevitably follow successful exploration in most cases. This means it is important to ensure adequate assessment at the stage of exploration, to ensure operators are not inadvertently 'encouraged' to operate in areas where mining should not be allowed.

The Discussion Document states that the *Government is committed to ensuring that New Zealand has a world-class regulatory regime for the safe and environmentally responsible exploration and production of our oil and gas resources.*[7] For the reasons set out above, the proposal to classify exploratory oil and gas drilling as a non-notified discretionary activity would not ensure New Zealand has a world-class regulatory regime.

2. Has section 2.3.1 correctly described the key issues related to discharges and dumping?

The Discussion Document states that these activities are already regulated, the purpose of the transfer of regulatory responsibility is to improve the efficiency of the overall management response, and no significant problems have been identified with the existing regime.[8] However, there is no information provided or discussion addressing whether the existing regime adequately protects the marine environment.

It is necessary to regularly review the effectiveness and efficiency of regulations. The Discussion Document addresses efficiency considerations only and does not consider the effectiveness of the current regime. It is therefore not possible to know whether the current regime relating to discharges and dumping is sufficiently effective or whether it requires strengthening.

The Discussion Document also contains no/little information on the environmental effects of the discharge and dumping activities to be regulated. In fact, in relation to some activities the Discussion Document does not even contain an adequate description of the activity to enable a member of the public to understand it. For these reasons, it is not possible to accurately evaluate the proposals without more information.

3. Do you agree that 'harmful substances' should be defined as in the proposed definition in 2.3.2? If not, how should the term be defined?

The Discussion Document proposes to build on the definition of 'harmful substance' in the Marine Protection Rules and suggest the following definition:

> *(a) a substance which is ecotoxic to aquatic organisms and considered hazardous for the purposes of the Hazardous Substances (Minimum Degrees of Hazard) Regulations 2001,*
>
> *(b) oil,*
>
> *(c) garbage,*
>
> *(d) discharged sediments and/or tailing from mineral operations.*

Section 33(3) requires the Minister to have regard to the nature and effect of other marine management regimes. The Resource Management (Marine Pollution) Regulations 1998 control dumping and discharges from ships and offshore installations in the coastal marine area and clause 3 defines harmful substances:

[7] Page 10
[8] Page 15

The following substances are **harmful substances** *for the purposes of the definition of the term harmful substances in section 2(1) of the Act:*

(a)petroleum in any form, including crude oil, fuel oil, sludge, oil refuse, and refined petroleum products (other than petrochemicals which are noxious liquid substances); and includes the substances specified in Schedule 2:

(b)any substance specified in Schedule 1 and any mixture of those substances if carried in bulk in a ship:

(c)drainage and other wastes from any form of toilet, urinal, or toilet scupper on a ship or offshore installation:

(d)drainage from washbasins, washtubs, and scuppers located in the dispensary, sick bay, or other medical premises of a ship or offshore installation:

(e)drainage from spaces on a ship or offshore installation containing living animals:

(f)waste water from a ship or offshore installation mixed with the drainage and waste specified in paragraphs (c), (d), or (e):

(g)all victual, domestic, and operational waste (other than fresh fish or parts of fresh fish) generated during the normal operations of a ship or offshore installation and liable to be discharged continuously or periodically.

EDS considers that the proposed definition has some advantages over the definition set out in the Resource Management (Marine Pollution) Regulations 1998 in terms of simplicity and additional matters covered. However, it does not address other harmful substances, such as the matters covered in (c) to (g) above. EDS considers that the definition should include these matters, particularly (g) which incorporates all other forms of waste.

4. Do you agree that the activities set out in Table 4 should be classified as permitted activities and regulated with these conditions? If not, how else could they be classified or regulated?

The comments below are based upon consistency with international obligations (s 33(3)(f)) and existing domestic regimes (s 33(3)(i)). As set out at section 2 above, the Discussion Document does not provide sufficient information to assess the proposed regulations against other matters listed in section 33(3) of the Act such as:

- Any effects on the environment of allowing an activity
- Any effects on existing interests of allowing an activity
- The effects on human health that may arise from effects on the environment
- The importance of protecting the biological diversity and integrity of marine species, ecosystems, and processes
- The importance of protecting rare and vulnerable ecosystems and the habitats of threatened species
- Best practice in relation to an industry or activity

Proposed Permitted Activity	*Comment*
Food waste – comminuted/ground and able	This is consistent with MARPOL Annex V

to pass through a screen with openings no greater than 25mm	
Offshore processing drainage and displacement water – oil content not exceeding 50 ppm and averages less than 30 ppm	This is inconsistent with the Resource Management (Marine Pollution) Regulations 1998, section 9, which states that in some circumstances a person may discharge oil from a ship or offshore installation if the oil content of the discharge does not exceed 15 ppm. EDS considers that the concentration permitted should be limited to 15ppm in the absence of evidence supporting a higher concentration.
Oily waste from machinery space – maximum discharge of 15 ppm	This is consistent with the existing regime in the EEZ and with the Resource Management (Marine Pollution) Regulations 1998, section 9.
Sediments and/or tailing from mineral operations during prospecting and exploration – conditions being considered	This is inconsistent with the current regime which requires a permit to be obtained for the dumping of dredged material. The current regime also provides a volume threshold over which specific site management is required. This proposal also fails to recognise that the impacts of dumping sediments and/or tailing from mineral operations will depend on the quantity disposed and the sensitivity of the location. It is inappropriate to treat all dumping in the same manner without gradation. The suggested condition (requiring sediments to be disposed of as close as possible to the original point of extraction) will not necessarily address these concerns. There needs to a limit which triggers the need for consent.
Burial at sea – EPA must issue a certificate of compliance and limited to 5 locations within the EEZ	This is consistent with the current regime which limits burial at sea to 5 locations. The requirement for a certificate of compliance ensures oversight of the activity.

5. Do you agree that the activities set out in Table 5 should be classified as non-notified discretionary? If not, how else could they be classified or regulated?

For the reasons set out above, EDS opposes the use of a non-notified discretionary activity status which has been proposed using an improper process. The activities set out in Table 5 are therefore considered under paragraph 6.

6. Do you agree that the activities set out in Table 6 should be classified as discretionary? If not, how else could they be classified or regulated?

The comments below are based upon consistency with international obligations and existing domestic regimes. As set out at section 2 above, the Discussion Document does not provide sufficient information to assess the proposed regulations against other matters listed in section 33(3) of the Act such as:

- Any effects on the environment of allowing an activity
- Any effects on existing interests of allowing an activity
- The effects on human health that may arise from effects on the environment
- The importance of protecting the biological diversity and integrity of marine species, ecosystems, and processes
- The importance of protecting rare and vulnerable ecosystems and the habitats of threatened species
- Best practice in relation to an industry or activity

It is unclear why the regulations are seeking to classify activities as discretionary activities when the Act provides that activities are discretionary as a default.

Proposed Non-notified Discretionary Activity	*Comment*
Offshore processing drainage and displacement water – exceeding permitted threshold – necessary for geological, technical or safety reasons	See above concerns in relation to the permitted activity threshold. Discretionary activity status will ensure full assessment of the effects of a proposed activity.
Production water discharges	Discretionary activity status will ensure full assessment of the effects of a proposed activity.
Operational chemical discharges	Discretionary activity status will ensure full assessment of the effects of a proposed activity.
Discharges of drilling fluids from oil and gas operations during the exploratory stage	Discretionary activity status will ensure full assessment of the effects of a proposed activity.
Candidate wastes under Annex I of the London Protocol except for dumping of structures during the decommissioning of oil and gas production structures.	Discretionary activity status will ensure full assessment of the effects of a proposed activity. This is consistent with the London Protocol.

Proposed Discretionary Activity	*Comment*
Discharges of sediments and/or tailings from mineral operations and discharges of drilling fluids form oil and gas drilling during the production stage	Discretionary activity status will ensure full assessment of the effects of a proposed activity.
Dumping of structures or parts	Discretionary activity status will ensure full assessment of

of structures during decommissioning of oil and gas production structures	the effects of a proposed activity.

Prohibited activities

EDS supports the proposed prohibited activities which are consistent with MARPOL and the London Convention.

Conclusion

EDS welcomes regulations which would better manage the environmental impacts of activities within the exclusive economic zone and continental shelf. However, we are strongly concerned that the proposed regulations do not put in place a robust risk management framework for oil and gas exploratory drilling. In addition, the proposed non-notified discretionary activity status would further weaken the management of oil and gas exploratory drilling. In regards to discharge and dumping activities, the Discussion Document contains no analysis of the environmental effects of the activities or comparison with existing regimes. It is therefore an inadequate basis upon which to undertake consultation. In light of the above, EDS submits that there is a need to reconsider the proposed regulations and issue a further discussion document containing more robust proposals and analysis.

We would welcome any further opportunity to discuss the Discussion Document.

Yours sincerely

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