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HSE Review
Energy and Communications Branch
Ministry of Economic Development
P O Box 1473
Wellington 6140

Offshore petroleum health, safety and environmental legislation review

The Environmental Defence Society (EDS) welcomes the opportunity to make submissions on the *Comparative review of health, safety and environmental legislation for offshore petroleum operations* commissioned by the Ministry of Economic Development (Report).

Summary of submissions

EDS is making submissions on four of the eight recommendations in the Report. A summary of the submissions are set out below.

In relation to the content of the Report, EDS is very concerned about findings that the New Zealand inspection service for offshore petroleum is severely under-resourced. EDS urges the Ministry of Economic Development to significantly increase the resources of this service urgently

Require HSE considerations (including strategic environmental assessment) at the resource allocation stage

EDS submits that petroleum activities should be subject to environmental scrutiny as recommended, but that this should be an environmental impact assessment undertaken on a project specific basis as a separate process from resource allocation, and that the process should be managed by the Environmental Protection Authority (EPA). Strategic issues should be addressed in a marine spatial plan for the EEZ.

Establish an environmental regulatory framework in the EEZ and extended continental shelf

EDS strongly supports the recommendation that an environmental regulatory framework be established in the EEZ and extended continental shelf and considers that the most effective and cost efficient way of addressing this gap is through expanding the application of the RMA to this area.

Establish an agency with responsibility for environmental regulation in the EEZ and extended continental shelf

EDS supports the need for an agency to be given responsibility for environmental regulation in the EEZ and extended continental shelf and considers the EPA to be the most appropriate agency to undertake this task.

Consider future consolidation of offshore environmental jurisdiction

EDS agrees that there needs to be consideration of the future arrangements for the offshore environmental jurisdiction and submits that a broad review of oceans governance arrangements is desirable. EDS recommends the creation of a *Royal Commission on Oceans Governance* to develop recommendations for new oceans legislation and governance arrangements.

Introduction

EDS is a public interest environmental law group, formed in 1971. It is Auckland-based and has a membership that consists largely of resource management professionals. It operates by litigating on environmentally important matters and as an environmental think tank.

EDS has had a long interest in marine management. In 2005 EDS published a report on oceans governance titled *Looking out to sea: New Zealand as a model for ocean governance*. In 2007 EDS published a report investigating integrated coastal management titled *Beyond the tide: Integrating the management of New Zealand's coasts*. The report was reprinted in 2009 with support from the Hauraki Gulf Forum.

In 2009, EDS also released a policy paper on the establishment of an EPA titled *Improving environmental governance: the role of an Environmental Protection Authority*. This paper canvassed gaps in current marine management (amongst other things) and proposed a role for the EPA which would include oversight of coastal and marine management.

EDS is currently finalising a second policy paper titled *Governing our oceans: Environmental legislation for the exclusive economic zone*. This paper is due to be released in March 2011. This submission draws on the analysis undertaken in preparing the paper. It included examining arrangements for managing the EEZ in the USA, Australia, Canada and the United Kingdom.

Inadequacies of current inspection service

EDS was very concerned about the Report's findings that the New Zealand inspection service for offshore petroleum is severely under-resourced. The Report indicated that there is currently only one person who is responsible for inspecting all offshore petroleum installations, which currently number seven, as well as all onshore petroleum and geothermal extraction activities.[1] EDS understands that thirty-one onshore petroleum wells were drilled in 2009 alone.[2] This can be

[1] Atkins Holm Joseph Majurey Limited and ERM New Zealand Limited, 2010, 31

[2] http://www.crownminerals.govt.nz/cms/petroleum/facts-and-figures/#current

compared to Australia where there is one inspector for every three installations, the United Kingdom where there is one inspector for every two installations and Norway where the ratio is one to one. [3]

EDS urges the Ministry of Economic Development to significantly increase the resources of the offshore petroleum inspection service urgently.

Require HSE considerations (including strategic environmental assessment) at the resource allocation stage

The report recommends that prior to Crown Minerals making decisions to allocate petroleum permits there be a new legal requirement that an applicant provide appropriate information on relevant health, safety and environmental issues. For environmental issues, it is proposed that a strategic environmental assessment be required or commissioned by Crown Minerals for review by relevant agencies such as the Ministry for the Environment and Maritime New Zealand. Crown Minerals would then be legally empowered to consider such information as part of an overall decision to grant or refuse a permit and for imposing conditions.

EDS agrees that environmental issues need to be scrutinised before petroleum prospecting or mining is able to take place. However, EDS does not agree that the best way for this to be achieved is for Crown Minerals to commission a strategic environmental assessment. This is for two main reasons:

First, each mining proposal needs to be subject to a project-specific environmental impact assessment, rather than only a broader strategic environmental assessment being undertaken. This was one of the key messages from the recent Gulf oil spill. For example, the Council on Environmental Quality produced a report dated 16 August 2010 which examined the application of the National Environmental Policy Act to the consenting process for the BP well.[4]

A major weakness in the process, identified by the Council, was that the Minerals Management Service (the federal regulator for offshore petroleum activity) failed to undertake any analysis to determine impacts from a potential site-specific spill. It had relied on existing categorical exclusions for its decision to approve BP's exploration plan and subsequent scrutiny of applications for permits to drill were based on a high level programmatic environmental impact statement. In short, there had been insufficient analysis of the specifics of the proposal before it was approved.

If we are to avoid such disasters in New Zealand, it is imperative that robust project-specific environmental assessments, which include risk assessments, are undertaken for each proposed petroleum activity.

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[3] Atkins Holm Joseph Majurey Limited and ERM New Zealand Limited, 2010, 31

[4] Council on Environmental Quality, 2010, *Report regarding the Minerals Management Service's National Environmental Policy Act policies, practices, and procedures as they relate to outer continental shelf oil and gas exploration and development*, http://www.whitehouse.gov/sites/default/files/microsites/ceq/20100816-ceq-mms-ocs-nepa.pdf

EDS agrees that a strategic approach should be taken to environmental issues, and submits that the best way of achieving this is through the development of an oceans plan which includes a strong spatial element (through mapping). This could, for example, identify sensitive areas which should be off-limits to specific petroleum and other activities or subject to stricter controls.

The second reason EDS does not agree with the specifics of the recommendation is that, to be effective, environmental assessment procedures need to undertaken by an independent environmental regulator and not by the authority allocating access to petroleum. This was another key lesson from the Gulf oil spill.

For example, the Outer Continental Shelf Safety Oversight Board's report, released on 1 September 2010, identified a number of issues with the functioning of the Minerals Management Service: [5] These included the conflicting roles of the Minerals Management Service where an emphasis on lease sales and permitting created an imbalance in how the agency fulfilled its dual mandate to responsibly develop outer continental shelf resources while protecting the environment and cultural resources. Incidents occurred where scientists' environmental impact findings were changed or minimised to expedite approvals.

Since the oil spill, the Minerals Management Service has been restructured, so that its functions now fall into three separate divisions, with allocation of access being undertaken separately from environmental protection.

This approach is supported by the comparative review of regulatory frameworks for offshore petroleum undertaken in the Report. On page 7, the Report concludes that a common element is the 'recognition that resource allocation/royalty collection functions must be separate from health, safety and environmental regulation'. It also concludes that environmental regulation is normally kept separate from health and safety aspects. It states on page 10 that:

> *In all of the Review Countries, there is an authority (or combination of authorities) that regulate health and safety aspects of offshore oil and gas activities and a separate regulatory authority that considers environmental impacts. In the majority of regimes, this environmental regulator does not specifically administer offshore oil and gas activities, but has a broader remit across the environmental context.*

In the New Zealand case, it is therefore important that environmental scrutiny is not undertaken by Crown Minerals which is responsible for allocating the resource and promoting investment in the Crown's mineral estate.[6] In addition, recent government announcements indicate that Crown Minerals will in future have a 'more commercial and strategic approach to meet the needs of both

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[5] US Department of the Interior Outer Continental Shelf Safety Oversight Board, 2010, *Report to Secretary of the Interior Ken Salazar*,
http://www.doi.gov/news/pressreleases/loader.cfm?csModule=security/getfile&PageID=43677

[6] http://www.crownminerals.govt.nz/cms/about

industry and government.'[7] Such a commercial approach aimed at promoting petroleum activity approach is potentially in conflict with undertaking robust environmental scrutiny of activities and that is why one agency should not perform both roles.

In EDSs view, the most appropriate agency to undertake environmental scrutiny of the environmental effects of offshore petroleum activity is the EPA for the reasons set out in the section below. This would also be consistent with international best practice as set out in the quoted passage above, where the environmental regulator has a broad remit, and not just one focused on offshore oil and gas activities.

In summary, EDS submits that petroleum activities should be subject to environmental scrutiny as recommended, but that this should be an environmental impact assessment undertaken on a project specific basis as a separate process from resource allocation, and that the process should be managed by the EPA. Strategic issues should be addressed in an integrated manner, across all oceans activities, in an oceans plan.

Establish an environmental regulatory framework in the EEZ and extended continental shelf

This recommendation proposes a new regulatory framework for environmental assessment and approval of petroleum activities in the EEZ and continental shelf. EDS strongly supports the recommendation to establish a new environmental regulatory framework applying to these areas. This gap in environmental legislation has been acknowledged since around 1999 and urgently needs to be filled.

EDS believes that the most effective and cost efficient way of addressing this gap is through expanding the application of the RMA to the EEZ. The RMA has been in place for almost 20 years. Its provisions have been well tested through the courts and their application is well-understood in practice. They would therefore provide legal certainty. Recent amendments have significantly streamlined processes, and the establishment of the EPA in 2009 has provided a centralised agency with the skills to process complex consents.

The RMA already applies to marine areas within the territorial sea, and in this area coexists with the existing fisheries, minerals allocation, marine pollution and marine protection regimes. There should therefore be few difficulties, arising from the interface with other existing legislation, in extending the RMA out to the EEZ.

The RMA already provides a comprehensive framework for integrated environmental management and this could be relatively easily extended over the EEZ. The Act has a clear purpose of 'sustainable management' which provides for environmental protection while at the same time enabling economic activities. This 'overall broad judgement' approach to decision-making, which is currently applied to land and the territorial sea, is equally appropriate for the EEZ.

Under the RMA, applicants are required to prepare an assessment of environmental effects to accompany resource consent applications. Decision-making is focused on assessing the significance

[7] http://www.crownminerals.govt.nz/cms/news/2010/opening-address-to-the-new-zealand-petroleum-conference

of potential effects as well as conformity with relevant plans, policies and part 2 of the Act. The RMA also provides for a single hearing process for matters of national significance through the board of inquiry process as well as through direct referral to the Environment Court. This effects-based approach is equally relevant to consenting within the EEZ.

Notified resource consent applications within the EEZ could be treated in a similar manner as matters of national significance to streamline the consenting process. Under this process, applications would have only one substantive hearing. The consenting process would be managed by the EPA, with the final decision made either by the board of inquiry, or the Environment Court. Appeal rights of applicants and submitters against this decision would be restricted to judicial review in the High Court.

Specialists in oceans management could be appointed to boards of inquiry appointed to determine EEZ consents. To retain continuity, a 'standing' board of inquiry or pool of oceans specialists could be established (an Oceans Commission).

National environmental standards could identify activities which are likely to have only minor effects within the EEZ, and spatial areas which are low-risk for specific activities, with applications meeting these standards being non-notified. Provision could be made for non-notified resource consents within the EEZ to be determined by the EPA.

Currently, for matters of national significance, the relevant regional council becomes responsible for associated monitoring and enforcement activities once the consent has been granted. The councils have limited logistical capacity beyond a mile or two from the coast. An amendment to the RMA would need to allocate responsibility for such activities within the EEZ, which could appropriately be given to the EPA. The EPA, which is soon to become a Crown entity, could call in the services of other Crown agencies, such as the Defence Force, Ministry of Fisheries, Department of Labour or Maritime New Zealand if necessary to assist with enforcement.

Under the RMA, the relevant plan determines the status of each activity within a particular area, depending on the likely significance of environmental impacts. Potential categories are permitted, controlled, restricted discretionary, discretionary, non-complying and prohibited. The category a proposal falls into determines the legal test that applies, and therefore indicates how hard or easy it will be to get approval.

Where Part 3 of the RMA (which sets out duties and restrictions) requires a resource consent to be obtained for an activity, and there is no relevant rule in a plan, the activity is treated as discretionary.[8] This enables a full environmental assessment of effects to be undertaken and consent to be declined if the effects are unacceptable.

Part 3 of the RMA could be amended to provide that consent is required before any activities are undertaken within the EEZ and this would immediately apply a discretionary consenting regime to the area. This amendment could be drafted to make sure it met the requirements under the Law of

[8] Section 87B(1), Resource Management Act 1991

the Sea including freedom of navigation, over-flight and the ability to lay cables and pipelines within the EEZ.

Such a regime could therefore be put into operation quickly to provide environmental scrutiny of proposals. A national 'oceans' policy statement and standards could subsequently be developed for the EEZ to provide more fine-grained management guidance.

The RMA provides for the development of national policy statements in Part 5. A national policy statement for the EEZ could be developed under these provisions and would provide an effective mechanism for setting out government priorities for the area. Consenting and other decisions would be required to have regard to these priorities under existing RMA provisions. The legislation currently provides some flexibility for the process to be undertaken when preparing such a policy statement. It may or may not include a board of inquiry at the discretion of the Minister. National policy statements are not subject to rights of appeal.

The RMA provides for the establishment of national environmental standards. The scope of such standards is very wide, and includes determining the activity status of specific activities, as well as setting methodological, quantitative and qualitative standards. A national environmental standard could be developed for the EEZ to provide a rules-based framework for consenting. This could include a spatial plan. Such standards take the form of regulations under the RMA.

The RMA also makes provision for marine spatial planning through the development of mandatory regional coastal plans. These provisions could be extended to the EEZ, to enable oceans plans to be developed and to provide a strategic approach to guide individual consenting decisions, although they would not need to be mandatory.

Extending the ambit of the RMA to include activities within the EEZ would be a relatively simple, quick and cost-effective solution to addressing current legislative gaps, particularly the lack of an environmental framework for exploration and mining activity.

An alternative would be to progress a new Exclusive Economic Zone Environmental Effects Act. Proposals to develop such legislation were approved by cabinet in 2008 and drafting commenced. This work was put on hold when the government changed after the November 2008 general election. The proposed design for the new legislation was set out in a cabinet paper titled *Proposal for Exclusive Economic Zone Environmental Effects legislation*.[9]

The proposed legislation has been designed as enabling law, with rules and standards to be provided in EEZ environmental regulations. The Minister for the Environment was to be responsible for the development of the regulations.

The proposed legislation has many similarities to the RMA and appears closely based on it. This includes the provision for a policy statement and the regulation of activities through a rules and consent framework, with rules defining the effect thresholds for different categories of activity. The

[9] Cab 07-C-0751

proposed ‘impact assessment statement’ closely resembles an assessment of environmental effects under the RMA. The proposed appeal to the Environment Court is similar to that under the RMA.

Key differences include the purpose, which appears to be designed to be more use-orientated than ‘sustainable management’ under the RMA, although it is not clear that there would be much actual difference to the application of these two slightly differently worded purposes in practice. The new legislation would have a more comprehensive and up-to-date set of environment principles, but such principles could be included in a national policy statement for the EEZ prepared under the RMA.

The new legislation provides more explicit protection for existing uses, although recent case law under the RMA has provided considerable protection for existing uses in areas such as water allocation, and such principles are likely to be equally applicable to existing uses in the EEZ. The new legislation proposes a more explicit adaptive management regime, but a similar approach is already being applied under the RMA to activities within the marine area, such as aquaculture.

The proposed legislation also proposes the use of regulations (which are not appealable) rather than regional coastal plans (which under the RMA can be appealed) to provide the rules framework. Now, under the RMA, a similar approach can be achieved through the use of national environmental standards.

The similarities between this proposed legislation and the RMA are so strong, and the differences so small, that extending the RMA to the EEZ would appear to be a much simpler mechanism to achieve essentially the same end. It would result in much greater certainty, than promulgating new legislation, as the provisions of the RMA are well-tested and well-understood. It would also provide an integrated approach for the management of the territorial sea and the EEZ.

Extending the RMA to the EEZ is much preferable to a further proliferation and fragmentation of marine legislation. It would also avoid applying a different environmental management framework to the same activity, such as mining, depending on whether it lies within or outside an arbitrary 12 nautical mile line.

Establish an agency with responsibility for environmental regulation in the EEZ and extended continental shelf

The recommendations in the Report identify the need for a regulatory agency to be established with central coordinating responsibility for environmental assessment, monitoring and enforcement within the EEZ and extended continental shelf. It also indicates that the logical initial choice would appear to be Maritime New Zealand while acknowledging that the final choice will depend on government decisions in respect of regulating other marine development activities and decisions as to the future role of the new EPA.

EDS agrees that there needs to be one regulatory agency with responsibility for environmental regulation in the EEZ and extended continental shelf. Since the Report was completed in September 2010 the details of the expanded EPA have been fleshed out and these make it clear, in EDSs view, that the EPA would be the most appropriate agency to take on this role.

The *Environmental Protection Authority Bill*, introduced into Parliament in late 2010 and expected to be passed into law in 2011, expands the functions of the EPA and establishes it as a crown entity. Under clause 11 of the Bill, the objective of the EPA will be to undertake its functions in a way that:

(a) contributes to the efficient, effective, and transparent management of New Zealand's environment and natural and physical resources; and

(b) enables New Zealand to meet its international obligations

The current functions of the EPA focus on managing the call-in process for matters of national significance under the RMA. The environmental assessment process for these RMA applications, which potentially includes petroleum activities on land and within the territorial sea, is similar to that which would be applicable to offshore petroleum activities.

The expanded EPA will also take on all the functions of the Environmental Risk Management Authority (ERMA) and provide technical advice to the Minister for the Environment on the development of RMA national environmental standards. It will therefore be very familiar with issues associated with managing environmental risk.

The Bill enables the EPA to take on any additional functions consistent with its objective where directed by the Minister for the Environment and also to carry out any functions conferred on it by other legislation. This provides the legislative scope for the EPA to take on additional functions within the EEZ and outer continental shelf such as environmental consenting for offshore petroleum.

In summary, the EPA will be science based with expertise in environmental management. It is already familiar with environmental impact assessment procedures and consenting. In its expanded role incorporating the functions of ERMA, it will also be familiar with risk management approaches. It is independent from government and from other activities promoting ocean industries such as petroleum exploration and mining.

The Minister for the Environment appears to concur with the conclusion as he has indicated that the EPA could eventually have a wider role in managing consenting within the EEZ.[10]

Although Maritime New Zealand also has skills in managing environmental issues such as marine pollution its functions are largely focused on the management of shipping and this is reflected in its legislated function which is 'to undertake its safety, security, marine protection and other functions in a way that contributes to the aim of achieving an integrated, safe, responsive and sustainable transport system.'[11] It will not have the same level of expertise in environmental impacts consenting as the EPA, nor in strategic environmental planning.

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[10] Peart R, 2010, 'An expanded EPA for New Zealand: A critical evaluation within an international context', *Resource Management Journal*, August, 13-14; Smith N, 2010, *Proposals for the Environmental Protection Authority*, Paper presented to the Cabinet Economic Growth and Infrastructure Committee, 28 April, www.mfe.govt.nz/cabinet-papers/cab-paper-proposals-epa.html, para 61

[11] Section 430, Maritime Transport Act 1994

Consider future consolidation of offshore environmental jurisdiction

The Report recommends that a review be undertaken by the Ministry for the Environment of the regulatory advantages and disadvantages of combining jurisdiction for environmental regulation within the territorial sea and EEZ/extended continental shelf into a single regulatory agency.

EDS agrees that a review of oceans governance arrangements is desirable. Much legislation in the marine area remains outdated and is becoming increasingly unworkable. Management remains very fragmented. The need for reform has been officially recognised since at least the late 1990s.[12]

Such a reform process would enable legislation to be designed for New Zealand's oceans, which reflects current scientific knowledge about ocean ecosystems, and international best practice in oceans management. Reform would enable the issues of marine use and marine conservation to be addressed in an integrated manner across all activities.

However EDS does not agree that such a process should be undertaken primarily by the Ministry for the Environment. EDS submits that the Minister for the Environment should establish a *Royal Commission on Oceans Governance.* Similar to the Royal Commission on Auckland Governance, it could be tasked with undertaking a comprehensive review of the current oceans legislative and management framework, reviewing international best practice, canvassing Māori, stakeholder and public opinion, and developing recommendations for a way forward.

Establishing the Royal Commission on Auckland Governance was a very successful model for developing a robust set of recommendations on a very complex institutional issue. EDS considers that a similar approach is equally appropriate for the consideration of future oceans governance arrangements.

Such reform would take time and the need to manage the environmental effects of prospecting and mining activities within the EEZ, is urgent. Extension of the RMA to the EEZ would be the simplest interim arrangement, while more fundamental reform is developed and implemented, possibly during the next term of government.

Conclusion

EDS welcomes the review and the opportunity to submit on the recommendations of the Report. We would welcome the opportunity to discuss the recommendations in more detail.

[12] Peart R, 2005, *Looking out to sea: New Zealand as a model for oceans governance*, Environmental Defence Society, Auckland, 183

Yours sincerely

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