Regulatory Impact Statement

Activity classification of exploration drilling under the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012.

Agency Disclosure Statement

This Regulatory Impact Statement (RIS) has been prepared by the Ministry for the Environment (MfE). It provides an analysis of options to classify the activity of exploration drilling for oil and gas under the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 (EEZ Act).

The EEZ Act and subsequent regulations add a new layer of environmental oversight that hasn't existed before.

This RIS considers what the most appropriate classification is for exploration drilling under the EEZ Act. Based on the available evidence, and information provided through the two submission processes, we have assessed a large-scale and uncontrolled release of oil from an offshore platform as a low probability event, but with significant adverse effects if it did occur.

Retaining the discretionary (status quo) approach would provide for greater public involvement in the decision-making process. However, the marine consent process (for both discretionary and non-notified activities) enables the views of existing interests and experts to be considered. While we have identified that public input can add value in the decision-making process, we have not been able to quantify this by estimating the extent to which it will affect the overall quality of decisions made by the Environmental Protection Authority (EPA).

The Government has signalled that it would like to maximise the economic benefits associated with oil and gas exploration. The discretionary classification would reduce the certainty around the timeframe for a decision during the exploration phase, when there are no guarantees that resource discoveries will be made. While industry has told us that certainty is preferable for making investment decisions, we have not attempted to quantify how greater or lesser certainty translates into decisions of whether or not to undertake exploration drilling. Companies consider a range of variables when determining where to invest and the classification of exploration drilling is only one aspect of New Zealand's regulatory regime.

As a result of the 2010 Gulf of Mexico oil spill most countries are reviewing their regulation of the oil and gas sector. A gap in the analysis is the lack of international evidence that exists on how countries regulate exploratory drilling due to most regimes going through transitional phase following the 2010 Gulf of Mexico oil spill. However, the EPA is working closely with regulatory agencies in other countries to ensure regulatory practices and experiences are shared.

None of the options discussed will impair private property rights, impair incentives for businesses to innovate, override fundamental common law principles, or impact on market competition.

This RIS does not recommend a preferred approach, but does identify the costs and benefits of the two feasible options available.

Glenn Wigley – Director

G.W.Bley

Signature of person

12/2/14

Date

Status quo and problem definition

Status quo

The purpose of the EEZ Act is to promote the sustainable management of the natural resources of New Zealand's exclusive economic zone and continental shelf.

Many of the activities undertaken in order to conduct exploration drilling became discretionary activities by default when the EEZ Act came into force on 28 June 2013. Some have been classified as permitted activities.

Cabinet agreed to the introduction of a new non-notified discretionary activity classification in February 2013 [CAB Min (13) 5/4 refers]. The new activity classification was introduced via a Supplementary Order Paper to the Marine Legislation Bill (ML Bill), which was passed into law as the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Amendment Act (EEZ Amendment Act) in October 2013.

On 28 August 2013, the Minister for the Environment, following Cabinet decision [CAB Min (13) 29/8 refers], released a discussion document seeking public feedback on a proposal to classify exploration drilling for oil and gas as a non-notified discretionary activity. 21,221 submissions were received to this consultation.

To ensure that concerns raised through consultation were addressed, the Minister for the Environment decided to seek further information from the public before making a final decision on the classification of exploration drilling. On 12 December 2013 an exposure draft of regulations proposing that exploration drilling for oil and gas and supporting information was released, public comment was invited on the regulations. The consultation period ended 31 January 2014, with 14,667 submissions received. Submissions from both consultation processes have been considered in the development of this RIS.

Prior to the EEZ Act coming into force, several regimes applied to drilling for oil and gas in the EEZ:

- The management of health and safety risks and inspections of offshore petroleum structures was covered by the Health and Safety in Employment (Petroleum Exploration and Extraction) Regulations 1999;

- New Zealand Petroleum and Minerals was, and continues to be, responsible for allocation of permits for prospecting, exploration and extraction under the Crown Minerals Act 1991 and Continental Shelf Act 1964; and

- Oil spill contingency planning and the regulation of operational oil and chemical discharges was covered by Marine Protection Rules under the Maritime Transport Act 1994, and enforced by Maritime New Zealand.

While the above regimes will remain in place, the EEZ Act and subsequent regulations introduce a new layer of environmental oversight that hasn't existed before to the regulation of exploratory drilling in the EEZ. Previously there was no overarching framework for assessing whether the potential effects on the environment or existing interests were

acceptable in a particular location, and no mechanism for public engagement in decision-making.

The EEZ Act allows for activities to be classified by regulation as: *permitted*, *non-notified discretionary, discretionary* or *prohibited.* An activity's classification will determine whether consent for the activity is required, and what decision-making process must be followed if it is.

Discretionary is the default classification for any activity where a classification is not otherwise prescribed. The Environmental Protection Authority (EPA) is required to run a publicly-notified consent process for all discretionary activities.

In February 2013 Cabinet agreed to introduce a non-notified discretionary activity classification [CAB Min (13) 5/4 refers]. The addition of a non-notified discretionary category was undertaken to address concerns that the three existing activity classification options would not, in some cases, allow for effective environmental effects management or a decision-making process proportionate with the likely effect of activities.

Section 29D (2) of the EEZ Amendment Act specifies that regulations must only provide that a discretionary activity is to be non-notified if, in the Minister's opinion:

(a) The activity has a low probability of significant adverse effects on the environment or existing interests; and

(b) The activity is:

    i. Routine or exploratory in nature; or

    ii. An activity of brief duration; or

    iii. A dumping activity.

The main difference between the discretionary and non-notified discretionary classifications is the extent of public involvement in decision making. Table 1 provides a summary of the key elements of the four different activity classifications under the EEZ Act and how they compare with one another.

Table 1: Summary of the EEZ Act activity classifications

	Permitted	Non-notified discretionary	Discretionary	Prohibited
Activity classified in regulations on the Minister's recommendation*	✓	✓	The default classification,** but the Minister can recommend terms and conditions	✓
Marine consent application required; activity can be allowed or declined	× Activity must be allowed subject to compliance with conditions set in regulations	✓ Statutory timeframes adding up to 60 working days for the EPA to process marine consent EPA has full discretion on decision	✓ Statutory timeframes adding up to 140 working days for the EPA to process marine consent EPA has full discretion on decision	n/a
Environmental impact assessment must be carried out	~ The Permitted Activity Regulations require an initial impact assessment	✓	✓	n/a
Iwi notification	✓	~***	~***	n/a
Any consultation with existing interests must be described in impact assessment	×	✓	✓	n/a
Public notification is required	×	×	✓	n/a
Application-specific conditions can apply	× Prescribed, generic conditions can be set out in regulation	✓	✓	n/a
Appeal rights for parties other than the applicant are provided for on marine consent decisions	n/a	×	✓	n/a
Ability to judicially review EPA consent decision	× No consent decision to review	✓	✓	× No consent decision to review

* The Minister recommends regulations classifying the activity to the Governor-General, to be made by Order in Council.

** If an activity within the scope of the EEZ Act is not classified in regulations it is *discretionary* by default.

*** iwi authorities, customary marine title groups and protected customary rights groups whom the EPA believe may be affected by the application will be served a copy of the consent application.

Exploration drilling

Exploration drilling can vary in its duration and scale, and involves a wide range of different activities which may include placing a rig, placing anchors or moorings, drilling and capping a well.

Drilling a single exploration well generally takes four to six weeks, but if a discovery is made operators may also wish to drill appraisal wells to determine the extent of the resource. Often two or three appraisal wells will be drilled, but an operator may plan to drill around five if they are confident of the potential resource.

The drilling duration for each exploration well will depend on variables such as the underlying geology, depth of drilling, equipment used and weather conditions. The total duration of exploration drilling activities will depend on how many wells are drilled. This is based on whether a discovery is made, and whether subsequent research determines that the discovery is of sufficient size to make it commercially viable. We know the following about well drilling duration in New Zealand:

- Over New Zealand's drilling history in the EEZ, most exploration permits have resulted in a single well being drilled (65% of permits have resulted in a single well); and
- Over the same time, the median drilling duration for drilling a single exploration well in the EEZ was 34 days, and the median drilling time under a permit (including where multiple wells were drilled) was 51 days.

The regulations proposed outline that exploration drilling for petroleum:

Many of the activities undertaken in order to conduct exploration drilling became classified as a discretionary activity by default when the EEZ Act came into force on 28 June 2013. Prior to that, exploration drilling could be undertaken subject to the operator gaining an exploration permit under the Crown Minerals Act 1991 (CMA) and meeting relevant health and safety and oil spill contingency criteria.

Once transitional provisions under the EEZ Act expire on 27 June 2014, any application to undertake exploration drilling will need to go through a discretionary notified marine consent process, unless exploration drilling is otherwise classified in regulation under the EEZ Act.

(a) means the drilling of—

> *(i) exploration wells for the purpose of establishing the presence or otherwise of hydrocarbons:*
>
> *(ii) appraisal wells for the purpose of determining the nature, location, or size of a hydrocarbon discovery; and*

(b) includes the suspension of a well as part of normal operations, for example, where it is necessary in order to carry out repairs or maintenance or because of weather conditions or for safety reasons; but

(c) does not include—

> *(i) the drilling of production wells or development wells (whether production or injection) associated with the commercial extraction of hydrocarbons; or*
>
> *(ii) the suspension of a well for future exploration, appraisal, or production purposes*

The petroleum industry in New Zealand

Since drilling began in New Zealand, 177 wellbores have been drilled in New Zealand's Exclusive Economic Zone (EEZ).[1] In 2012, New Zealand produced an average of 40,368 barrels of oil, condensate and naphtha per day.

Benefits of petroleum exploration

The economic benefit of the petroleum industry to New Zealand includes the payment of royalties and taxes, capital investment, employment, and technology and innovation transfers. New Zealand's royalty regime stipulates the payment of either an ad valorem royalty (AVR) or an accounting profits royalty (APR), whichever is the greater in any given year. The royalty rates are either:

- 5% AVR, that is 5% of the net revenues obtained from the sale of petroleum; or
- 20% APR, that is 20% of the accounting profit of petroleum production.[2]

The petroleum industry contributed $2.5 billion to the New Zealand economy ($407 million through royalties and Energy Resource Levies) in 2012/13.[3] This represents approximately 1.2% of New Zealand's annual GDP.

Risks of petroleum exploration

Major oil spills are rare and have a very low probability of occurrence, but their consequences are significant. A prolonged and uncontrolled release of oil from an offshore installation into the marine environment would have significant social, cultural, environmental and economic implications for New Zealand.

While it is difficult to put an exact number on the probability of an oil spill because of variations in reporting and analysis, the evidence shows that the probability is low. Evidence from OGP[4] suggests that the likelihood of a blowout is higher when the formation being drilled is unproven, but even so, this is a low probability event.

Maritime NZ has undertaken a review of publicly available spill data, which suggests a loss of well control event occurs in approximately 2.54 out of every 1000 deep offshore exploration wells drilled. The majority of these events result in discharges that are contained and recovered without significant environmental effects.

There is some evidence that as water depth increases, the likelihood of an incident during drilling also increases.[5] However, the number of incidents reported does not reflect the number of well blowouts or oil spills. The incidents referred to include incidents involving structural damage to a facility, injury that leads to an evacuation or days away from work, or property damage exceeding $25,000.

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[1] This number includes well side-tracks and re-entries. Data provided by Ministry of Business, Innovation and Employment (as at 28/11/2013).

[2] http://www.nzpam.govt.nz/cms/petroleum/legislation

[3] http://www.nzpam.govt.nz/cms/minerals/facts-and-figures

[4] OGP Risk Assessment Report No. 434-2: Blowout Frequencies, March 2010.

[5] http://www.rff.org/Publications/Resources/Pages/Deepwater-Drilling-Recommendations-for-a-Safer-Future-177.aspx.

Data collected by the Bureau of Safety and Environmental Enforcement in the United States identified 74 instances of spills of oil or other substances (of over 50 barrels) from a deep sea platform or rig, out of over 2,000 deep sea wells drilled in the Gulf of Mexico.[6] Over half of the reported spills were classified as 'minor'[7] according to the US Coast Guard definition. Of the over 2,000 wells drilled, five reported spills have been attributed to loss of well control.

The overall impact of an oil spill would be influenced by the quantity of oil spilled – a result of the rate of flow and the time taken to contain it. Containment of a spill depends partly on the proximity and availability of vessels, rigs and equipment with the capability to undertake capping or relief well drilling. New Zealand's petroleum sector is small and isolated by world standards, which places it at a disadvantage in terms of mobilising an oil spill response.

The potential impact of an oil spill is also taken into account under other regulatory regimes. The Health and Safety in Employment (Petroleum Exploration and Extraction) Regulations 2013 require the approval of a safety case for the drilling facilities ('the installation'). The operator must also provide the High Hazards Unit with a well design notification, which describes the results of the 'well examination' which must be carried out by an 'independent third party' (which could be a party within the same company as the operator, as long as they are independent of the operation). The MTA gives Maritime New Zealand the ability to require operators to undertake oil spill contingency planning. The well control contingency plan is focussed on measures to re-establish well control, and an oil spill contingency plan that anticipates the steps the operators would take to response to an oil spill.

Part of the Maritime NZ's assessment of an operators discharge management plan is consideration of the operator's financial capability to undertake the proposed well control contingency plan. Under MTA, owners and operators of offshore installations are liable for the full cost related to oil pollution damage to third parties, and clean-up costs to public agencies, without the need to prove fault. This is supported by a requirement in the MTA for operators of offshore installations to hold liability insurance, or other financial security, that covers the operator's potential liability under the MTA.

While there has never been a significant oil spill associated with exploration drilling in New Zealand, the Rena shipwreck (October 2011) demonstrates the significant effect a spill can have in New Zealand waters. The Rena is estimated to have spilled between 350-400 tonnes of oil into the Pacific Ocean east of Tauranga. At the height of the response, over 400 birds were being cared for in the Te Maunga wildlife facility, and a total of 2,410 dead birds were collected, of which 1,448 were oiled.[8] One year on from the spill it was estimated that the spill had resulted in direct financial costs to the Crown of approximately $47 million.[9]

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[6] Ministry for the Environment 2013. *Supporting information for the exposure draft of proposed regulations for exploratory oil and gas drilling under the EEZ Act.* Wellington: Ministry for the Environment.

[7] Ministry for the Environment 2013. *Supporting information for the exposure draft of proposed regulations for exploratory oil and gas drilling under the EEZ Act.* Wellington: Ministry for the Environment.

[8] http://www.maritimenz.govt.nz/Environmental/Responding-to-spills-and-pollution/Past-spill-responses/Rena-response.asp#latest

[9] http://beehive.govt.nz/release/rena-compensation-agreed

Problem definition

The Government is concerned that, in relation to exploration drilling, the discretionary marine consent process (status quo) is not proportionate to the likely effects of the activity to be undertaken. The Minister for the Environment, on Cabinet's instruction [CAB Min (13) 29/9 refers, CAB MIN (13) 43/8 refers and CAB Min (13) 30/9 refers], proposed that a more proportionate approach would be to classify exploration drilling as a non-notified discretionary activity and agreed to releasing proposals for consultation and an exposure draft process.

While the EEZ Act allows for activities to be classified in one of four ways, the permitted and prohibited activity classifications are not considered feasible (as outlined in the Options Analysis below).

Both discretionary classifications create some uncertainty for applicants, as the EPA may grant or decline the consent. However, both the discretionary options are favourable to a permitted classification because:

- They require applicants to complete a detailed impact assessment of the proposed activity;
- The EPA can consider effects of activities on a case-by-case basis and can take cumulative effects into account;
- The EPA can impose conditions of consent on a case-by-case basis to mitigate effects; and
- The EPA can take a cautious approach to new activities or technologies, such as by applying adaptive management.

The benefits of the discretionary classification (status quo) compared with the non-notified discretionary classification are:

- It allows for a wide range of people to be involved in decision making process and this may elicit new information or evidence;
- It gives the public an opportunity to submit further evidence to the EPA with additional information about the effects of activities and adverse events;
- It provides wider public scrutiny over the impact assessment prepared by applicants; and
- It provides an avenue for appeals if submitters are concerned that there has been an error of law in making a consent decision.

The problems with the discretionary classification (status quo) when compared with the non-notified discretionary classification are:

- The ability for a submitter to appeal a successful consent application introduces greater uncertainty for applicants, which will have a large impact on the feasibility of booking a rig and undertaking the activity
- If an appeal occurs, it would result in further delays and costs (not estimated, but a High Court Appeal process could take months or even years), with the potential for the original consent decisions to remain the same, and
- It results in a longer and more costly consent process for the applicant (80 additional days, not including any appeals). The marginal cost of a notified vs. non-notified process is estimated to be between $150,000 to $1,050,000 (due to public consultation and the more complex hearings associated with a notified process). The EPA has estimated the

likely costs of assessing an application under a non-notified process at between $100,000 to $450,000.[10]

The industry has submitted that it is difficult to sufficiently plan for exploration drilling on this basis. Certainty of timeframes is a key driver for industry because operators often only have rigs available for a short period of time due to a limited worldwide supply of drill ships and supply vessels, and investors need to make decisions and put contracts in place many months in advance of an activity.

The significant cost of hiring a rig and New Zealand's isolated location mean that the industry usually contracts one rig at a time and shares the resource while it is in New Zealand waters. As there is a need to book a rig in advance, delays contribute to cost and erode the opportunity to contract the rig and/or utilise it within the planned period (the per day cost of a rig is estimated at approximately $400,000, regardless of whether it is being used to drill).[11]

Industry submitters considered that requiring a public notification process would impose unfeasibly high costs on industry without achieving any environmental benefit. The possibility that successful marine consent applications may be appealed could delay the beginning of an operation by several months or even over a year, which is particularly problematic and costly for short duration activities.

Oil companies make investment decisions globally. The costs and uncertainty of the New Zealand regime compared with other regimes is one factor they will take into account when making investment decisions. An unfavourable comparison may result in the opportunity cost of lost economic activity, even where a marine consent would ultimately be granted.

As investment decisions rely on a wider range of variables than just comparative regulatory regimes (for example, the size of the potential opportunity, the size of the potential market, ease of extraction and commercialisation), we have not attempted to quantify this effect. However, the petroleum industry currently contributes $2.5 billion to the New Zealand economy and further exploration presents a significant economic opportunity for New Zealand. The Government has signalled that it would like to maximise the economic benefits associated with oil and gas exploration.

A decision on the activity classification is required now to give industry participants sufficient time to align themselves with the regulatory regime prior to the transitional provisions expiring after 27 June 2014.

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[10] Estimates supplied by the Environmental Protection Authority as at October 2013.

[11] Indicative figures supplied by PEPANZ as at October 2013. The per day costs of operating a rig vary from approximately $200,000 for shallow water jack-up rigs to as much as $1 million for the modern deepwater rigs/drill ships. By way of example the Kan Tan semisubmersible rig drilling at the moment off Taranaki has been estimated at around $400,000 per day.

Objectives

The EEZ Act promotes the sustainable management of the natural resources in New Zealand's EEZ and continental shelf. It fills a regulatory gap in the management of activities undertaken in this space, including oil and gas prospecting and drilling, seabed mining, marine scientific research, and the laying of submarine cables.

The Government's objectives in setting regulations are to ensure that those regulations:

a) fulfil New Zealand's obligations under relevant international conventions relating to the marine environment

b) provide for protection of the environment in the EEZ and continental shelf

c) enable economic activity of benefit to operators and the New Zealand economy

d) are cost-effective, with the cost to government and operators proportionate to the level of environmental effects addressed, and

e) provide for consideration of non-environmental impacts, including existing interests, iwi and other matters set out in the EEZ Act, in a manner proportionate to the scale and effects of activities.[12]

The government wants to ensure strong regulatory oversight while providing confidence to investors about regulatory processes and timeframes.

Options and impact analysis

Activity classification options

The EEZ Act provides for activities to be classified under four classifications:

- Permitted;
- Prohibited;
- Discretionary; and
- Non-notified discretionary.

If an activity is not prescribed by regulations it is considered discretionary by default. The following analysis examines which activity class is most appropriate for exploration drilling for oil and gas.

Permitted Classification

If exploration drilling were a permitted activity, an applicant would have to comply with conditions set out in regulations, but would not have to obtain a marine consent. The

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[12] Ministry for the Environment. 2013. *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.* Wellington: Ministry for the Environment

conditions would be established, in advance, to manage environmental and other impacts relevant under the EEZ Act.

The Government does not consider that a permitted activity classification for exploration drilling is appropriate. If exploration drilling were a permitted activity, the activity would not require a marine consent and would mean the EPA would not be able to:

- Undertake a case-by-case assessment of the activities
- Assess the potential for adverse effects on a case-by-case basis
- Take cumulative effects into account
- Establish conditionals to mitigate effects, or
- Take a cautious approach to new activities or technologies, such as by applying adaptive management.

A permitted classification would not enable the EPA to undertake site-specific assessments of the activity or make an assessment of the potential for adverse effects. This classification does not provide any opportunity for the public, iwi, and those with existing interests, to be heard in relation to the activity.

Some activities associated with the exploration phase of oil and gas activities have very minimal impacts on the environment. However, the effects of drilling a well require greater regulatory oversight because of the potential impacts of an oil spill due to loss of well control. Therefore, it is appropriate for the potential adverse effects of exploration drilling to be considered under a marine consent process. Given that there is limited knowledge about the nature of the environment in many areas of the EEZ and continental shelf, it is appropriate for the EPA to assess applications for exploration drilling operations on a case-by-case basis.

Variations of a permitted classification (e.g. geographic areas where activity is permitted, or an activity being permitted to a certain depth) also do not allow for a case-by-case assessment of effects.

A permitted activity classification is not considered a feasible option.

Prohibited classification

Of the 97 unique submissions received during the first consultation process that addressed the classification of exploration drilling, 85 proposed an alternative classification for exploration drilling for oil and gas, 35 considered it appropriate for the activity to be prohibited, nine proposed it was prohibited with a caveat that if it cannot it should be discretionary. During the exposure draft process 10 supported the proposed classification, 14,566 thought it should be discretionary, while 87 proposed other classification including prohibited. The key reason for not supporting the proposed classification was that the environmental consequences of a well blowout outweighed any economic benefits gained from the proposed activity.

Exploration drilling is essential to reach the production phase of petroleum mining. Classifying exploration drilling as a prohibited activity is not aligned with the Government's objective to enable economic activity of benefit to operators and the New Zealand economy, and the opportunity cost of prohibiting exploration drilling would be substantial. The

petroleum industry contributed $2.5 billion to the New Zealand economy ($407 million through royalties and Energy Resource Levies) in 2012/13.[13]

Prohibiting exploration drilling is not considered to be a feasible option.

Discretionary

A discretionary activity classification is the status quo. No regulatory amendment needs to be made for exploration drilling to be classified as a discretionary activity.

Submissions to the discussion document and exposure draft process were divided on whether a discretionary notified marine consent is a proportionate consent process for exploration drilling:

- Those who consider that it is proportionate point to the significant environmental consequences of a well blowout, the precedent that consent to undertake exploration drilling may have (if oil is found), their view that a precautionary approach should include public involvement and the ability for the public to be engaged in decisions that affect the environment and existing interests; and
- Those who consider it disproportionate identify the uncertainty of the appeal process under the discretionary process as negatively impacting the investment case for exploration drilling.

There is general agreement amongst submitters and stakeholders with the Government's assessment that an uncontrolled large-scale oil spill as a result of exploration drilling for oil and gas is a low probability event.

Table 2: Key parts of discretionary consent process

- The applicant completes an impact assessment, the requirements of which are outlined in the EEZ Act (section 39). An impact assessment must include a description of any consultation undertaken with existing interests;
- The EPA determines whether the application is complete (section 41) and requests further information where required (section 42);
- The EPA can obtain additional advice where appropriate (section 44);
- The EPA provides public notice of the application (section 45) and a 20 working day submissions period is provided (sections 46 & 47);
- A hearing is conducted if the EPA considers it necessary or desirable, or if the applicant or a submitter requests it (section 50);
- The EPA considers the marine consent application (based on considerations in sections 59 - 61) and makes a decision (section 62);
- The applicant and submitters can appeal EPA decision on questions of law (section 105).

Retaining the status quo is considered a feasible option for analysis.

[13] http://www.nzpam.govt.nz/cms/minerals/facts-and-figures

Non-notified discretionary

A non-notified discretionary activity classification shares many of the characteristics of the discretionary category:

- The applicant is required to prepare an impact assessment in the same manner;
- The EPA will assess the application based on the same principles;
- The EPA can consider effects of activities on a case-by-case basis and can take cumulative effects into account;
- The EPA can tailor conditions of consent on a case-by-case basis; and
- The EPA can take a cautious approach to new activities or technologies, such as applying adaptive management.

The EPA is required to take a range of factors into consideration when assessing an application for a marine consent, and will give the same weight to those factors under both the *discretionary* and *non-notified discretionary* activity classifications.

The key difference between the two discretionary processes is that the EPA is not required to run a publicly-notified submission process in making its decision for non-notified discretionary activities.

Not requiring this process removes the ability for the public to make submissions on the initial consent decision, and thereby restricts any appeal of the EPA's consent decision to the applicant only.

As noted above, many submitters raised concerns about reducing public involvement in consent decision-making processes.

Classifying exploration drilling as a non-notified discretionary activity is considered feasible for analysis.

Table 3: Key distinctions between the two discretionary processes (differences coloured in red)

	Application		Consideration			Decision[14]	Appeal
(Notified) discretionary marine consent process with statutory timeframes adding up to 140 working days (excluding appeals)							
Process	Applicant lodges application for marine consent. This includes impact assessment which must describe consultation with existing interests	EPA either accepts application as complete or returns it to applicant as incomplete	EPA can seek further information from the applicant, existing interests or third parties if required	EPA publicly notifies application *and calls for submissions*	Hearing held *if* EPA chooses or if requested by an applicant or submitter	Decision: EPA either grants or declines the marine consent, and may also set conditions around the activity	Appeal rights available to applicant to the High Court on points of law Appeal rights available to submitters to the High Court on points of law
Timeframe	N/A	Within 10 working days	N/A	Notified within 10 working days of accepting application as complete. Submission period of up to 20 working days after notification	Hearing must be held with 40 working days after the closing date of submissions	Must issue a decision within 20 working days of the conclusion of the hearing, or within 20 working days of the close of submissions (if no hearing)	Not later than 15 working days after the decision is notified to the person affected by the decision
Non-notified discretionary marine consent process with statutory timeframes adding up to 60 working days (excluding appeals)							
Process	Applicant lodges application for marine consent. This includes impact assessment which must describe consultation with existing interests	EPA either accepts application as complete or returns it to applicant as incomplete	EPA can seek further information from the applicant, existing interests or third parties if required	EPA provides a copy of the application to iwi authorities, customary marine title groups and protected customary rights groups whom they believe may be affected *but does not call for submissions*	EPA may conduct a hearing on an application for a marine consent for a non-notified activity if the EPA considers it necessary or desirable	Decision: EPA either grants or declines the marine consent, and may also set conditions around the activity	Appeal rights available to applicant to the High Court on points of law N/A
Timeframe	N/A	Within 10 working days	N/A	N/A	No timeframes for when hearing must take place, but the requirement for a decision within 50 working days is effectively a constraint	Must issue a decision within 50 working days within accepting the application as complete	Not later than 15 working days after the decision is notified to the person affected by the decision

[14] The ability to judicially review EPA consent decisions remains and is therefore applicable under both discretionary and non-notified discretionary processes.

Assessment of the two discretionary classifications against the Government's objectives

Fulfilment of New Zealand's international obligations

New Zealand has relevant international obligations under the United Nations Convention on the Law of the Sea (UNCLOS), the Convention on Biological Diversity (CBD) and the Convention for the Protection of Natural Resources and Environment of the South Pacific Region 1986 (the Noumea Convention).

These obligations relate to the protection of the marine environment in general, the need for impact assessments, and public participation in decision making.

With respect to the protection of the marine environment, UNCLOS reiterates that States have an obligation to protect and preserve the marine environment (Article 192). They also have the sovereign right to exploit their natural resources pursuant to their environmental policies and in accordance with their duty to protect and preserve the marine environment (Article 193). Among the requirements of UNCLOS are duties to take measures necessary to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of life (Article 194(5)), and to take all measures necessary to prevent, reduce and control pollution of the marine environment resulting from the use of technologies under their jurisdiction and control, or the intentional or accidental introduction of species, alien or new, to a particular part of the marine environment, which may cause significant and harmful changes thereto (Article 196 (1)).

The CBD reiterates that States have the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction (Article 3).

The Noumea Convention requires Parties to, inter alia, take all appropriate measures ... to prevent, reduce and control pollution of the Convention Area, from any source, and to ensure sound environmental management and development of natural resources, using for this purpose the best practicable means at their disposal, and in accordance with their capabilities (Article 5).

With respect to impact assessments and public participation, UNCLOS requires that when States have reasonable grounds for believing that planned activities under their jurisdiction or control may cause substantial pollution of or significant and harmful changes to the marine environment, they shall, as far as practicable, assess the potential effects of such activities on the marine environment and publish reports of the results of such assessments (or provide them to the competent international organizations (Articles 205 and 206).

The CBD requires State to introduce appropriate procedures requiring environmental impact assessment of proposed projects that are likely to have significant adverse effects on biological diversity with a view to avoiding or minimizing such effects and, where appropriate, allow for public participation in such procedures.

The Noumea Convention requires each Party to, within its capabilities, assess the potential effects of major projects on the marine environment, so that appropriate measures can be

taken to prevent any substantial pollution of, or significant and harmful changes within, the Convention Area. Where appropriate, each Party is to invite public comment on such assessments according to its national procedures, and communicate the results of the assessments to the relevant organisation.

UNCLOS also includes requirements for ongoing monitoring of the effects of any activities which they permit or in which they engage in order to determine whether these activities are likely to pollute the marine environment.

Officials are satisfied that either a discretionary or non-notified classification for exploration drilling for oil and gas fulfil New Zealand's international obligations for the following reasons:

- All marine consent applicants (for both publicly-notified and non-notified activities) need to submit an impact assessment (required under section 39 of the EEZ Act).

- When considering its decision, the EPA is required to take into account the importance of protecting the biological diversity and integrity of marine species, ecosystems and processes (section 59(d) of the EEZ Act). The EPA also has discretion to impose any condition it considers appropriate to deal with adverse effects of the activity under section 63 of the EEZ Act. This is consistent with NZ obligations under the Convention for Biological Diversity 1992 (CBD).

- The definition of "effect" is set out in section 6 (1) of the EEZ Act and includes "any potential effect of a low probability that has a high potential impact". This definition captures oil spills. A prolonged and uncontrolled release of oil from an offshore installation into the marine environment is likely to have significant social, cultural, environmental and economic implications for New Zealand.

- The probability of a significant adverse effect from exploration drilling is low, and we believe that the requirement to submit an impact assessment meets New Zealand's obligations under the United Nations Convention on the Law of the Sea 1982 (UNCLOS), and the CBD (see section 11 of the EEZ Act). Through consultation with experts, including NIWA, officials have assessed that the routine environmental effects of exploration drilling (such as placing the rig and related activities) can be undertaken in a way that would result in only minor impacts. Officials have also identified the probability of a well blowout during exploration as low, based on international evidence of historical rates of incidents.[15] We consider the production phase to be the appropriate time to invite public comment.

- Although there is a high level of public interest in drilling for oil and gas, our international obligations provide the Government with the ability to consider the scale of public participation which should be commensurate with the nature of the activity and its effects. Article 14 of the CBD requires the Government to, as far as is possible and appropriate, "introduce procedures requiring environmental impact assessment of its

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[15] International Association of Oil and Gas Producers, *Risk Assessment Data Directory, Report No. 434-2: Blowout Frequencies, March 2010,* OGP Publications, London

proposed projects that are likely to have significant adverse effects on biological diversity ... and, where appropriate, allow for public participation in such procedures."

- Section 11 of the EEZ Act states that New Zealand's obligations under the CBD continue under the Act. In giving effect our obligations under article 14 of the CBD, the Government can exercise flexibility in determining whether public participation is appropriate based on the activity's likely effects on biological diversity. The Regulations are consistent with this.

- Given that under the Regulations, the process of assessing activities classified as non-notified discretionary requires the preparation of an impact statement and allows the EPA to decline marine consent applications, the risk of an application for exploratory drilling succeeding that is likely to have adverse effects on biological diversity is negligible. Not allowing for public participation with regard to such an application is consistent with the Government's obligations under the CBD.

- The non-notified classification enables certain activities to be not publicly-notified in regulations. This means that we need to be satisfied that exploration drilling, as a general activity, is not a "major project" for the purpose of Convention for the Protection of Natural Resources and Environment of the South Pacific Region 1986 (the Noumea Convention). There is no definition of "major project" in the Noumea Convention but, in consultation with MFAT, officials have concluded that where the environmental effects of a project are minor and the probability of causing pollution is low, then the activity is unlikely to be considered a major project. The following factors have been taken into account when considering whether exploratory drilling could be considered to be a major project for the purposes of the Noumea Convention:

    - Exploratory drilling has a low probability of significant adverse effects on biological diversity
    - The routine environmental effects of exploration drilling are minor
    - There is a low probability of any major environmental effects of exploration drilling
    - The impact assessment process requires applicants to identify the effects of the activity on the environment and existing interests; to identify persons whose existing interests are likely to be adversely affected; and describe any consultation undertaken with these persons
    - Relative to production drilling, the scope and scale of exploration drilling is significantly less; and
    - Though exploration drilling is an expensive activity, the cost of any activity in the EEZ is expensive.

Environmental protection

Any form of drilling poses environmental risk. Though the probability of an oil spill is low, the consequences could be significant. The overall risk of an activity will be impacted by:

- How much is known about the pressure characteristics of a field;
- Sea conditions and sea floor characteristics;
- Depth of well;
- The development phase of a well;
- The equipment being used;

- The expected timeframe of an activity;
- Sensitivity of the receiving environment; and
- Effects on the environment and existing interests, including cumulative effects.

The EPA will consider factors such as these when it assesses the effects of allowing the activity, as the potential impact of an oil spill on the environment needs to be considered.

A decision between the two discretionary activity classifications is not a decision in favour of, or against, exploration drilling. Both marine consent processes allow the possible effects and risks to be fully assessed on a case-by-case basis by the EPA. They both allow the EPA to seek further information from the applicant as well as additional expert advice, to put mitigation measures in place as a condition of consent, or decline an application.

The non-notified discretionary classification does not lessen the weight given to these factors, and therefore does not increase the likelihood that a marine consent will be granted. Nor does it exclude consideration of potential effects on existing interests from the marine consent decision.

Through consultation with experts including NIWA, officals have assessed the routine environmental effects of exploration drilling (such as placing the rig and related activities) as minimal. The evidence available about non-routine impacts, such as large scale oil spill, shows there to be a low probability of occurrence.

When considering an application for a marine consent, the EPA is required to take into account the importance of protecting the biological diversity and integrity of marine species, ecosystems, and processes.

Enabling activity of economic benefit to New Zealand

Oil and gas producers are global operators and assess their investment options based on the likelihood of achieving returns. Factors they take into account include:

- The size of the potential opportunity;
- The size of the potential market;
- The ease of commercialisation; and
- The regulatory regime that governs how they may operate.

Both discretionary classifications result in some outcome uncertainty for applicants, as the EPA may choose to grant or decline a consent application. However, the status quo results in greater uncertainty for applicants because of the ability for submitters to appeal successful consent applications to the High Court.

The industry states that it is difficult to sufficiently plan for exploration on this basis. The significant cost of hiring a rig and New Zealand's isolated location mean that the industry usually contracts one rig at a time and shares the resource while it is in New Zealand waters. As there is a need to book a rig in advance, delays contribute to cost and erode the opportunity to contract and/or utilise the rig within the planned period (the per day cost of a rig is estimated at approximately $400,000, regardless of whether it is being used to drill)[16].

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[16] Indicative figures supplied by PEPANZ as at October 2013.

The industry prefers a process that reduces uncertainty compared with the status quo. Industry submissions suggest that fewer exploration drilling applications would be made under the discretionary classification, when compared with a non-notified classification, due to the uncertainty created by allowing submitters to appeal EPA decisions.

Cost effective

Notified vs non-notified time costs

For a publicly-notified process the statutory timeframes add up to 140 working days, excluding possible appeals. The timeframe is reduced to 60 working days for a non-notified process due to the absence of public submissions and the expectation that hearings, if necessary, will be shorter in duration. The EPA has the discretion to extend the statutory timeframe in order to ensure it has all the information it requires.

Notified vs non-notified application preparation costs

It is estimated that the cost of preparing an application, including the impact assessment, is between $100,000 to $500,000[17]. If an applicant chooses to apply for notified and non-notified consents at different times, they will need to prepare separate applications. However, if an applicant chooses to apply for their notified and non-notified consents together, while they will be considered through different processes, the applicant will likely experience economies of scale as they will only need to prepare one application, albeit clearly distinguishing the information pertinent to the notified process from the non-notified process.

Notified vs non-notified regulator costs

The EPA has estimated the likely costs to assess a notified application, including the cost of administering the public hearing, to be $250,000 to $1,500,000. These costs are mostly recovered from the applicant. The breakdown of these costs is estimated to be[18]:

- Low complexity applications with minimal submissions are estimated to cost around $350,000;
- Average complexity applications with around 200 submissions and a two-week hearing are estimated to cost between $350,000 and $600,000; and
- Highly complex applications (e.g. those that cross the boundary between the territorial sea and the EEZ and/or have high numbers of submissions) can cost between $1-2 million (based on similar Resource Management Act 1991 (RMA) proposals). Given the relatively small footprint of drilling activities, it is likely that cross-boundary drilling can be avoided, however, given the contentious nature of drilling it is likely that notified applications will attract high volumes of submissions.

The EPA has estimated the likely costs of assessing an application, under the non-notified discretionary process, to be lower than for a discretionary process, at between $100,000 and $450,000.[19] The EPA will incur costs associated with notifying iwi, but as there will be no

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[17] Ministry for the Environment. 2012. *Managing our oceans: A discussion document on the regulations proposed under the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Bill.* Wellington: Ministry for the Environment.

[18] Ibid.

[19] Estimates supplied by the Environmental Protection Authority as at October 2013.

right of submission the EPA will incur less cost than it otherwise would in a fully notified process.

The non-notified process carries lower costs than the notified process. However, when compared with the total outlay to drill a well (potentially between $20 - $100 million)[20], and the potential returns from a productive discovery, the cost differential between the discretionary and the non-notified discretionary classification is unlikely to be a major factor in determining whether to invest or not.

Consideration of non-environmental impacts and the public interest

Public openness and ability to make a submission

The Minister must take into account the desirability of the public being heard in relation to an activity when developing regulations.

Under the non-notified discretionary process, the EPA would not call for submissions from the public, iwi or existing interests in relation to the application. However, information on the impacts on the environment and existing interests, and a description of consultation undertaken with existing interests, would be provided only through the applicant's impact assessment and the EPA's ability to seek further information and technical advice.

Where a marine consent is required for an activity:

- Section 38 of the EEZ ACT requires that an application for a marine consent include an impact assessment
- Section 39 of the EEZ Act requires that an impact assessment:
    - Identifies persons whose existing interests are likely to be adversely affected by the activity, and
    - Describes any consultation undertaken with persons described above
- Section 42 of the EEZ Act enables the EPA to request further information from an applicant and section 44 enables the EPA to commission further advice
- Section 61 of the EEZ Act requires the EPA to make full use of the powers set out in sections 42 and 44.

Although there is a high level of public interest in drilling for oil and gas, the scale of public participation should be commensurate with the nature of the activity and its effects. In the case of exploration drilling, the activity is short in duration and exploration in nature. Without undertaking this activity, operators will not know whether a commercially viable resource exists to produce from. The non-notified discretionary process does not exclude consideration of potential effects on existing interests from the marine consent decision and a publicly notified process would be required if the applicant wanted a marine consent to undertake oil and gas production.

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[20] Indicative figures supplied by PEPANZ as at October 2013

A large number of submitters from both consultations were critical of the non-notified discretionary classification because of the implications for public participation. Many submitters highlighted the significant effects of an oil spill and felt that public consultation is required to provide a robust assessment of the risks, to ensure a precautionary approach is taken, and to give legitimacy to the decision-making process. They stated that:

- Stopping the public from 'having a say' was inconsistent with democratic principles and shows disregard for public opinion;
- Transparency, public participation and the ability to appeal decisions would help communities to challenge the practices and processes used by operators to make sure they are safe and would provide greater incentive for applicants to provide high quality information in their impact assessment;
- Public input is important as it recognises the limitations of government expertise and ensures that any relevant expert information can be provided as part of marine consent applications; and
- The reduction in compliance costs for the industry is not sufficient to outweigh the value of public participation in the decision making process.

Our view is that public input into the decision-making process adds most value in identifying the potential effects of an activity or adverse effects on existing interests. For technically-complex decisions, a public submissions process is unlikely to provide additional technical information about the probability of an adverse event to enhance the EPA's assessment process.

However, a non-notified discretionary classification would reduce the opportunity for the public to express interest and provide information to inform the decision-making process. This raises the possibility that some information on the effects and local impacts of exploration drilling operations may not be available to consent decision-makers. This risk is mitigated by the ability for the EPA, under both the discretionary and non-notified classifications, to seek further information from an applicant and technical advice to inform its assessment.

Section 44 (1) of the EEZ Act (as amended by the EEZ Amendment Act) provides that the EPA may:

> (a) commission an independent review of the impact assessment:
> (b) commission any person to provide a report on a matter described in paragraph (d):
> (c) seek advice from the Māori Advisory Committee on any matter related to the application:
> (d) seek advice or information from any person on any aspect of—
> - (i) an application for a marine consent; or
> - (ii) the activity to which an application relates.

In addition, under the new section 44B of the EEZ Act, the EPA will be able to call for a hearing when considering a non-notified discretionary marine consent decision if it considers it necessary or desirable. However, it is not obliged to allow the public to present their views at such a hearing.

Review of the EPA's consent decision

Under both discretionary processes, the EPA's consent decision can be judicially reviewed. However, only the notified discretionary process allows the consent decision to be appealed by parties other than the applicant.

The High Court is not a specialist environmental tribunal and appeals of EPA decisions under the EEZ Act are restricted to points of law[21].

As there has never been an opportunity to appeal an EPA decision on a marine consent it is difficult to estimate the likelihood of this occurring, the potential length of time it would take (there is no statutory timeframe for High Court decisions), or the cost.

Other appeals to the High Court on issues affecting the environment can be illustrative however. Under the RMA, eight proposals lodged with the EPA have been directed to a Board of Inquiry and final decisions have been released. Of these decisions, three have been appealed to the High Court.[22] All the appeals were dismissed by the High Court and the time between the original EPA decision and the High Court judgement ranged from 2-5 months.

Consultation

Consultation requirements for making regulations are set out in Section 32 of the EEZ Act. The Minister directed officials to undertake two separate processes to seek public feedback on proposals.

Discussion document consultation

In line with the requirements, there was a four-week public consultation during August and September 2013. A discussion document was both published online and sent to environmental groups, councils, stakeholders and iwi at the start of that period. Hui were held with iwi at seven locations around the country: Christchurch, New Plymouth, Gisborne, Napier, Wellington, Dunedin and Auckland. These locations ensured a range of iwi views were heard. The Ministry for the Environment also held stakeholder workshops with industry in Wellington to discuss and better understand issues.

A total of 21,221 submissions were received, of these 21,146 wanted exploratory drilling to be prohibited. Of these, 97 were unique and modified form submissions. Of these, four submitters supported the proposed classification, while three supported with amendments, 35 submitted exploration drilling for oil and gas should be prohibited, nine wanted it prohibited and if not discretionary, 18 supported a discretionary classification, six supported non-notified discretionary up to 200m then prohibited at depths beyond 200m. The 21,102 template form submissions predominantly came from campaigns organised by Greenpeace and the Green Party and all opposed the proposed classification.

Unique submissions were received from individuals (78), iwi (12), environmental/community groups (10), industry (8), local authorities (8), legal groups (2) and one policy research organisation.

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[21] "...It can generally be said that while questions of fact are concerned with the factual basis on which law is applied, whether a set of facts satisfies a certain legal definition or requirement is a question of law" Legislation Advisory Committee Guidelines, 13.3.2, http://www2.justice.govt.nz/lac/pubs/2001/legislative_guide_2000/chapter_13.html

[22] The cases were: Transmission Gully Plan Change Request; MacKays to Peka Peka Proposal (application for leave to appeal the High Court decision turned down by the Supreme Court); and NZ King Salmon (leave granted for appeal the High Court decision, now under consideration by the Supreme Court)

Following feedback received during consultation, in particular the concerns raised that the term "exploration drilling" could encompass a wider range of activities than previously thought, the Minister for the Environment decided to seek further information from the public before making a final decision on the classification of exploration drilling.

Exposure draft consultation

On 12 December 2013, the Minister released an exposure draft of regulations, with additional supporting information, for public consultation. This was a six-week consultation period that ended 31 January 2014. The draft regulations and supporting information was released online and sent to environmental groups, councils, stakeholders and iwi at the start of that period. An invitation was made to all Ministry's iwi contacts to meet to discuss at Hui, one Hui with Rangitāne O Tamaki nui a Rua representatives was held in Dannevirke. The Ministry also held stakeholder workshops with industry and environmental non-government organisations in Wellington to discuss and better understand issues.

A total of 14,667 submissions were received. Of these, 72 were unique and 239 modified form submissions 14,356 were template submissions from the Greenpeace and Green party websites. 14,653 were opposed to the proposed classification, 14,527 supported discretionary classification, 87 other and 10 supported the non-notified discretionary classification proposed.

Unique submissions were received from individuals (48), iwi (4), environmental/community groups (5), industry (7), local authorities (6), policy organisation (1)and one policy research organisation.

A complete summary of submissions for both the discussion document and the exposure draft consultation are publicly available on the Ministry for the Environment website.

Key feedback received through public consultation

Submitters raised a number of key issues. These were:

1. **International compliance:** Concern was expressed that classifying exploration drilling as non-notified discretionary would not meet international obligations under UNCLOS, CBD, the Noumea Convention, the Rio Declaration on Environment and Development 1992 and with international norms such as the "precautionary principle". Concern was also raised around compliance with international human rights obligations, such as under the International Covenant on Civil and Political Rights 1966, and the Universal Declaration of Human Rights 1948.

2. **Environmental effects/risk:** Submitters generally considered that deep-sea exploration drilling was a highly risky activity, of which the environmental, social and economic consequences for New Zealand were considered to be significant. Submitters questioned whether risks of exploration drilling were any less than for production drilling and in many cases stated they considered the probability of a well blow-out were greater at the exploration phase. Reference was often made to the Deepwater Horizon spill in the Gulf of Mexico, which was originally drilled as an exploration well, although the operator was transitioning it into a production well when the blowout occurred. The effects and

associated level of risk for particular locations was also raised as a concern by submitters, in particular for Kaikoura, Otago, Bay of Plenty, and Tasman.

It was stated that research on marine ecosystems was too insufficient at this stage and that environmental aspects had to be given precedence of economic considerations in this case. Industry submitted that the actual impacts of exploration drilling were low and that globally this is a mature activity with predictable effects.

Environmental NGOs expressed concern at the lack of spatial discretion in the regulations, that further work needed to be undertaken to develop an integrated oceans policy, and that this should include prohibiting exploration in sensitive areas of the EEZ.

Subsequent to the exposure draft process there is a general level of acceptance from stakeholders, including environmental NGO's that exploration drilling has a low probability of a significant effect.

3. **Public participation:** Submitters stated that public consultation recognises the limits of government expertise and that a public process provides a check that authorities and operators have got it right. The public have value to add in terms of technical expertise, and also in terms of the judgement about level of risk at the local level. Submitters considered allowing public involvement would enable the public to present expert evidence on conditions, to cross-examine the applicant's witnesses on technical issues, to cross-examine the applicant on matters such as the company's track record and insurance, and to make submissions on appropriate conditions such as requirements for well capping equipment to be available within a certain timeframe

   It was also felt that once a well strikes oil, even if it goes through a discretionary process at the production phase, the environment-economy balance will have shifted towards the economic case, inevitably promoting and institutionalising a values trade-off.

   Submissions also raised concern that the non-notified classification is not consistent with a precautionary approach. Drilling should be notified and a full hearing held to assess possible effects and controls including preventing the activity if warranted.

   Submitters considered the appeal process is an important constitutional check on the decision making power of the EPA, and the absence of rights of appeal could potentially lead to inadequate decision-making due to the absence of testing of evidential material.

Submissions in support of the non-notified classification supported the classification for the following reasons:

4. **Uncertainty:** Industry submitted that requiring a notified discretionary process would impose greater uncertainty and costs on applicants without achieving any environmental benefit. Industry also submitted that it would result in timeframe issues in terms of contracting and/or utilising a rig, and that as such, requiring a notification process would effectively amount to a decision not to have offshore oil and gas production in New Zealand.

   Submitters requested that regulations be implemented as soon as possible. They asked for the 28-day rule to be waived.

5. **Proportionate:** Submitters considered it proportionate given the profile and scale of environmental effects of the activity.

6. **Appropriate:** Submitters stated it appropriate given that a number of the component activities could be classified as permitted activities given their associated level of effects.

Conclusions and recommendations

The Government considers that close regulatory oversight is required for all drilling activities in the EEZ (exploration and production).

The discretionary and non-notified discretionary classifications are the only activity classifications under the EEZ Act that provide the EPA with an opportunity to examine the potential effects of an activity on the environment and existing interests in a particular location prior to making a consent decision.

Section 29D (2) of the EEZ Amendment Act specifies that regulations must only provide that a discretionary activity is to be non-notified discretionary if, in the Minister's opinion:

(a) The activity has a low probability of significant adverse effects on the environment or existing interests; and

(b) The activity is:

i. routine or exploratory in nature; or

ii. an activity of brief duration; or

iii. a dumping activity.

Taking into account the evidence we have collected, and the views and material supplied through the two consultation processes, the Ministry's view is that exploration drilling meets these requirements.

Our assessment of the feasible activity classifications is that:

- The ability for the EPA to analyse impact assessments, require further information from applicants and seek additional expert advice is the same under both options; and
- The EPA's decision under both options could be judicially reviewed by parties affected by an EPA consent decision.

The benefits of the full discretionary process (status quo) compared with a non-notified process are that it provides:

- Greater potential for public involvement in decisions that many people feel strongly about;
- Greater awareness of potentially impacted parties and the effect of an adverse event;
- Wider public scrutiny of an applicant's impact assessment; and
- An avenue for appeals if submitters are concerned that there has been an error of law in making a consent decision.

We have not attempted to quantify or weight the relative value of public engagement in the process compared with the impact this has on the quality of the decision made by the EPA.

The costs of the full discretionary process compared with a non-notified process are that:

- It introduces additional time and costs to the applicant – 80 additional days and costs estimated between $250,000 and $1,500,000 for a notified process, as opposed to between $100,000 and $450,000 for non-notified;[23]
- The ability for submitters to appeal a successful consent application has the potential to impose additional costs on the applicant (even if the decision remains the same) and introduces further uncertainty around the timeframe to a final decision; and
- The industry prefers greater certainty when making investment options. A regulatory approach that results in greater uncertainty is likely to negatively impact on New Zealand's relative competitiveness as an investment option for oil and gas exploration.

The non-notified process carries lower costs than the notified process. When compared with the total outlay to drill a well (potentially between $20 - $100 million)[24], and the potential returns from a productive discovery, the cost differential between the discretionary and the non-notified discretionary classification itself is unlikely to be a major factor in determining whether to invest or not. The key difference for the industry is the greater level of process certainty that the non-notified classification offers compared with the notified classification.

Officials are satisfied that either the discretionary or non-notified classification fulfil New Zealand's international obligations as discussed previously.

Implementation plan

No regulatory changes would be required to retain the discretionary classification (the status quo).

Changing the activity classification of exploration drilling to a non-notified classification would be achieved by making regulations. We do not expect any transitional provisions would be required.

The Minister for the Environment publicly consulted on an exposure draft of regulations to test their workability.

Monitoring, evaluation and review

The effectiveness of the activity classification will be monitored, evaluated and reviewed as part of the wider EEZ framework.

On 12 December 2012 the Cabinet Economic Growth and Infrastructure Committee invited the Ministry for the Environment to report back to Cabinet on information needed to inform future reviews of the EEZ Act regulations and on cost-effective ways to generate and procure that information [EGI Min (12) 29/14 refers]. The report back has been extended to June 2014.

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[23] Estimates supplied by the Environmental Protection Authority as at October 2013.

[24] Indicative figures supplied by PEPANZ as at October 2013.

Part of this ongoing monitoring, evaluation and review may include:

- Evaluation of compliance costs and the effectiveness of all EEZ functions, including the non-notified discretionary activity classification;
- Evaluation of the activity classifications, including their ease of use for operators, and their effectiveness in managing environmental effects.