

19 November 2010

Māori Affairs Committee
Parliament Buildings
WELLINGTON 6160

MARINE AND COASTAL AREA (TAKUTAI MOANA) BILL

Submission by the Petroleum Exploration and Production Association of New Zealand

Introduction

This submission is made on behalf of the Petroleum Exploration and Production Association of New Zealand (**PEPANZ**) on the Marine and Coastal Area Bill.

PEPANZ is an incorporated society, operating as a trade association, to promote the interests of companies actively involved in petroleum exploration and production in New Zealand and services companies offering technical and other business support to the sector. Our mission is to promote a legislative, administrative, economic and social framework which efficiently and effectively facilitates safe, environmentally responsible and profitable oil and gas exploration, development and production.

PEPANZ wishes to appear before the Māori Affairs Committee to speak to its submission.

Executive Summary

PEPANZ accepts the Government's decision to move to a new regime of management for the marine and coastal area. The purpose of this submission is to identify the areas of the Bill that are supported and to seek clarification of a number of matters.

PEPANZ is concerned with the potential extent, scope and effect of customary marine title and associated rights. The Bill appears to have the potential for very large areas of the common marine and coastal area to be given customary marine title from which significant rights and privileges flow and questions whether this appropriately balances the interests of all New Zealanders as was the stated intention during the earlier consultation process.

PEPANZ is concerned with the implication of the Resource Management Act permission right (power of veto) provided to holders of a customary marine title which could add significantly to delays and costs in resource management processes, limit access and undermine the principle of integrated management of resources.

PEPANZ is concerned that planning documents prepared by a customary marine title group without any public consultation will potentially be able to override statutory regional policy statements and plans prepared by Regional Councils.

PEPANZ supports the clear statement in the Bill that guarantees public rights of access to the common marine and coastal area.

In considering and making recommendations on matters that may affect existing and future access arrangements and authorisations, PEPANZ requests that the Committee has regard to the potential consequences on the petroleum industry. The key for our members is to obtain certainty of process and tenure to attract investment in new exploration and production activities and to this end we support the development of clear, consistent and transparent processes.

Background

PEPANZ recognises that the determination of Maori customary interests in the Marine and Coastal Area is largely a matter for resolution between the Crown and Maori. However, PEPANZ considers it imperative for the future economic and social wellbeing of New Zealand that there is certainty on this issue, that the regime adopted is efficient – it must be simple, avoid high compliance costs and be consistent with other natural resource management regimes, and it must be fair to all New Zealanders and protect their rights and interests. If these principles are undermined or ignored then the solution will not be durable.

Oil and gas explorers operate under the Crown Minerals Act 1991 (**CMA**) and associated regulations and policies, across the foreshore and seabed and out as far as the boundary of the New Zealand Exclusive Economic Zone (**EEZ**) and continental shelf.

In 2009 the petroleum industry generated revenue exceeding \$2.8b for the New Zealand economy. The industry in Taranaki directly employs approximately 1,200 staff. In 2009 royalty payments to the Crown of \$510m and tax payments of \$485m contributed significantly to New Zealand's income.

PEPANZ made a submission to the Panel on the Ministerial Review of the Foreshore and Seabed Act in 2009 and before that to the Select Committee on the Foreshore and Seabed Bill in 2004.

The main areas of concern for PEPANZ members are the protection of existing rights and the impact that the Bill might have on their ability to negotiate access to resources and to obtain new resource consents for activities within the common marine and coastal area.

Existing operations within the marine and coastal area include the facilities associated with the Maui, Pohukura and Kupe fields in Taranaki, which have offshore structures and associated pipelines to onshore processing facilities. Only one of these, Pohukura (North of Waitara) has wells located within the 12 nautical mile limit (the Territorial Sea). The other wells are located as far offshore as 60 kilometers.

Submission

Continued Crown ownership of petroleum

Retention of Crown ownership of petroleum will ensure continuity of the current tried and tested processes under the Crown Minerals Act. The status quo of applying to the Crown for permits for petroleum activities provides a certain and efficient process. It means that our members know who they have to deal with and the process that will apply.

Protection of existing interests and authorisations

Industry operators have invested significant time and money to obtain existing authorisations. Consequently, the industry supports the recognition and continuation of existing interests and authorisations, including the continuation of existing leases, licences and permits in clause 22 and the accommodated activities in clause 8.

The inclusion in accommodated activities and renewals of existing consents for operations associated with existing nationally or regionally significant infrastructure will ensure security of tenure. These activities will still need resource consents and therefore will be assessed under the Resource Management Act 1991 (**RMA**).

New consents for petroleum activities and nationally and regionally significant infrastructure

PEPANZ supports the inclusion of activities necessary for, or reasonably related to, prospecting, exploration or mining of petroleum and new nationally and regionally significant infrastructure in the list of deemed accommodated activities.

PEPANZ supports the processes outlined in Schedule 1 for negotiating arbitrated activity agreements with customary marine title groups. These processes will apply to both new applications for resource consents for nationally and regionally significant infrastructure and for new applications to undertake activities that are

necessary for or reasonably related to prospecting, exploring and mining for petroleum. It will provide certainty of process and has parallels with the arbitration provisions in the CMA.

The process outlined in Schedule 1 is an equitable process that will encourage open consultation with customary marine title groups and facilitate an environment where groups and industry members can negotiate openly. In the absence of an agreed outcome it enables the terms upon which the activity may be undertaken to be granted subject to suitable commercial arrangements.

Access to petroleum within the common marine and coastal area

Under the current Crown Minerals Act processes, when the Crown grants permits, it does not guarantee access to the land for the purpose of exercising that permit. It is up to the permit holder to negotiate access. At present that access is relatively straight forward to negotiate because all foreshore, seabed and waters out to the edge of the EEZ are in Crown ownership. There are some areas off bounds to exploration, such as marine reserves. In general, however, gaining access is a matter of process.

PEPANZ supports the proposed amendments to section 61 of the CMA which will ensure that the existing processes for obtaining an access agreement, where applicable, will apply in respect of land in the common marine and coastal area.

Resource management permission right

Clause 65 provides that holders of customary marine title rights have a 'permission right' under the Resource Management Act which allows them the right to give or decline permission on any grounds for an activity to which an RMA permission right (consent) applies. The decision to give or decline permission is not subject to appeal or objection.

PEPANZ is concerned that such a right would in effect provide iwi or hapu with a right of veto over petroleum exploration and production activities requiring an RMA consent, despite the fact that those same iwi/hapu will take part in the RMA process as submitters. It will direct the type and location of development that can occur in the marine and coastal area. It may encourage coastal iwi or hapu to seek inappropriate terms for access.

The right of veto will also undermine other legislation such as the Resource Management Act that applies in the coast and result in two separate regimes that will not promote the integrated management of resources. Integrated management is one of the cornerstones of the Resource Management Act reforms and this important principle should not be undermined.

The right of veto is likely to lead to ambiguity and uncertainty between the Resource Management Act and the Marine and Coastal Area legislation and to increased costs and delays. It may also undermine Treaty of Waitangi settlements by directly introducing property right entitlements for coastal iwi or hapu. The Resource Management Act permission right fails to strike the appropriate balance between the customary rights of Maori and non-Maori and should be reviewed by the Committee.

PEPANZ supports Clause 65(6) which provides that a Resource Management Act permission right does not apply to the grant or exercise of resource consents for an 'accommodated activity' (as defined in the Bill). This recognises that there are important activities that need to be undertaken in the public interest and therefore should not be subject to the permission right. This includes emergency activities, scientific research or monitoring and existing infrastructure that is nationally or regionally significant.

New infrastructure that is nationally or regionally significant, can become a 'deemed accommodated activity' (to which the RMA permission right does not apply) only if the work is agreed in principle by the group which holds a customary title in the area relevant to the proposed structure or infrastructure or if the work is classified by the Minister for Land Information as a deemed accommodated activity following a process set out in Part 1 of Schedule 1. That process in turn provides for the customary marine title group to identify appropriate compensation for the removal of its Resource Management Act permission right in the event that the group does not wish to agree to the construction of the proposed structure of infrastructure going ahead.

This process for new nationally or regionally significant infrastructure could lead to added delay and cost, particularly if the customary title holder does not agree in principle to the work and the operator then seeks approval from the Minister to have the work classified as a deemed accommodated matter.

PEPANZ submits that any new nationally or regionally significant structure or infrastructure should be given the same status as existing infrastructure i.e. as an accommodated activity under Clause 8(1), given the importance of such works to the social, economic and environmental welfare of the community at large.

Decisions sought

Reconsider the scope of the Resource Management Act permission right under Clause 65.

Retain Clause 65(6) which provides that a Resource Management Act permission right does not apply to the grant or exercise of a resource consent for an 'accommodated activity'.

Amend the definition of "accommodated activity" to include future as well as current, nationally or regionally significant structures or infrastructure.

Wāhi tapu protection right

Clause 78 enables wāhi tapu conditions to be set out in a customary marine title which can prohibit or restrict public access to the wāhi tapu or wāhi tapu area. Wardens may be appointed by a customary marine title group under Clause 79 to implement any prohibition or restriction and wardens will have the power to order people to leave a wāhi tapu or wāhi tapu area, to record details of those who fail to comply and to report to a constable any failure to comply with a prohibition or restriction.

It is possible that nationally or regionally significant infrastructure, such as oil and gas pipelines from the offshore permit areas, may have been developed within these areas before wāhi tapu conditions are imposed. It is requested that this situation be recognised by requiring due regard of existing users of these areas. This could be achieved by adding a subsection to clause 78 as follows:

Wāhi tapu conditions must take into account any existing activities and existing nationally or regionally significant structures or infrastructure.

PEPANZ's concern arises from the very broad definition of a wāhi tapu or wāhi tapu area as being a place or area sacred to Maori in the traditional, spiritual, religious, ritual or mythological sense. It is possible that given the broad meaning of these concepts, large areas of the common marine and coastal area could be identified as wāhi tapu from which the general public could be excluded at any time.

PEPANZ wishes to make it clear to the Committee that it is not opposed to restrictions being placed on public access to protect sacred wāhi tapu sites, indeed such restrictions will be necessary in some areas to ensure such sites are protected. However, the current provisions of the Bill are very broad and are likely to raise difficulties for the Courts or Ministers in tightly defining wāhi tapu areas that are sought by iwi or are likely to give rise to problems as previously noted if such areas are given very wide interpretation.

The Committee is invited to consider ways in which the protection of wāhi tapu under customary title can be made clear and simple so that it works in a practical sense for Maori and non-Maori alike.

The Bill is not clear on the relationship between wāhi tapu conditions and rules in regional plans (such as those for permitted activities), resource consents and navigation safety bylaws. It is assumed that wāhi tapu conditions set under Clause 78 would not override rules in regional plans or resource consents or bylaws but this should be made more explicit.

PEPANZ is further concerned with Clause 80 regarding the implementation and enforcement of wāhi tapu conditions. Under Clause 80 (1) local authorities with statutory functions in the location of the wāhi tapu area

must, in consultation with the relevant customary title group, 'take any appropriate action' that is reasonably necessary to implement a prohibition or restriction included in the wāhi tapu conditions.

The phrase 'any appropriate action' is open-ended, vague and uncertain. It could for example mean that Councils are charged with taking actions such as erecting signs and fences and undertaking ongoing monitoring and enforcement. It could place local authorities in the position of being the primary implementation agencies for wāhi tapu conditions. Apart from the significant costs that this could impose on Councils, this is not an appropriate role for local authorities.

Decisions sought

Reconsider the workability in law of Clauses 78 and 79.

Include consultation with local authorities in setting wāhi tapu conditions.

Clarify the relationship between wāhi tapu conditions and other laws, permissions and rights.

Delete Clause 80 (1) or draft it more narrowly or explicitly.

Customary marine title (clauses 60-91)

Extent, scope and effect of customary marine title

PEPANZ has significant concerns about the establishment of customary marine title under Subpart 3 of Part 3 of the Bill and in particular the potential extent, scope and effect of customary marine title.

The tests for determining the existence of customary marine title appear to have been significantly reduced. Clause 60 provides that customary marine title exists where an applicant group holds a specific area in accordance with Tikanga Maori and the specified area has been exclusively used and occupied from 1840 to the present day without substantial interruption. The test for exclusive use and occupation has been reduced and does not require evidence of the applicant group owning land abutting the area or exercising customary fishing rights. These tests appear to be very open with the potential to allow very large areas of the marine and coastal area to be given customary marine title status.

Once customary marine title has been established then under Clause 63 rights can be delegated or transferred to any party and commercial benefit derived from it, effectively privatising rights in the common marine and coastal area.

The Committee should examine whether or not the potential outcomes in terms of the possible extent, scope and effect of customary title is what was expected and whether these provisions appropriately balance the interests of all New Zealanders as was the stated intention during the earlier consultation process.

Decision sought

Clarify the extent of customary title expected

Time limits

Specifying a time period for making applications for recognition of customary marine title will provide certainty. Once the time period has passed the potential extent of the marine and coastal area that is subject to claims will be known. It is noted that the proposed six year time period will not commence until Part 4 of the Bill commences. It is not clear why the commencement date for Part 4 is not the same as for the rest of the Bill when enacted. In the interests of achieving certainty, it is requested that the commencement date for Part 4 be the day after the Act receives the Royal assent.

Decision sought

That the commencement date for Part 4 be the day after the Act receives the Royal assent.

Royalties for non-nationalised minerals

PEPANZ supports the proposal that the Crown will collect royalties for non-nationalised minerals on behalf of an applicant group. While this does not apply to petroleum, it provides consistency with the existing CMA approach to treatment of nationalised and non-nationalised minerals.

Planning document

Clauses 84 to 91 provide for planning documents to be prepared by a customary marine title group and for that document to be recognised in various ways by certain other agencies organisations, including local authorities.

In relation to the statutory documents prepared by Regional Councils under the Resource Management Act, Clause 91 requires Councils to examine those documents to ensure that they recognise and provide for the matters set out in the planning document of the customary marine title group. Regional Councils are also required to take into account the provisions of a planning document that apply to any part of the common marine and coastal area that is outside of a customary marine title area.

PEPANZ is concerned with the impact that these clauses would have on the planning documents prepared by Regional Councils following public input. The planning documents prepared under the Bill do not follow any public consultative process and provide no opportunity for public input.

The statutory planning documents prepared by Regional Councils on the other hand are prepared following full public consultation and participation. They set out a carefully considered framework for resource management that has been fully tested with a wide range of stakeholders and the public and for which Regional Councils are then accountable.

Public consultation processes for preparing plans and policies are at the foundation of the Resource Management Act under which all Councils are required to operate. This is for good reason – the policies and rules contained within them directly affect resource users and the community. Having to amend publicly considered documents to take account of documents that have not been tested publicly would undermine the public process and public confidence in that process.

PEPANZ believes that it is appropriate for Regional Councils to engage with Maori in the preparation of statutory documents. The preparation of iwi or hapu management plans or planning documents is also endorsed as a meaningful way of identifying key planning issues and ways to address those from a Maori perspective. PEPANZ is concerned about elevating the status of such documents above the recognised planning framework of the Resource Management Act. It may be more appropriate that such documents be taken into account in statutory planning processes.

PEPANZ is concerned that a planning document could potentially undermine the process for obtaining activity agreements (contained in Schedule 1 of the Bill), by making certain development activities (such as petroleum development) within customary title areas a prohibited activity. For example, a planning document could potentially be used to veto future nationally significant mining operations such as development of a petroleum pipeline from an offshore facility across the foreshore without any recourse to the courts to debate the merits of the proposal.

A planning document might have this effect by specifying in objectives and policies that mining is considered to be unsustainable or inconsistent with a group's cultural identity. Regional Councils would then be required to ensure that the regional planning documents provide for these matters. This may extend to requiring that a rule be introduced making mining a prohibited activity within the relevant area.

PEPANZ requests that planning documents be required to go through an RMA-type process where submissions are sought from interested parties or at least from any affected persons. A right of appeal could be introduced,

for example to the Environment Court, so that the merits of any prohibitions within the planning document that will impact on third parties can be appropriately debated and assessed.

Decisions sought

Reconsider the status of planning documents under Clause 91 to either require that these documents be taken into account in plan changes, variations or reviews; or

Make the planning documents referred to in clause 91 subject to the same scrutiny as regional policies and plans prepared by a Regional Council

It is also requested that the following wording be added to clause 84:

The planning document prepared under subsection (1) must be prepared in accordance with Part 2 of the Resource Management Act 1991; and

Must not be inconsistent with the provisions of –

the New Zealand coastal policy statement; or

any relevant national policy statement.

In the alternative, it is requested that clause 91(3) be amended to include the ability for a Regional Council to determine that a matter within a planning document is inconsistent with the purpose and principles of the RMA and, to that limited extent, have an ability to decline to provide for the matter in the regional planning documents.

Amendments to Regional Council functions under the RMA

The Bill proposes to amend section 30(1)(d)(ii) of the RMA, which relates to the functions of Regional Councils in respect of the coastal marine area, to replace the reference to the foreshore or seabed. The amendment proposes to repeal and substitute the section with the following (emphasis added):

(ii) the occupation of space in, and the extraction of sand, shingle, shell, or other natural material from, the coastal marine area, to the extent that it is not within the common marine and coastal area:

As drafted this amendment will mean the occupation of space, and extraction of the listed minerals, within the common coastal marine area is not a Regional Council function. However, the amendment to section 12(2) of the RMA (page 113 of the Bill) envisages that these activities may be provided for in regional coastal plans. PEPANZ would like it clarified if the intention of this amendment was to remove this function from Regional Councils or if this is a drafting error.

If the intention was to exclude these functions from applying to privately owned areas of the coastal and marine area then removal of the word “not” should clarify that Councils retain the functions only in respect of the common marine and coastal area.

Conclusion

PEPANZ supports the provisions in the Bill that provide for continued certainty for investment in petroleum exploration and production in the marine and coastal area, and seeks clarification of the matters identified above. Clarification of these matters will help to ensure that any system that is established practically works for the petroleum industry and is transparent and consistent. Certainty about proposals will also help maintain the confidence needed for long-term investment in this critical industry.

Thank you for the opportunity to express our members' views. If you consider that there is any further information we can provide to assist the Committee please contact PEPANZ.

John Pfahlert
Executive Officer