



To Hon David Parker, Minister for the Environment			Tracking #: 2018-B-04280
<u>Security Level:</u>	In Confidence	Attachments: Three	Submissions Draft cabinet paper 2018-C-04248 Draft Regulatory Impact Summary
Date Submitted:	09/03/2018	Response needed by:	15/3/2018
MfE Priority:	Urgent	Action Sought:	Decision

## EEZ Amendment for Board of Inquiry cost recovery: cover note to draft Cabinet paper 2018-C-04248

### Key Messages

1. This briefing is a cover note to the attached draft Cabinet paper (2018-C-04248) which seeks Cabinet approval to amend the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 (EEZ Act) to provide for recovery of costs associated with a Board of Inquiry (BOI). We seek your feedback on the attached draft Cabinet paper.
2. The Cabinet paper will seek approval for both policy proposals and to introduce an EEZ Act Amendment Bill ("the Bill") into the House as soon as possible following Cabinet approval on 26 March.
3. The costs associated with appointing the BOI for Tamarind's marine consent application will not be cost recoverable as the application was lodged on 9 March. Therefore costs of appointing the BOI for this particular application will fall to the Crown. We estimate that cost will be approximately \$216,000. We will provide you with further advice about how these costs may be funded.
4. This briefing:
  - summarises submissions received during targeted consultation on the proposal
  - outlines the timeframe for progressing the amendment
  - highlights other issues that your colleagues may raise at Cabinet.
5. The supporting material includes information on:
  - regulation 16 of the EEZ Discharge and Dumping Regulations ("D&D Regulations")  
s9(2)(f)(iv)
  - variances between proposed cost recovery provisions under the EEZ Act and the Resource Management Act 1991 (RMA)

### Consultation and submissions

6. We undertook a brief targeted consultation between 8 February and 13 February on the proposal to amend the EEZ Act to provide for the Minister for the Environment to recover costs associated with a BOI appointed to decide publicly notifiable marine consent applications for section 20 activities, and to delegate cost-recovery to the EPA.

7. A letter outlining the proposal and inviting feedback was sent to the following stakeholders, who were identified as potential applicants for marine consents subject to a BOI process:
  - Shell Taranaki Limited
  - OMV New Zealand Limited
  - Tamarind Resources
  - Lattice Energy (Beach Energy)
  - Chatham Rock Phosphate
  - PEPANZ (Industry body – petroleum)
  - Straterra (Industry body – minerals)
8. Five responses were received.
9. All submitters supported cost-recovery provisions. PEPANZ expressed concern about the short timeframe for consultation, and Beach Energy asked for further detail about the proposal.
10. Two submitted that the Bill could also be used to amend regulation 16 of the D&D Regulations. One submitted that rights of objection should also be included.
11. We consider that the Bill is not an appropriate vehicle for these suggested changes.
12. Copies of submissions are attached to this briefing note.

#### **Process and timeline**

13. In a previous briefing (2018-B-04323) you agreed to progress the amendment on an expedited timeframe (and without retrospective effect for applications already lodged).
14. Under the expedited timeframe you will:
  - Seek Cabinet approval for both policy proposals and to introduce the Bill into the House at the same time.
  - Take policy proposals and the Bill direct to Cabinet instead of the Environment and Legislation Cabinet Committee.
  - Add the Bill to the list of urgent bills in the House to enable the Parliamentary Counsel Office (PCO) to draft in advance of Cabinet approvals.
  - Recommended the House direct a short select committee process for the Bill (1-2 weeks).
15. Under the expedited timeframe, the Bill should be introduced into the House as soon as possible following Cabinet approval on 26 March.
16. While the costs associated with Tamarind's application will fall to the Crown, progressing the amendment on an expedited timeframe reduces the risk that another marine consent application will be lodged prior to the amendment taking effect.

#### **Other issues that colleagues may raise at Cabinet**

17. The Ministry for Business, Innovation and Employment (MBIE) raised questions as to whether this Bill could be used to amend regulation 16 of the D&D Regulations s9(2)(f) s9(2)(f)(iv) We have provided some supporting material on these issues.
18. We have advised MBIE that these matters are not comparable to the amendment for cost recovery which is minor, non-controversial and requires urgent attention, and that this Bill, regarding cost recovery for BOIs, is not an appropriate vehicle for the suggested changes.

19. MBIE have agreed that the current Bill, for BOI cost recovery, may not be appropriate for addressing these issues given the urgency in amending the Act. However, MBIE are advising Minister Woods to use the time allocated for the Bill at the Cabinet meeting as an opportunity to raise the above issues with the EEZ Act; and to seek Cabinet agreement to direct officials to report back by 31 December 2018.
20. Petroleum Exploration and Production New Zealand (PEPANZ) sent you and Minister Sage a letter on 31 Jan outlining the industry's concern with regulation 16. Officials are currently working on advice including these two potential amendments and how we would prioritise, in relation to each other, any further improvements to the EEZ Act.
21. We propose that you raise this at the Marine Ministers' meeting on 27 March. We also recommend that you meet with Minister Woods before 26 March, to discuss her intentions in raising these issues at Cabinet given that officials have already begun developing advice on these non-urgent amendments. We will provide you with background information to support your discussion, should you wish to meet with Minister Woods.

## Recommendations

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22. We recommend that you:

- a. **Note** that Tamarind has lodged its marine consent and therefore costs associated with appointing the BOI for the Tamarind application will fall to the Crown (estimate of \$216,000)
- b. **Note** that the EEZ Act Amendment Bill 2018 is to be progressed on an expedited timeframe which means that you will:
  - Seek Cabinet approval for both policy proposals and to introduce the Bill into the House at the same time.
  - Take policy proposals and the Bill direct to Cabinet instead of the Environment and Legislation Committee.
  - Add the Bill to the list of urgent bills in the House to enable the Parliamentary Counsel Office (PCO) to draft in advance of Cabinet approvals.
  - Recommend the House undertakes a short select committee process for the Bill (1-2 weeks).
- c. **Agree** to provide feedback on the attached draft Cabinet paper
- d. **Agree** to add the EEZ Amendment Bill 2018 to the list of urgent bills in the House.
- e. **Agree** to raise the matter of potential improvements to the EEZ Act at the Marine Ministers' meeting on 27 March.

Yes/No

Yes/No

Yes/No

- f. **Meet** with Minister Woods before 26 March, to discuss her intentions with respect to raising other issues with the EEZ Act during the Cabinet meeting.

Yes/No

**Signature**



John Robertson  
**Acting Director**  
**Marine, Environmental Risk and Science**

12/3/18



Hon David Parker  
**Minister for the Environment**

17/3/18  
**Date**

**Ministry for the Environment contacts**

Position	Name	Cell phone	1 <sup>st</sup> contact
Principal author	s9(2)(a)		
Responsible Manager	Lou Hunt	022 066 8764	
Director	John Robertson (acting)	022 066 3568	X

Re paras 31 to 39, I agree with the approach - re full cost recovery. My concern is that there needs to be a duty upon those incurring the costs not to incur excessive cost. How could we achieve that?

## Supporting material

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### Issues that may be raised by Minister Woods

#### Regulation 16 of the EEZ Discharge and Dumping Regulations

23. In consultation on the proposed amendment to the EEZ Act for BOI cost-recovery, PEPANZ and one petroleum operator submitted that the process could also be used to reclassify offshore processing drainage as a non-notified activity. This was also raised by MBIE during departmental consultation on the proposals.
24. Regulation 16 provides that the discharge of harmful substances from petroleum extraction activities is a discretionary activity requiring **notified** marine consent from the EPA (not a BOI, as it is not a section 20 activity). However, the activity is **non-notified** if:
  - the discharge is from production water for the purpose of a test flow of an exploration well, or
  - the discharge is from an existing structure.
25. These regulations were made when the management of discharges transferred from Maritime New Zealand to the EPA. The regulations provided for discharges from existing structures to be a non-notified activity because the effects of those discharges had already been considered and 'approved' under the previous regime through a Discharge Management Plan. Discharges from other new structures require a notified marine consent. Our view is that this distinction is appropriate.
26. Regulation 16 also provides for discharges resulting from the test flow of an exploration well to be non-notified. At the time the regulations were developed, it was not anticipated that there were other discharges associated exploration drilling. However, it has been brought to our attention that there are drainage discharges associated with exploration drilling and by default, these are classified as a notified discretionary activity. Given other activities associated with exploration drilling are non-notified, there is an inconsistency in how operators obtain marine consents for exploration drilling.
27. While we recognise that there is inconsistency in regulation 16, our advice is that any amendment to the regulation should be subject to appropriate consideration in its own right. The EEZ Act sets out the process that must be followed when developing or amending regulations and there are matters that you must take into account before recommending the making of regulations or classifying of an activity. We consider that any change to the D&D Regulations or Non-notified Activities Regulations is a change to the current policy and likely to be controversial. We do not consider that the proposed Bill is an appropriate vehicle to address the matter.

s9(2)(f)(iv)

### **Variances between proposed cost recovery provisions under the EEZ Act and the RMA**

31. The proposed Bill will be appended to the Cabinet paper once drafted.
32. The general intent is to align the cost recovery processes for BOIs under the EEZ Act with corresponding processes under the RMA. However, the two acts differ in several respects. Relevant provisions of the RMA which have not been entirely translated into the proposed amendment include:
  - **subsection 149ZD(6)**, which sets out criteria that the local authority, EPA or Minister must have regard to when recovering costs,
  - **subsection 179ZD(7)**, which provides for a person to object to a requirement to pay costs, and
  - **section 149ZG** "Process may be suspended if costs outstanding".

### **Consideration of extent of benefit obtained by applicant**

33. One of the criteria under **subsection 179ZD(6)** of the RMA is that:

"(b) the applicant should be required to pay for costs only to the extent that the benefit of the actions of the local authority, EPA, or Minister (as the case may be) to which the costs relate is obtained by the applicant as distinct from the community as a whole"
34. We have not included a corresponding criterion in the proposed EEZ Act amendment. In December 2012, the Minister for the Environment considered what functions under the EEZ Act would have private, public or mixed benefits, and Cabinet agreed that all functions related to marine consent applications conferred a private benefit and would be entirely cost-recoverable from the applicant.

### **Objection to costs**

35. The RMA provides in **subsection 149ZD(7)** that a person may object to a requirement to pay costs incurred by a local authority, the EPA or the Minister.
36. The EEZ Act does not provide for an applicant to object to a requirement to pay costs in relation to any other process. It is considered that introducing this provision only for BOI costs would not be in keeping with other processes under the EEZ Act, so this provision has not been included in the proposed amendment.
37. While we don't consider it appropriate to consider substantive changes to rights of objection in relation to the proposed amendment, we could consider the matter as part of a wider review of the EEZ Act.

### **Suspension of inquiry**

38. Section 149ZG sets out in detail how the EPA would suspend a process if costs were outstanding. During the preparation of the Resource Legislation Amendment Act 2017 (RLAA), Cabinet agreed to include a corresponding section to RMA 149ZG in the EEZ Act, but later agreed to rescind that decision, as the existing subsection 147(3) was considered to be sufficient. Subsection 147(3) provides that "If a charge is payable to the EPA, the EPA need not perform any action to which the charge relates until the charge has been paid in full."
39. We consider that "a charge payable to the EPA" would include any charge payable to the EPA on behalf of the Minister. We have proposed that the wording of section 147(3) is amended to make it clear that the process is suspended whether the decision-maker is the EPA or a BOI. However, given the previous decisions taken by Cabinet, we have not proposed to make any further changes to suspension processes through this amendment.

### **List of attachments**

- Submissions
- Draft Cabinet paper 2018-C-04248
- Draft Regulatory Impact Summary

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