

## Submission

**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***

03 October 2013

Ministry for the Environment  
PO Box 10362  
Wellington 6143

To the Minister for the Environment

Please find attached the McGuinness Institute's submission on the discussion document regarding activity classifications under the EEZ Act.

Kind Regards,



Wendy McGuinness  
Chief Executive

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## About the McGuinness Institute

The McGuinness Institute, formerly the Sustainable Future Institute, was founded in 2004. The Institute is a non-partisan, not for profit research organisation, working towards a sustainable future, by contributing strategic foresight through evidence based research and policy analysis.

## Experience

In preparing this submission we draw on three of the McGuinness Institute's projects; *Project 2058*, *Project Genetic Modification* and *Project One Ocean*.

*Project 2058* is the Institute's flagship project. It includes a research programme that aims to explore New Zealand's long-term future with a view to putting forward a National Sustainable Development Strategy (NSDS) for New Zealand. As part of *Project 2058* we are preparing to launch *TalentNZ*. This project focuses on making New Zealand 'a place where talent wants to live,' inspired by the late Sir Paul Callaghan, a passionate New Zealander who cared deeply about the future of this country and its young people.

*Project Genetic Modification* closely monitors developments in genetic modification and related policy both in New Zealand and internationally. Our recently released report *An Overview of Genetic Modification in New Zealand: the first forty years 1973 – 2013* provides a comprehensive overview of policy development through four key eras: (1) the journey towards the 2001 Royal Commission on Genetic Modification; (2) the Royal Commission and its findings, (3) the response to the Royal Commission, and (4) the era of institutional change from 2008 – 2013.

*Project One Ocean* focuses on the importance of ocean management. Per capita, New Zealand has the largest area of continental shelf in the world and it is important that we think about policy and values that drive our management of this vast resource. The most recent component of this project was a think piece and working paper on the NZ King Salmon Board of Inquiry hearing *Think Piece 16: New Zealand King Salmon was it a good decision for New Zealand?*

These Projects are concerned with risk management and long-term strategic thinking for the benefit of New Zealanders. The Institute sees the effective use and management of New Zealand's resources as an integral part of our sustainable future.

## 1. Introduction

As pointed out in the discussion document, New Zealand's EEZ is one of the largest in the world. The Ocean is integral to New Zealand's economic, environmental and social well-being. In the coming decades, effective management of our oceans will become increasingly important, as demands on resources increase due to an ever growing global population. As a sustainable futures think tank, the McGuinness Institute's primary focus is the degree to which proposed additions detailed in the decision document will provide effective oceans management for the longterm interests of New Zealand. Adequate foresight must be applied to regulatory schemes of such importance. We appreciate the opportunity to comment on the proposals contained in the discussion document.

In particular, we are concerned with the proposed classification of exploratory drilling for oil and gas as *non-notified discretionary* in the EEZ and continental shelf. Whilst the Institute is not inherently opposed to the prospect of oil and gas exploration in our EEZ, we believe that a principle-based approach must be employed to ensure the preservation of our oceans for future generations.

This paper begins by outlining a principled based approach to policy making that should drive best practice in the management of New Zealand's resources. It then goes on address the specific questions posed in the discussion document.

## 2. Principle Based Approach

The Institute considers there are a number of characteristics that should drive public policy so that regulations provide effective outcomes for current and future generations of New Zealanders. We outline these principles below and explain why we have concerns with the current approach being proposed in the discussion document.

- a. Clarity - There is a clear definition of the problem
- b. Strategic thinking - Strategic options to solve the problem and their impacts are a matter of public record
- c. Impartiality - Independence exists between vested interests and policy maker
- d. Evidence-based policy making is sought
- e. Risk Management approach is employed
- f. Durable public policy is sought
- g. Transparent public policy is sought
- h. Whole-system approach regarding environmental effects is required
- i. Monitoring, Testing and Reporting of effects is fundamental
- j. Assurance reporting is required
- k. New Zealand is the only focus (therefore benefits to non-New Zealand commercial interests are not taken into account)

We discuss each of the above in turn.

- a. In this case the policy problem government is wishing to solve is 'higher costs and longer timeframes associated with a full discretionary consenting process' (page v).
- b. Strategic options to solve this problem are firstly not explored in this paper, nor are the impacts of the preferred option fully explored. For example, there is no comparison of how this new change will be different than the status quo.
- c. Policy appears to be driven by one group of stakeholders, in this case, the mining companies who have complained to Government that the current system is expensive in terms of costs and time taken. These are legitimate concerns but they are not described in any detail. The discussion paper does not outline the actual costs and time taken under the current status quo. There is no real time data in this discussion paper providing evidence of the size of the problem.
- d. Evidence-based policy making is the catch phrase of the Chief Scientific Advisor, Professor Gluckman. In his recent paper *The role of evidence in policy formation and implementation* which undertook an assessment of attitudes towards the use evidence in decisionmaking in government departments, Professor Gluckman stated,

My view is that quality evidence should be seen as base knowledge on which, in a democracy, multiple values and associated perspectives must be overlaid. However, where evidence is conflated with values, its power is diminished. Where evidence is not considered properly, the risk of less than desirable policy outcomes is inevitable. (Gluckman, 2013)<sup>1</sup>

The institute believes evidence-based policy making is crucial to ensuring effective decisionmaking. We find it surprising that such an approach does not seem to have been applied in this case – where science is critical to understanding the environmental benefits, risks and costs.

- e. Risk management standards are now well recognised as international best practice, New Zealand and Australian risk management standards are world renowned – yet this discussion paper places very little emphasis on these recent and well regarded standards. The Australian/New Zealand Standard - Risk Management Principles and Guidelines AS/NZS ISO 31000:2009 (which replaces AS/NZS 4360:2004) provides a generic guide for managing risk. It may be applied to a wide range of activities or operations of any public, private or community enterprise, or group.
- f. Durable public policy is an emerging goal for regulation, a concept we support. This implies policy should be sufficiently flexible to meet the needs in the medium to long-term; in other words no short term reactive policy changes should be implemented

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<sup>1</sup> Gluckman, P. (2013) *The role of evidence in policy formation and implementation A report from the Prime Minister's Chief Science Advisor*. Retrieved October 02, 2013 from: <http://www.pmcsa.org.nz/wp-content/uploads/The-role-of-evidence-in-policy-formation-and-implementation-report.pdf>

designed to meet the needs of one stakeholder without a deep understanding of how this policy is likely to evolve, both nationally and globally. This perspective is missing from this discussion paper. Secondly, durable policy must be both elegant and simple; we believe regulation should be simple and clear. Policy makers must articulate why this fourth mechanism is needed, why current costs and timeframes cannot be managed under the three existing categories. A simple, clear and transparent structure makes for the most durable regulation.

- g. Transparent public policy is necessary in order to be assess public policy outcomes over time. This way lessons are learnt rather than repeated.
- h. A whole-system approach is critical to understanding environmental effects. If we wish to assess, value and weigh effects over time, we need to document changes to inputs, processes and outputs of any given system. In this case, the system is the Pacific Ocean and the events that impact on that system includes drilling, discharging of harmful substances and the dumping of waste. From our understanding no definition of exploratory activity is included in the EEZ Act, a limited definition is present in the Crown Minerals Act 1991. A more detailed definition of exploratory activity should be conceptualized and included in both pieces of legislation, to ensure an integrated approach to exploratory drilling exists across both the resource allocation and resource management schemes.
- i. Processes outlining required monitoring, testing and reporting of effects are not well outlined in this paper. The discussion paper seeks feedback on important issues, the classifications of: exploratory drilling for oil and gas, discharges of harmful substances and the dumping of waste. We are advised that the EPA is responsible for enforcing the regime and issuing permits (page 3); but we are not advised what reporting system is to be put in place for each of these three important aspects of ocean management. Quality, timely and relevant data is essential if the decision makers and the public are able to assess the effectiveness of proposed changes.
- j. Assurance reporting is also critical; testing must be carried out on applicants. Regulations without enforcement effectively equate to a voluntary regime.
- k. New Zealand is the only focus (therefore benefits to non-New Zealand commercial interests should not be taken into account). It always surprising the number of times we fail to put boundaries around effects when assessing whether something is in the best interests of New Zealand or not; often we simply fail to critically assess who gain the benefits, and who bares the costs and risks. Although this relates directly to risk management; it is also clearly a principle that underlies public policy; the public relates to the people of New Zealand – that is the primary test that should underlie all public policy.

Given this background we clearly have grave concerns about the wider process surrounding the issues at the center of this paper. We accept that it is unlikely that any changes will be made as a result of our concerns, however we feel it is important that these concerns are tabled for those revisiting this issue in the future.

### **3. Specific concerns**

Whilst the Institute appreciates the need for efficiency and keeping costs low in the consenting process, we are of the opinion that, if potential adverse effects on the environment are more than minor, the public should be afforded the opportunity to make submissions. This would align with current Resource Management Act processes, the purpose of the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 and ensure integrity in the management of activities that have the potential to cause adverse environmental effects.

### **4. Responses to Specified Questions**

Please note the Institute has focused specifically on Question 1, as we see this issue as fundamental to the development of evidence-based public policy.

#### **Question 1**

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

The Institute does not support the classification of exploratory drilling for oil and gas as *non-notified discretionary* on the following grounds.

Such activities evoke high public interest and should not be carried out without the opportunity for public involvement. Such decisionmaking behind closed doors is likely to be deemed unacceptable by most New Zealanders.

Possible commercial interests, purported benefits of increased efficiency and reduced costs should not be reasonably assumed to outweigh public participation and due process. Similarly, although the suggested reforms reflect global standards, it does not follow that the global standard is sufficient for New Zealand; our regulatory system should reflect our unique requirements. Exploratory drilling for oil and gas underwater has the potential to cause adverse environmental effects, which are considerably more challenging to manage than those on land. It was an exploratory well that resulted in the 2010 Gulf of Mexico Deepwater Horizon incident.

Hence the New Zealand public must be considered a stakeholder in this issue, a significant proportion of the population would be affected in the event of any environmental disaster resulting from such activities. Transparency and high levels of accountability are expected by the New Zealand public and are crucial to ensuring the integrity, longevity and

effectiveness of resource management systems. In order to maintain public faith it follows that the public need to be informed and feel that they have the right to participate in decisionmaking processes. In this way, it is not just that the public are able to voice their opinions but they are encouraged to be informed about policy reforms and developments, which in turn enhances the longterm effectiveness of our regulatory system.

Preventing the public from participating in the process surrounding potentially high risk environmental activity is tantamount to abuse of process, and indicates a lack of foresight on behalf of the government. Regulatory processes surrounding environmental management should follow a principled approach and give due consideration to longterm interests of New Zealanders to ensure 'best practice.'

#### **Question 2**

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

Yes.

#### **Question 3**

**Do you agree that 'harmful substances' should be defined in the proposed definition in 2.3.2? if not, how should the term be defined?**

Yes harmful substances should be defined as in the proposed definition in 2.3.2.

#### **Question 4**

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

Yes. With regards to 'Discharges of sediments and/or tailings from mineral operations during prospecting and exploration' we agree with the possible management condition requiring the disposal of sediment as close to the original point of extraction as possible.

#### **Question 5**

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

The discharge of drilling fluids from oil and gas operations during the exploratory stage should be classified as a discretionary activity in line with our recommendation for the classification of exploratory drilling for oil and gas.

## Question 6

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

Yes.

### 5. Recommendations

It is our recommendation that exploratory drilling for oil and gas in the EEZ and continental shelf should continue to be classified as a discretionary activity, and therefore should continue to be publicly notified.

We make this recommendation on the basis that:

- The discussion paper does not provide evidence that a fourth category is required; rather it implies the current administrative system is not meeting the needs of commercial stakeholders. We therefore would support the Minister in undertaking an *independent review of the current process in order to look for ways to minimize processing costs and reduce processing times*. Such a review should quantify the current processing costs and processing time in question, and identify how processing costs and times could be better managed. From our understanding, no work has been undertaken that independently reviews the status quo.
- Work should also be done to clearly define ‘exploratory activities’ in terms of the quality (i.e the type of mineral) and quantity (as in the amount extracted from the ocean) so that a *maximum national limit* is set. This would ensure that definitions and regulations surrounding exploratory activities are integrated across both the resource allocation (primarily the Crown Minerals Act 1991) and resource management schemes (The EEZ Act 2012 and Resource Management Act 1991).
- We also consider a *review of international best practice* would be a very useful mechanism for ensuring New Zealand applies best practice to ocean management. Not only would such an initiative ensure that New Zealand positions itself as a leader in ocean management but it would send a very clear message to all stakeholders that this is a resource that New Zealand values. Such a review should also quantify the costs and time taken to undergo similar applications in other countries.
- New Zealand has excellent marine scientists that could be called upon to help record and manage effects. A non-notified discretionary process for exploratory drilling and gas precludes scientific endeavor by preventing scientific evidence to be tabled in response to applications. The proposed approach does not align with the values and vision of science and commercial interests working together, rather such an approach is secretive and hidden; embracing instead commercial endeavor at the expensive of



scientific interests. If the Government is determined to progress this proposal we suggest it looks at ways to both (i) *embrace science*, inviting reputable scientists to inform public policy and advise decisionmakers on effects (in terms of quality and quantity of material drilled) and that those (ii) *effects are comprehensively reported* over time in the public arena (so that a benchmark is recorded and effects of this proposed policy can be assessed over time).

- We also consider that as drilling for oil and gas requires camera equipment and mapping of the seabed, New Zealand should consider *what opportunities exist in regard to obtaining image/records* from commercial companies that might be useful as a way of benchmarking long-term effects over time; such as mapping terrain or ecosystems mapping. For example, part of a non-notified discretionary activity might be that images of the seabed are recorded before and after excavation. In other words, controls can be put in place to monitor/police effects at the start of the application process at very little cost to applicants’.
- Finally we believe that there is a key risk that we are once again being reactive and not thinking strategically about what ocean management means to New Zealanders, both today and in the future. In the longer term, we would like to see a *comprehensive Oceans Act*, similar to the 1996 Canadian model. The preamble to the Canadian act ‘recognizes that the three oceans, the Arctic, the Pacific and the Atlantic, are the common heritage of all Canadians’ and they ‘reaffirm Canada’s role as a world leader in oceans and marine resource management.’ Further the Institute considers New Zealand needs to be thinking about not only the Pacific but also Antarctica. The Antarctic Treaty, which aims to protect Antarctica for 50 years from commercial exploitation, expires in 1948 – only 35 years away. It is time to think deeply about what our oceans mean to us as a people and how we might best manage them for both current and future generations.

If you have any questions or queries, please do not hesitate to contact Wendy McGuinness or Renata Mokena Lodge at the Institute.