

# Memorandum

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**To:** Beach Energy Notified DMC

**From:** Phillipa McKenzie, Senior Solicitor and Tim Roser, Senior Technical Advisor,

**Date:** 15 September 2020

**Subject:** EEZ100019: Applicant's proposed removal of condition 13.

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## Context

1. On 08 September 2020 the EPA held a public hearing for the notified marine consent application EEZ100019 for the discharge of trace amounts of harmful substances from the deck drains of a MODU in the Canterbury Basin as part of an EAD campaign.
2. Counsel for the applicant provided an opening legal submission<sup>1</sup> which in part, voiced reservations in regards to including their proffered condition 12, later referred to as condition 13 within Appendix 2 of the EPA's conditions report<sup>2</sup>. In doing so, the applicant requested it be removed and replaced by an advice note.
3. After discussing this topic with Counsel for the applicant, the DMC asked if the EPA wished to provide comment<sup>3</sup>. This request was subsequently reflected by the DMC minute<sup>4</sup> dated 10 September 2020.
4. The DMC minute requests that the EPA responds to the applicant's position on the proposed ESRP condition 13. This memo provides the EPA's response.

## Response

### Dealing with adverse effects

5. Ensuring the implementation of Emergency Spill Response Plan's (ESRP) procedures is key to preventing and managing the occurrence of OPD discharges and in turn the magnitude and likelihood of the associated adverse effects.
6. Under section 63(1) a marine consent authority may grant a marine consent on any condition that it considers appropriate to deal with adverse effects of the activity authorised by the consent on the environment or existing interests. The DMC must be satisfied that adverse effects of the proposed offshore processing drainage are appropriately managed.
7. Along with the other conditions presented within Appendix 2 of the conditions report, condition 13 manages the adverse effects of the proposed activity in a concise and effective way by requiring the operator to adhere to their ESRP procedures. These ESRP procedures are presented to the EPA for certification in accordance with regulation 24 before they can operate.

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<sup>1</sup> [http://epa/edrms/eez/1/EEZ100019/Hearings/Day\\_01\\_Beach\\_Energy\\_Marine\\_Consent\\_Opening\\_Submission.pdf](http://epa/edrms/eez/1/EEZ100019/Hearings/Day_01_Beach_Energy_Marine_Consent_Opening_Submission.pdf)

<sup>2</sup> [http://epa/edrms/eez/1/EEZ100019/Staff\\_Report/Conditions\\_Report\\_EEZ100019.pdf](http://epa/edrms/eez/1/EEZ100019/Staff_Report/Conditions_Report_EEZ100019.pdf)

<sup>3</sup> [https://www.epa.govt.nz/assets/FileAPI/proposal/EEZ100019/Hearings/Day\\_01\\_Beach\\_Energy\\_Hearing\\_Transcript\\_8\\_September\\_2020.pdf](https://www.epa.govt.nz/assets/FileAPI/proposal/EEZ100019/Hearings/Day_01_Beach_Energy_Hearing_Transcript_8_September_2020.pdf)

<sup>4</sup> [http://epa/edrms/eez/1/EEZ100019/Decision\\_Maker\\_Administration/Beach\\_Notified\\_DMC\\_Minute\\_04\\_Further\\_Information\\_requested\\_during\\_the\\_hearing.pdf](http://epa/edrms/eez/1/EEZ100019/Decision_Maker_Administration/Beach_Notified_DMC_Minute_04_Further_Information_requested_during_the_hearing.pdf)

8. The EPA considers it entirely appropriate that adverse effects from offshore processing discharge are managed by way of condition 13. The inclusion of condition 13 appropriately confines the risk of adverse effects of offshore processing drainage by ensuring the procedures the operator has determined will prevent, minimise or mitigate spills of harmful substances, are actually implemented.
9. The worst case scenario of adverse effects put forward in the applicant's impact assessment (IA) accounts for the avoiding, remedying and mitigating effects of the proffered conditions, including condition 13. As a result, the IA assumes adequate prevention and clean-up procedures will occur (section 3.2 of the IA) to reduce the volume of hazardous substances entering the hazard area deck drains to no worse than 250ml of sodium hypochlorite (Potable grade HSR003698). No other scenario has been presented within the IA for the DMC to consider.
10. Condition 13 critically ensures the applicant's prevention and clean up procedures actually occur so only residual amounts of harmful substances enter the offshore processing drainage tanks. Without condition 13 in place, the likelihood and volume of hazardous substances entering the offshore processing drainage is beyond the worst case scenario presented in the applicant's IA and inadequately confined by the other conditions.
11. As this is an application for a marine discharge consent, both limbs of the purpose of the Act under section 10 are applicable, and both address this issue. Under section 10(1)(a) the purpose of the Act is to promote **sustainable management** - which means managing the use, development, and protection of natural resources in a way, or at a rate, that enables people to provide for their economic well-being while— (c) **avoiding**, remedying, or mitigating any adverse effects of activities on the environment.
12. Under s10(1)(b) the purpose of the Act is to protect the environment from pollution by regulating or prohibiting the discharge of harmful substances.
13. [Subpart 4](#) of the EEZ Act imposes, in [section 25](#), a duty on every person to avoid, remedy, or mitigate the adverse effects of their activities on the environment. A condition requiring compliance with the ESRP would also be consistent with this general duty to avoid adverse effects on the environment.
14. Section 59 EEZA requires a DMC to determine whether granting the marine consent achieves the objective in section 10(1)(a) as discussed above, and to separately determine whether granting the marine discharge consent achieves the objectives in section 10(1)(a) and 10(1)(b). The threshold for marine discharge consents is whether or not the activity can be carried out in a way that avoids having any material harm to the environment.

### Limits on imposing conditions

15. Section 63(3) provides that: the marine consent authority must not impose a condition on a consent if the condition would be inconsistent with this Act or any regulations.
16. There is no inconsistency with requiring compliance with ESRP requirements as set out in the Regulations.
17. With respect to s63 (4), the EPA considers that condition 13 is not in conflict with a measure required by another marine management regime or the Health and Safety at Work Act 2015.
18. The OMV Whio-1 principles that Counsel for the applicant has raised are not binding but do provide a useful expression of the considerations this DMC would apply.
19. The ESRP is a prerequisite for operation of an offshore installation, and the EPA is responsible for approval of ESRP requirements. The ESRP is part of the EEZA marine management regime (as

defined by section 7 of the EEZA). The EPA does not agree that these principles support the argument that a condition relating to an ESRP should not be imposed.

20. The EPA does not agree that a condition requiring compliance with the ESRP is being used as a “gap filler”. As set out in the EPA’s condition report, this condition is imposed for the purpose of managing adverse effects as required in s63 EEZ Act.
21. Counsel for the applicant’s submissions make an assumption of Parliament’s intent but there is no basis for that assumption in the plain wording of the EEZ Act. The DMC has the ability to set conditions on the basis of managing adverse effects. Provided those conditions are not inconsistent with the Act or regulations, and don’t conflict with any measure required by a different marine management regime (which this doesn’t) then there is no issue with imposing it. If Parliament had intended to exclude conditions requiring compliance with specific aspects of the EEZ marine management regime then it would have done so expressly, as is the case for adaptive management for marine discharge and dumping consents.
22. The imposition of condition 13 does not conflict with the requirement in the EEZ regulations for an operator to hold an EPA approved ESRP. The condition in fact compliments this requirement in regulation 24.
23. Counsel for the applicant has raised concerns about some aspects of the ESRP requiring matters such as information which it considers to be unrelated to the marine discharge consent. However, it is the ESRP in totality that gives assurance that the adverse effects of the discharge are sufficiently mitigated to pass the test imposed by the purpose, as required by the Court of Appeal. All requirements under regulation 24 for inclusion in an ESRP contribute to limiting the risk presented by a spill.

### Enforceability

24. Counsel for the applicant is correct in that there are other methods of enforcing compliance with an ESRP. These include the possibility of issuing an abatement notice for breach of ESRP requirements. It is equally true that there would be a full range of enforcement options available for a breach of a condition on the consent that required compliance with the ESRP.
25. Regulation 24 requires the owner to prepare and have an ESRP approved by the EPA before they operate an offshore installation and outlines the contents of the ESRP. It does not explicitly require the operation to be conducted in accordance with the ESRP.
26. Ensuring an operator implements the measures they describe in their own ESRP via a condition is a small step to appropriately manage the risks associated with offshore processing drainage. The most common occurrence of non-compliance is from simple operational failures of which can be readily remedied. As a result, such matters are often more reasonably handled through consent conditions as opposed to an indirect and serious issuing of an abatement notice.
27. The EPA does not agree with Counsel for the applicants’ proposal that this matter could be dealt with in an advice note. An advice note is unenforceable so does not address the issue of managing an adverse effect which a condition of consent would manage.
28. Should the DMC wish to look at alternative drafting of condition 13, or wish to consider alternative conditions under s63(1) to manage the adverse effects, the EPA is available to provide comment if required.