

PETROLEUM DEVELOPMENT: EXCLUDING THE PUBLIC

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Abstract

This article examines how the law excludes the public from decision-making, and thus from formally opposing petroleum development in New Zealand.

This insight piece reports on an interesting, albeit troubling phenomena taking place in New Zealand. Specifically, it addresses the exclusion of the public from decision-making concerning petroleum development. This development contrasts sharply with the long established and wide-ranging requirements for public participation in other areas of environmental management, and jars with the general approach to participatory democracy in New Zealand. The author invites readers to consider the scenario in their own jurisdiction in order to ascertain whether this is a widespread issue, and to provoke debate within the IUCN AEL about the causes, consequences and possible responses to this development.

Within New Zealand, the state owns petroleum in all its forms. Rights to prospect, explore for and take petroleum are allocated via a permitting system determined by the Minister for Energy (*Crown Minerals Act 1991*). There is no public input into these processes. New Zealand's Government aims to increase petroleum production. In the last three years, a number of exploration permits have been granted for deep-water drill sites outside the territorial waters. A condition of an exploration permit is that the holder drills an exploratory well within the five-year duration of the permit.

Offshore petroleum development has proved controversial in New Zealand. The pristine but treacherous oceanic conditions make drilling difficult and the nation has limited capacity to respond to a spill. Petrobras has been granted prospecting and exploratory permits for an area off the Eastern Cape, in the deep waters of the South Pacific Ocean. In April 2011, as part of a protest flotilla organised by Maori iwi against the granting of those permits, Elvis

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Teddy sailed within 20 meters of a Petrobas seismic survey ship causing it to divert from its route. The navy stopped the protest and Mr Teddy was arrested and charged. At first instance the Court dismissed the criminal charges, finding that the section of law the Government was purporting to operate under had no application outside New Zealand's territorial waters. Upon appeal in March 2013, the decision was overturned but leave was granted for the matter to go before the Court of Appeal, with the High Court noting the public importance of the case (*Teddy v Police* [2013] NZHC 756).

The Government reacted swiftly. On 9th April 2013 a law change was introduced that made protesting against minerals exploitation at sea, within the entire area of the exclusive economic zone and territorial waters, a criminal offence (*Crown Minerals Act 1991 ss101A-C*). The change empowered the Government to impose 500 m wide "non-interference zones" around structures and ships. It is now a strict liability offence to enter a non-interference zone without reasonable excuse, enforcement officers have extensive powers of seizure and may arrest without warrant, and the penalty is a fine of up to \$10,000.

The manner in which this law change was effected drew condemnation from many sectors. It was introduced via a "supplementary order paper" (a process reserved usually for minor technical amendments to Bills) thus avoiding any opportunity for public input and parliamentary scrutiny. The change to the law was enacted within 7 days and narrowly approved by a one-vote majority. Concern has been expressed as to the legality of the substantive provisions (Duncan Currie *Opinion on Proposed Amendments to the Crown Minerals (Permitting and Crown Land) Bill* 5th April 2013 at <http://www.greenpeace.org/new-zealand/en/press/Government-Bid-to-Criminalise-Sea-Protests-Slammed/>).

Additional legislative amendments have been introduced that have the effect of silencing further any opposition to offshore petroleum development. Amendments to *the Exclusive Economic Zone and Continental Shelf (Environment Effects) Act 2011 (EEZA)* are particularly note-worthy.

Prior to 2011, there was no environmental regulation of activities in the exclusive economic zone but following Deepwater Horizon the Government fast-tracked the EEZA (legislation that had hitherto been languishing at the policy development stage for over a decade). The Act creates an environmental permitting regime for the exclusive economic zone. Activities are classified as permitted, discretionary, or prohibited. Discretionary activities require a marine permit from the Environmental Protection Agency (EPA), a full environment impact

assessment is required, and the EPA must be satisfied that the applicant can “remedy, mitigate or avoid” any adverse effects on the environment posed by the activity (EEZA s 10).

Initially, well drilling was classified as a discretionary activity. The EEZA has been heavily criticised but one feature, supported by all parties at the time of enactment, was that discretionary activities would be fully notified. This meant that any member of the public was entitled to make submissions on an application, mirroring the wide approach to public participation in other environmental management regimes in New Zealand.

However, on 28th August 2013, the Government proposed introducing a new category of “non-notified consent” for exploratory drilling (Ministry for Environment (2013) *Classifications under the EEZ Act: A discussion documents on the regulation of exploratory drilling, discharges of harmful substances and dumping of waste in the Exclusive Economic Zone and continental shelf*, Wellington, New Zealand). The justification given was “the cost to applicants and likely impact on investor certainty of the discretionary consent process are disproportionate, given the nature of exploratory drilling and its likely impacts” (at 13). The timeframes for public consultation on the new proposals were truncated, and the primary legislation was amended in October 2013 (EEZA s 29C). The effect is to lock the public out of all decision-making concerning exploratory offshore drilling.

Concern is now being raised as to the lack of transparency surrounding decision-making. On 26th November 2013, Greenpeace filed for judicial review of the EPA’s decision to approve Anadarko’s exploratory drilling programme off the Raglan coast (*Greenpeace NZ Inc v The Environmental Protection Authority* CIV 2013-485-9572, (HC) Wellington, 9th December 2013). Note that the New Zealand High Court has inherent jurisdiction to review the decisions of public bodies for legality, and adopts a liberal approach to standing. Responsible environmental organisations, representing a relevant aspect of public interest, will be granted standing (see for example, *Environmental Defence Society Inc. v South Pacific Aluminium Ltd* (No3) [1981] 1 NZLR 216 (CA)). The application by Greenpeace claims that the EPA had not seen Anadarko’s Discharge Management and Emergency Response Plans for the Raglan coast drilling, which are critical parts of the environmental impact assessment. The EPA responded that Maritime New Zealand had seen these documents and would be the appropriate agency to respond to a spill. Maritime New Zealand has resisted public disclosure of these documents, insisting that any interested persons apply under the *Official Information Act 1982*. This process serves to delay the release of the Plans until after the well has been drilled (<http://business.scoop.co.nz/2013/11/26/correct-greenpeace-hauls-down-flag-at-sea-heads->

[for-court/](#) accessed 19.12.13). It remains to be seen whether the High Court will find the EPA's procedures to be legal.

To conclude, New Zealand is regarded as a liberal country with meaningful participatory democracy, and New Zealanders have a proud tradition of protesting against perceived social wrongs. It is the combination of these factors that makes the present approach to petroleum development so incongruent.

The author would like to invite IUCN AEL members who have researched or written papers on the issues raised here from the perspective of their own jurisdictions, to contact her.