Guidance for petroleum mining operators - Rulings

Introduction

1. This document provides guidance to petroleum mining operators on the processing of requests for Rulings made to the Environmental Protection Authority (EPA) under section 162 of the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 (“the EEZ Act”).

2. Notwithstanding this guidance, the EPA will be open to considering whether it is appropriate in the particular circumstances to depart from the guidance, and exercise its statutory discretion differently.

3. This guidance covers the following topics:
   - who needs a Ruling
   - what is a Ruling
   - making a Ruling request
   - information to support a decision
   - the EPA’s assessment
   - the EPA’s decision
   - cost recovery
   - timeframe

4. For further information please email eez.info@epa.govt.nz or call free phone 0800 208 338.

Who needs a Ruling?

5. This guidance is relevant to operators who wish to undertake an existing activity that involves:
   a) an existing structure or an existing submarine pipeline; and
   b) is associated with mining for petroleum authorised by a petroleum mining permit granted under section 25 of the Crown Minerals Act 1991 before 28 June 2013 (the date of the EEZ Act coming into force) or authorised by an existing privilege preserved under clause 12 of Schedule 1 of the Crown Minerals Act 1991.

6. Section 162 of the EEZ Act allows an operator to continue with existing activities involving structures or pipelines which would otherwise require a marine consent as a result of section 20 of the EEZ Act coming into force. These existing activities may continue without a marine consent for the term of the relevant petroleum mining permit or privilege under the Crown Minerals Act 1991.

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1 Described in section 20(2) and (4) and restricted by section 20(1) and (3).
7. However, if operators wish to undertake activities described in section 162(3) of the EEZ Act, they will need to request a Ruling from the EPA. Activities described in section 162(3) include:

a) any activity that is part of the activity, such as placing a structure or drilling a well, that had not commenced before this Act comes into force; or

b) any change in the character, intensity, or scale of the activity made on or after the date on which this Act comes into force; or

c) the alteration, extension, removal, or demolition of an existing structure or existing submarine pipeline associated with the activity.

What is a Ruling?

8. A Ruling is a statement from the EPA that the adverse effects on the environment or existing interests of those activities described in section 162(3) are likely to be minor or less than minor. This Ruling provides for operators to undertake those activities lawfully under the EEZ Act.

Making a request

9. The EPA will only consider whether to provide a Ruling if it is requested to do so.

10. Any person may request the EPA to provide a Ruling (referred to in this guidance as the “requestor”).

11. The EPA encourages requestors to have ‘pre-lodgement’ discussions with the EPA prior to formal lodgement of a request. This is to ensure there is a good understanding of the Rulings assessment and decision-making process.

12. The EPA provides a form for making a request. Requestors should complete the form for all requests, which should be lodged with the EPA, accompanied by supporting information.

13. For more information on how to complete a ruling request form please see Guidance on using the rulings assessment tool on the EPA website.

14. Please contact eez.info@epa.govt.nz or call free phone 0800 208 338 to initiate a pre-lodgement discussion with the EPA or for a copy of the request form.

15. A request for a Ruling should be made for each activity referred to in section 162(3), that is restricted by section 20 and would otherwise require a marine consent, and in relation to each structure or pipeline.

16. A request for a number of Rulings for different activities may be made at the same time. A separate Ruling is not required for each time the activity may take place within a defined period of time (eg the life of the authorisation of the structure or pipeline the activity is associated with).
Information to support a decision

17. The EPA will not provide a Ruling under section 162 of the EEZ Act unless it has both adequate and certain information on the adverse effects and is satisfied that the adverse effects on the environment or existing interests are likely to be minor or less than minor.

18. The requestor should provide information (for each activity) in sufficient detail for the EPA to be able to assess:
   - whether it has jurisdiction to provide a Ruling and
   - the adverse effects on the environment or existing interests.

19. If the EPA is requested to provide a number of Rulings then the information provided must be able to be relied on as a basis for the assessment of all of the activities that are described. For example, Rulings which will apply to a range of different types of alterations at a number of existing structures must be supported by information which is relevant to those existing structures and the effects on the environment at the location of those structures.

20. The EPA will use section 39 of the EEZ Act as a starting point for considering the adequacy of the information provided in the request. Relevant considerations are that:
   a) There is sufficient detail to enable the EPA to understand the nature of the activity.
   b) There is information describing the current state of the area, and the environment surrounding the area, where it is proposed that the activity will be undertaken.
   c) A reasonable effort has been made to identify the effects of the activity on the environment and existing interests (including cumulative effects and effects that may occur in NZ or in the sea above or beyond the continental shelf beyond the outer limits of the EEZ); and to identify the persons whose existing interests are likely to be adversely affected by activity.
   d) There is information regarding the possible alternative methods for undertaking the activity that would avoid, remedy, or mitigate the effect.
   e) The information provided is in:
      - such detail as corresponds to the scale and significance of the effects that the activity may have on the environment and existing interests and
      - sufficient detail to enable the EPA and persons whose existing interests may be affected to understand the activity’s effect on the environment and existing interests.

21. The EPA may also seek information directly from a person with an existing interest. The EPA may also seek information from other sources.

22. Where the EPA seeks advice from other sources it will inform the requestor prior to seeking the advice and consider whether the requestor could adequately source the required information.
23. The EPA will not consider unsolicited information proffered from third parties in making its decision.

The EPA’s assessment

Relevant considerations

24. The decision path at Appendix A provides guidance on the considerations the EPA will take into account (but is not limited to) prior to making a decision to provide a Ruling. Some of these considerations are described below.

Scope of assessment

25. The EPA will assess whether the adverse ‘effects’ on the ‘environment’ or ‘existing interests’ of an activity are likely to be minor or less than minor.

26. An effect (as defined in section 6 of the EEZ Act) includes:
   a) any positive or adverse effect; and
   b) any temporary or permanent effect; and
   c) any past, present, or future effects; and
   d) any cumulative effect that arises over time or in combination with other effects; and
   e) any potential effect of high probability; and
   f) any potential effect of low probability that has a high potential impact.

a) to d) apply regardless of the scale, intensity, duration, or frequency of the effect.

27. The environment (as defined in section 4 of the EEZ Act) means the natural environment, including ecosystems and their constituent parts and all natural resources, of: New Zealand; the exclusive economic zone; the continental shelf; the waters beyond the exclusive economic zone and above and beyond the continental shelf.

28. An existing interest (as defined in section 4 of the EEZ Act) means the interest a person has in:
   a) any lawfully established existing activity, whether or not authorised by or under any Act or regulations, including rights of access, navigation, and fishing
   b) any activity that may be undertaken under the authority of an existing marine consent granted under section 62
   c) any activity that may be undertaken under the authority of an existing resource consent granted under the Resource Management Act 1991
   d) the settlement of a historical claim under the Treaty of Waitangi Act 1975
   e) the settlement of a contemporary claim under the Treaty of Waitangi as provided for in an Act, including the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992
f) a protected customary right or customary marine title recognised under the Marine and Coastal Area (Takutai Moana) Act 2011

Assessment of jurisdiction to make a Ruling

29. In its assessment of whether to provide a Ruling, will only consider the effects of the activities which would otherwise be restricted by sections 20(1) or (3) of the EEZ Act, and which fall which the scope of the activities described in section 162(3) of the EEZ Act.

Other marine management regimes

30. In considering whether the effects of an activity are minor or less than minor, the EPA will consider the nature and effect of other marine management regimes (defined in section 7 of the EEZ Act). In particular the nature and extent to which the application of another marine management regime may mitigate an effect.

The environment and existing interests

31. The ‘environment’ and ‘existing interests’ that will be considered is the environment and existing interests at the time at which the Ruling is provided, and not the environment or existing interests as they were at the time at which the EEZ Act came into force – 28 June 2013.

32. However, any impacts on the environment and existing interests which have occurred from changes to the “existing activity” will be taken into account in the consideration of the environment and existing interests and may be relevant to the consideration of any cumulative effects.

The EPA’s decision

Decision maker

33. The EPA’s decision will be made by an EPA staff member holding the appropriate delegated authority.

Scope of the decision on a Ruling

34. The EPA will not provide a Ruling that the adverse effects exceed the threshold of “minor or less than minor” (ie that the adverse effects are more than minor).

35. The EPA’s Ruling will only apply to those activities which would otherwise be restricted by section 20(1) or (3) of the EEZ Act.

36. The EPA may decide to provide a Ruling (within the scope of section 162) for any number of activities at any number of the existing structures or pipelines to which section 162(1) applies, and these Rulings can be made in the same decision.

Reasons not to make a Ruling
37. The EPA will not provide a Ruling where:
   - the activity is not restricted by section 20, or is broader than what is restricted by section 20 (the EPA has no jurisdiction to provide a Ruling for the activity); or
   - there is insufficient information available to it to assess:
     - whether it has jurisdiction to provide a Ruling
     - whether the adverse effects of the activity are minor or less than minor.
   - the adverse effects of the activity are more than minor; or
   - there are no adverse effects.

Opportunity to comment on prejudicial information
38. The EPA will provide the requestor with an opportunity to respond to any prejudicial information that the EPA may propose to take into account in its decision. This includes any advice that indicates that the EPA should not provide the Ruling in the form that is requested, or to more narrowly describe the activity than that which has been requested.

Description of the activity to which a Ruling applies
39. A Ruling will identify and describe the activities which are authorised by the Ruling.

40. In general, the EPA will not provide a Ruling for a broader range of activities than that which has been requested. For example, if the EPA receives a request for a Ruling to apply with respect to just one existing structure, it will not consider whether the Ruling could also apply to another existing structure unless it is requested to do so.

41. The EPA cannot impose conditions to ensure that an activity is undertaken in a particular manner.

42. The EPA may limit the scope of the activities to which a Ruling applies. For example, it may limit the:
   - particular structures or pipelines to which it applies
   - period of time during which the activity may be undertaken
   - manner in which the activity is undertaken
   - range of activities.

43. If the assessment of adverse effects takes into account measures that the requestor intends to take to avoid, remedy or mitigate adverse effects, then these mitigation measures will form a part of the description of the activity for which a Ruling is provided.
Final decision and reasons

44. The EPA will provide its final decision in writing to the requestor.

45. The EPA will provide written reasons for its decision on whether to provide a Ruling, including reasons for a decision to provide a Ruling for a more narrowly described activity than that which has been requested.

46. The decision will record the information on which the EPA has based its decision.

47. The decision with reasons will be made public on the EPA’s website.

Cost recovery

48. The requestor is liable to pay the costs of the EPA exercising its function.

Timeframe

49. A Ruling will be made as soon as reasonably practicable following the receipt of a request.

50. The timing will be subject to the requirement for any further information, and depend on the nature of the activity and the complexity of consideration.
Appendix A: Rulings decision path
Rulings decision path

Does the EPA have the jurisdiction to consider providing a Ruling for the activity described?

1. Does the activity described fall within the scope of one of the activities restricted by s 20 of the EEZ Act?
   - Yes
   - No

2. Is the activity described in the request associated with mining for petroleum authorised by:
   a) a petroleum mining permit granted under s 25 of the Crown minerals Act 1991 before 28 June 2013, or
   b) an existing privilege preserved under clause 12 of Schedule 1 of the Crown Minerals Act 1991?
   - Yes
   - No

3. Does the activity described fall within the scope of the broad categories of activities described in s 162(3)?
   - Yes
   - No

4. If the activity falls within s 162(3)(b) of the EEZ Act, is the activity described in terms of the change in character, intensity, or scale between existing and proposed activity?
   - Yes
   - No

5. Does the activity described have adverse effects?
   - Yes
   - No

   Continue to assessment of adverse effects on the environment

EPA does not have jurisdiction to consider request
Assessment of adverse effects on the environment

1. Does the EPA have all relevant information for the assessment of the effects of the activity on the environment?
   - Yes: Proceed to the next step.
   - No: EPA does not have jurisdiction to consider request.

2. Is there uncertainty or inadequacy in the information available (from any source) relating to the adverse effects on the environment?
   - Yes: EPA does not have jurisdiction to consider request.
   - No: Proceed to the next step.

3. Does the uncertainty or inadequacy impact on the EPA's ability to conclude whether the adverse effects on the environment of the activity are likely to be minor or less than minor?
   - Yes: EPA does not have jurisdiction to consider request.
   - No: Proceed to the next step.

4. Are the adverse effects on the environment of the activity likely to be minor or less than minor?
   - Yes: Proceed to assessment of adverse effects on existing interests.
   - No: EPA does not have jurisdiction to consider request.
Assessment of adverse effects on existing interests

Does the EPA have all relevant information for the assessment of the effects of the activity on existing interests?  

No: EPA does not have jurisdiction to consider request

Yes

Is there uncertainty or inadequacy in the information available (from any source) relating to the adverse effects on existing interests?  

No: EPA does not have jurisdiction to consider request

Yes

Does the uncertainty or inadequacy impact on the EPA's ability to conclude whether the adverse effects on existing interests of the activity are likely to be minor or less than minor?  

No: Are the adverse effects on existing interests of the activity likely to be minor or less than minor?  

No: EPA does not have jurisdiction to consider request

Yes: The EPA may provide the Ruling

Yes