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Resources Policy Group
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Draft Minerals Programmes - Submissions from ECO

1.0 INTRODUCTION

The Environment and Conservation Organisations of NZ (ECO) is the national alliance of 55 groups with a concern for the environment. ECO has been involved in issues of resource management and land-use policy since its formation 40 years ago. We have actively engaged in minerals and mining law and policy and resource, environment and conservation management, policy and law.

This submission has been prepared by members of ECO Executive and is in line with ECO Policy.

ECO wishes to be heard in support of this submission. Please contact both the ECO office at eco@eco.org.nz on 04-385-7545 and Cath Wallace on 021-891-994 and Cath.Wallace@paradise.net.nz.

1.1 ECO has found making this submission difficult because it is about minerals programmes that relate to law that is subject to an Amendment Bill (Crown Minerals (Permitting and Crown Land) Amendment Bill which in turn itself is subject to a Supplementary Order Paper and a Select Committee inquiry. This makes it very difficult to make coherent and relevant submissions and we recommend that in future the law be settled before consultation is embarked on in relation to a Minerals Programme.

1.2 In the light of this difficulty and to avoid repetition, we ask that our submissions on the Bill be taken into account in relation to these submissions on the Minerals Programmes.

1.3 Many of the points made in these submissions relate to both the Petroleum and non-Petroleum Minerals Programme Drafts, but some of course are different. ECO has used the numbering from the non-Petroleum Draft Minerals Programme but asks that the points be considered in relation to both Draft Minerals Programmes, except where they are specific to one or the other (eg in relation to Tier 1 and 2, access agreements etc).

1.4 ECO asked for but was not given in a timely fashion a copy of the Draft Minerals Programmes in WORD to aid cutting and pasting for making submissions. We urge MED and NZP&M to always provide Word versions of papers that are open to submission, since PDF documents are much more clumsy for submitters to use in submissions.

2 The October 2012 Draft Minerals Programme – Minerals Excluding Petroleum

In this section ECO uses for reference the numbering in the Draft Minerals Programme for non-Petroleum minerals.

1.2 Purpose Statement in the Crown Minerals Act &
1.3 Interpretation of the Purpose Statement in the Bill & SOP

The interpretation of the Purpose statement of the Bill is in ECO's view inappropriately "one-dimensional" for good public policy which should consider a range of criteria for policy.

We urge that the Minister and Ministry reconsider the interpretation to take a wider view of wealth and benefit in New Zealand and to adopt a more considered view of what efficiency, effective and fairness mean.

Some aspects of the interpretation are also circular and are inconsistent with established understandings of terms such as "efficiency".

(1) Section 1A of the Act says:
—The purpose of this Act is to promote prospecting for, exploration for, and mining of Crown-owned minerals for the benefit of New Zealand, by providing for:
(a) the efficient allocation of rights to prospect for, explore for and mine Crown-owned minerals; and

(b) the effective management and regulation of the exercise of those rights; and

(c) a fair financial return to the Crown for its minerals".

1.3.3 & 4 ECO has already submitted on the issue of the inappropriateness of a regulatory agency also having a role to promote the same industry. This sets up an immediate conflict of interest.

Recommendation for the Chapeau in (1) re the discussion in 1.3.3

We suggest “manage” or “regulate” as substitute word for “promote” in the chapeau of (1). Good management will in itself encourage investment, but it will also pay attention to other aspects of minerals activity including safeguarding the rights and interests of land owners and occupiers and society.

1.3.5 Policy and Investment stability

Public policy should always strive to avoid capricious changes in policy and law, but certainty of investment should not be treated as a right that trumps social and other considerations. It is not a free good. In a world which itself is changing in fundamental ways – with changing and interacting biophysical systems and economic systems, and developing knowledge and social values, it is not reasonable to promise full stability to investors. This promise of stability seems to be a theme in both the Bill and the Programme. We entirely agree that policy coherence and durability a valuable, but it is also true that policy and practice needs to evolve and change with conditions and knowledge.

1.3.6 Interpretation of “for the benefit of New Zealand”

We suggest that the excessive emphasis in this Draft Programme on benefits being narrowly defined as from maximising extraction of minerals and economic growth, fails to acknowledge other important values. As such the policy and law will not have a durable social licence – so it will be changed in future leading to the very instability of policy and investment that the Draft Programme seeks to avoid.

Minerals activity will be on places that matter to people, with impacts that people care about. We acknowledge that there are other consent processes, but the determination of the government to elevate the pursuit of “economic wealth” over protection of natural and social capital and the ecosystem services, social connectedness and cultural values will – and already has – led to huge opposition to minerals activity. The message is that miners are welcome and the New Zealand populace, communities and places they care about can go jump. The social licence for minerals activity will be lost, and in places such as the Coromandel is already gone.

The one-sided nature of the policy will lead to direct action, conflict and anger in otherwise peacable societies in New Zealand. The Minister and NZ P&M is already perceived as having been largely captured by the mining industry and this will simply make that official. NZ P&M will lose reputation further and will eventually be disestablished as having disregarded the social and environmental interest and well being.

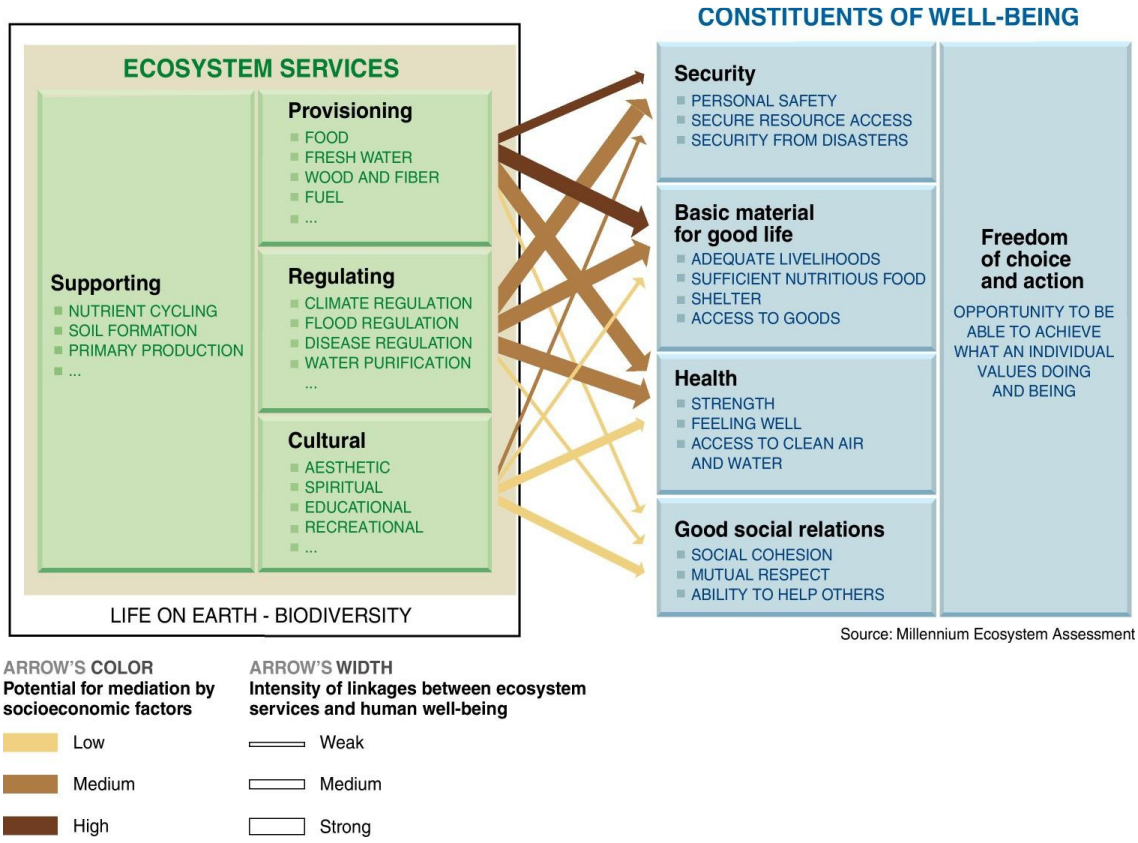
We draw your attention to how out of step with the rest of the world is the government’s extractivist economic growth model, and its narrowest of narrow conceptions of wealth and well being. There is no argument or evidence offered in the Draft Minerals Programmes to support the assertions and assumptions that underpin the interpretation offered of the Crown Minerals Bill Purpose. We are not aware of any such evidence that supports the interpretation made. We are aware that there is a large amount of international literature and evidence that would contest these assumptions and assertions (Common and Stagl, 2005; Watson and Zakri, 2005) As such, we suggest that the Courts would not support the interpretation offered by the Minister and there will be thus greater rather than lesser instability of the policy in the Minerals Programmes.

The idea of maintaining the biophysical systems and services and resources that they supply is now extremely well established and are mainstream thinking in the rest of the world (Fluerbaey,2009; Stigliz, Sen and Fitoussi; Watson and Zakri, 2005; TEEB,). The discussion of the Minerals Programmes and the CMA Bill both ignore these issues and

i) behave as though "for the benefit of New Zealand" means only very narrowly conceived economic benefit, and
ii) that the only legitimate goal of public policy is economic growth, and
iii) that the only source of such growth is from maximising the economic recovery of mineral resources.

We contest each of these assumptions and we urge a rethink and reference to modern economic thinking as well as broader conceptions of benefit.

The Millennium Ecosystem Assessment diagramme below provides a quick means of visualising the services and benefits that people get from ecosystems:

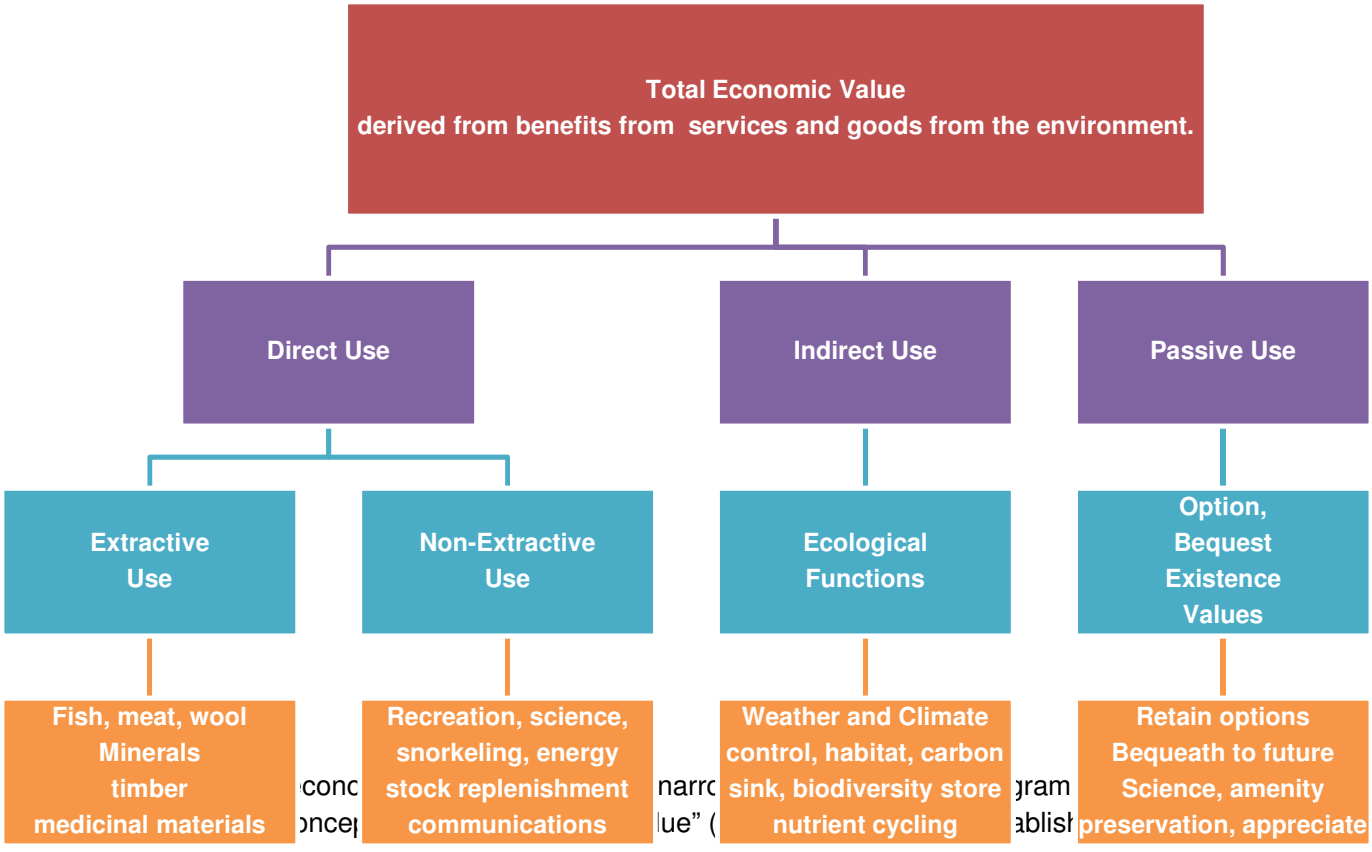


The diagramme above shows how much is being omitted from the Minerals Programme consideration. Looking at the left hand side, extraction of minerals is just one of the Provisioning services from ecosystems. No other sources are considered in the Draft Programme, which cannot led to efficient or effective minerals management.

Looking at the Constituents of Wellbeing, almost all are omitted, except secure resource access (for miners but greater insecurity for others) and for a few access to goods and livelihoods. Whatever minerals activity provides in gains has to be offset against the disruption to other activities that are affected, the disruption of communities and livelihoods affected and the displacement of other activities and the impacts of the use of inputs to production that might otherwise be used elsewhere. These are the opportunity costs and externalised costs that correct economic analysis should consider, not disregard.

The assertion that increasing New Zealand's economic wealth is the best means of providing benefit to New Zealand, fails to consider what is lost in the process, and that, as Daly and Farley have put it, some growth in economic activity is uneconomic. They mean that the marginal social costs are greater than the marginal social benefits.

There is no argument or evidence offered in the Draft Minerals Programmes to support the assertions and assumptions that underpin the interpretation of the Crown Minerals Bill Purpose. We are not aware of any such evidence that supports the interpretation made. We are aware that there is a large amount of international literature and evidence that would contest these assumptions and assertions (Gliesner, Llwellyn-Folwer and McAlistair 2011, OECD, 2011, Stiglitz, Sen, & Fitoussi, 2009). As such, we suggest that the Courts would not support the interpretation offered by the Minister and there will be thus greater rather than lesser instability of the policy in the Minerals Programmes.



from environmental economics (Pearce & Turner, 1990; Common and Stagl 2005) The point of putting this forward is so that the Minister and the Ministry can appreciate the matters that should, by best economic professional practice, be incorporated into considerations of benefits and so that the notion of the environment providing a range of services that go beyond the benefits from extraction of resources is more readily grasped.

The above diagram shows the variety of different sources of economic value derived from the environment. The environment and the biophysical processes that generate the goods and services are styled in the international literature as "natural capital".

Good public policy should take account of all of these forms of derived value. It should also recognise that natural capital is essential to human survival and well being, can be damaged by extraction and is largely irreplaceable, so it is not sufficient to treat the conversion of natural capital into financial capital as automatically ok.

It is not adequate to have a government promoting extraction of minerals but not considering the impacts on other sources of value from the environment or how natural capital such as the environment in which minerals activity occurs is affected. The term "benefit to New Zealand" must take all the effects on the benefits from the environment and the natural capital into account, and consider economic, cultural and social impacts (and more such as impact on New Zealand's reputation).

1.3.7 Are these matters covered elsewhere?

The statement in 1.3.7 that "other components of "the benefit of New Zealand" are covered in other legislation" is only partly true. If the government in the form of NZP&M is pushing and promoting minerals activity, then this loads extra costs onto everyone else to make the case for the other values that are potentially put at risk from such expanded activity. Costs under the RMA and especially under the EEZ&CS Act processes to local and regional government and to communities and individuals can be high and may also make people despair of and distrust the government and the regulator as hopelessly and deliberately biased. This is not a recipe for good public policy, for benefit to New Zealand or for confidence in the government. We urge a reconsideration of these interpretations.

1.3.8 Interpretation of "efficient allocation of rights" to prospect, explore and mine.

This set of interpretations is somewhat circular and fails to capture the notion of economic efficiency, either in static terms or in dynamic terms. The static efficiency condition is that marginal social costs must equal marginal social benefits. This allows a consideration of the gains and costs of the activity.

The dynamic test of efficiency brings in efficient allocation over time and considers the rate of extraction (and impacts and losses from those impacts). This definition fails to consider such standard economic considerations.

Efficiency in the interpretation provided fails to consider how this all stacks up for those other than the minerals activity applicants and consent holders and the regulators. There is no consideration of the inefficiencies for the public, the lack of public transparency about applications made or any other that that applicants are kept informed about processes.

Equity should also be a consideration in public policy (Australian Treasury, 2005; Brown-Weiss, 1989) and we note that there is no hint of consideration in this Purpose interpretation

of what the appropriate allocation of minerals is over time or within any time period. Intergenerational efficiency and equity are both ignored.

Most particularly, the well-established principle of strong sustainability is not discussed. This is the idea that while it is fine to derive benefit from natural capital, such capital must be maintained intact for the future. In relation to minerals the impacts of extraction must be considered and the rate of depletion must match the rate of availability of substitutes.

We oppose the interpretation in 1.3.8 and ask that it be withdrawn and rewritten to conform with modern resource management and environmental economic and ethical thinking and to take account of the need to maintain intact natural capital (see for instance Australian Treasury, 2012

1.4.5 Separation of powers and functions and avoidance of conflicts of objectives and interests – not achieved.

ECO agrees that the goal of avoiding conflicts of objectives and interests and functions of Ministers and agencies is a worthy goal. The Bill and the Draft Minerals Programmes fail to achieve this in two ways:

a) The regulatory function of the Ministry is in immediate conflict with the promotion Purpose of the Bill and this is intensified by the interpretation contained in the draft Minerals Programmes;

b) The Bill in removing the autonomy of the Conservation Minister and handing that to the Energy and Resources Minister and/or the Cabinet and Governor General through the Order in Council process sets up an acute conflict of goals and interests and is in fact a brazen attempt to subjugate conservation to short term extractive benefits.

The logical conclusion and the compelling public case is to correct both sources of conflict. The Bill, Programmes and the Minister and CEO should not be tasked to promote minerals activity but to regulate it. The Minister of Conservation (and other Ministers in charge of land and Acts) should have the sole authority to make decisions within the Conservation or other Acts affected by the Bill and Programme.

1.6 Minerals covered by the non-Petroleum Draft Minerals Programme:

The term "ordinarily".

Throughout the Draft Minerals Programmes there is use of the term "ordinarily". But there is little guidance as to what constitutes ordinary or non-ordinary circumstances or what will then be done and what considerations will bear on decisions. It is undoubtedly helpful to provide an indication of what will ordinarily be done, but more explanation is required to make sense of when and on what basis non-ordinary (extraordinary?) decision making will occur and to what effect.

1.6.3 Uranium and thorium minerals

Given the health and other risks associated with Uranium and thorium, and the difficulties of tracking the use of such material for munitions, ECO recommends that the word "ordinarily" should be deleted from this paragraph to ensure that mining such materials will always be declined.

1.6.6 Stopped legal roads
Apparently this provision to allow without a minerals permit exploration and mining of crown minerals on stopped legal roads that are bounded by land in which privately owned minerals are present is a "fix" to help Solid Energy avoid applying for permits for such areas of stopped road. ECO is very concerned that such a "fix" will create problems of its own that are much more troublesome – particularly to land owners and occupiers – than saving such permits would warrant.

We can think of private land with privately owned minerals which do have such public stopped legal roads in them, in at least one case with access from the sea. There may be areas of coastal land that has stopped legal roads on them too. This provision is an ad hoc "fix" that we believe would allow an exploration or mining company to do whatever they wished on the land in pursuit of minerals (so long as the District Plan permitted) with no protections for the land owner or occupier or the environment. This is of major concern. Aside from fossicking areas, we know of no other land that could be so used for exploration and mining with no permit and thus no controls by the Crown. That is unacceptable. This is an ad hoc "fix" that should be withdrawn on account of what may be unintended consequences that could be dire for the land owners and occupiers.

1.6.7 and 1.6.8 Underground Coal Gasification and Coal Seam Gas
The Draft Minerals Programmes propose to treat these two methods of extraction of methane separately, the first in the non-Petroleum and the second in the Petroleum Minerals Programmes. We reject this as confusing and inconsistent and recommend that both be classified within the non-Petroleum Minerals Programme.

1.7 Tier 1 and 2 permits.
(1) We agree that the most technically and geologically projects – and we would add the most difficult or risky environmentally and for safety and health – are best treated to a more intensive management regime than other projects, so we agree with the sentiments in 1.7.1. We note though, that Tier 1 and 2 projects are not defined in any of those terms. They are instead determined on the basis of the money spent or earned or royalties due. We submit that the determination of Tier 1 and 2 should have several criteria employed including the various technical and geological complexities and the risks to the environment and to health and safety – the latter which we note are now to be referenced in the SOP to the Bill.

In this context, we ask that you reference our submissions to the Bill and the criteria for determination of the Tier classifications. We consider that the use of financial criteria will simply invite strategic behaviour with multiple permit applications for smaller areas in order to come in under the bar. This will increase transactions costs for all and fragment the regulatory effort.

1.8 Gold Fossicking Areas
ECO submits that areas with particular localised high conservation and other high localised recreational or aesthetic values – such as dotterel or other threatened species habitats, should be exempted from any consideration of gold fossicking.

Again, the refusal to consider other aspects of what is valuable does no credit to the Ministry or the Minerals Programme.

We recommend the addition to 1.8 (2) and 1.8 (5) exemptions for areas that have conservation, historic, landscape, or recreational values that would be adversely affected by fossicking.

3 Land available for mineral prospecting, exploration and mining.

3.1.3 ECO understands the logic that the exemption of the requirement for an access agreement to be take out for minerals activity on areas from the common marine and coastal area is founded on the statement that such land is owned in common or is *res nullius* or unowned. The provision though effectively rests ownership in the minerals explorer or miner, and we regard that as intolerable.
In our view the appropriate thing is to require either the Minister of Conservation and/or the Regional Council or a combination of Iwi and hapu to determine access agreements or to set up a citizens jury to decide such matters as an access agreement, if the Crown is not up to it. We do not agree with leaving this area open to minerals activity as though there were no other uses or values to it.

3.2.4 We agree there should be powers under s 62 of the Act to prohibit access to Crown Land. In particular we think that Ecological areas, World Heritage Areas and Marine and other wildlife sanctuaries should automatically be off limits, including existing permits. Termination of existing minerals permits in World Heritage Areas was recommended by the Turner report to the ICMM and IUCN in respect of World Heritage Areas.

3.3 Land Access Provisions

1) The right of the land owner and occupier to veto minerals activity that disturbs the surface of the land is reasonable and should be retained. This should be extended to include any minerals activity with an impact on

a) emissions from the land (eg gas) or
b) on the physical structure of the soil and land,or
c) on water in or on the land.

This recommendation is to capture the effects of gas extraction technologies and other technologies with such impacts.

2) ECO considers that the durability of minerals in the land is such that it is unreasonable to force land owners and occupiers to allow access. As such we oppose the provisions for the OIC requirements for non-petroleum minerals and the compulsory arbitration provisions for the Petroleum minerals. Even if such owners and occupiers refuse access, those minerals will still be there for the future.

3.3.9.
The tests in S 57 of the Act are too weak. "Will not, or is not likely to" is a weak test. We submit that a much better test is **that there be a very low probability and that the harm in the event that it does happen must be low** to permit such activities to be exempt from being classified as minerals activity.

4 Permits – General

4.2 Permits may be granted where there are other permits

Allowing overlapping permits over the same ground beyond minimum impact permits in our view is simply asking for conflict, especially where rights in priority are not established, so there is no starting point for negotiated settlements. We think this is inadequate and it is much better to allow serial access not simultaneous access.

4.5 Rights to Subsequent permits
As noted in our submissions to the bill we oppose automatic rights of exchange of permit types and the freeze on conditions. This should be a right in priority, not an absolute right. Moreover there should be an explicit right to change the conditions at milestones, including the royalty conditions.

4.13 Registers of Permits
ECO urges the Ministry to keep public registers of applications for permits. The Ministry used to do this and has discontinued that. This lacks transparency and clarity for land owners, occupiers, other potential applicants, communities and other agencies. We reject this retreat from openness of information and urge that applications be made available, even if specific details of spending are with-held in certain circumstances.

5.2 Preliminary Assessments
5.2.(3) should include reference to the minister considering and being satisfied with matters in subclause (2) as well as subclause (1) or the ability of the minister to decline an application if (2) is not be is in doubt.

5.4 Good Industry Practice
The exclusion of environmental, health and safety matters in the consideration as to whether applicants and operators have engaged in good industry practice is objectionable.
We recommend the deletion of this exclusion. Such and exclusion is reckless and reinforces the sense that MED and the Minister don't care at all about workers, the environment or the health of New Zealanders. Moreover, this section seems to be inconsistent with 5.6.

5.5(4) We oppose the lax provision that makes it clear that non-compliance with important matters may not stand in the way of an applicant being granted a permit. No applicant should be allowed to have an application granted if there is material non-compliance.

5.5.6 The period for consideration of non-compliance should be at least 30 years, given that permits may last for 35-40 years and be renewed for a similar period. Ten years is too few.

5.6.3(a) is unprecautionary and fails to pay due regard to the concerns of the community and the risks if things do go wrong.

Prospecting Permits
8.1.1.b.i is too permissive. This should be constrained to minimum impact activities and sampling in particular but also non-aerial surveying should be closely constrained or large impacts could occur.

Penalties
All of the penalties need to be overhauled to have maxima that will deter and penalise large operators. The penalties in the Bill are much too low and these should be able to be adjusted every 5 years or so. We urge the Ministry to think in terms of penalties in billions not thousands of dollars.

[Our bibliography has mysteriously disappeared when we removed a footnote. We will send you the repaired version later when we have a chance to go back and find all the references again.]

The Draft Petroleum Programme. We have further comments to follow.