EXECUTIVE COUNCIL

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Responsible Director:	**Director of Mineral Resources**
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Previous papers:	**70-13, 155-15**
List of Documents:	Draft Consultation Document (Not for public release)

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1. Recommendations

Honourable Members are recommended to approve:

- A proposed Fixed Penalty of Level 6 on the Standard Scale (currently £10,000) for certain instances of administrative non-compliance. **(Section 5.4.3)**

2. Additional Budgetary Implications

No immediate implications (see resource implications)

3. Executive Summary

3.1 The current Offshore Minerals Ordinance has limited provisions for the regulation of the environmental impacts of the oil industry. This paper seeks Executive Council approval to launch a public consultation on proposed legislation to cover the existing regulatory gaps. The attached document, which details the proposed legislation will form a basis for consultation and will be made public for a period of 6 weeks. Following consultation, it is envisioned that a further paper will be put to Executive Council summarising stakeholder responses and detailing any consequent changes prior to entering the drafting stage.

3.2 The key aspects of the proposed legislation are:

3.2.1 A statutory requirement for an approved Environment Case for all activities requiring a relevant consent under the Offshore Mineral Ordinance (section 5.3). An Environment Case will comprise an Environmental Impact Assessment (Part 1) and an Environment Plan (Part 2). The Environment Plan will set out the relevant operators' management structures, systems and performance standards to ensure environmental risks are kept to as low as reasonably possible. This will allow the Falkland Islands Government to hold operators legally responsible for ensuring their environmental impacts are kept to a specific and quantified level.

3.2.2 A statutory requirement for an Oil Pollution Emergency Plan (Section 5.5), substituting the current licence requirement for an Oil Spill Contingency Plan and introducing associated duties and criminal offences.

3.2.3 Intervention and enforcement powers (Sections 5.4, 5.6), allowing FIG inspectors to impose certain changes to activities, or stop activities altogether, if the environmental risk so requires it, or to require certain actions to be taken by the operator in the event of an incident. Proposed powers will also grant inspectors access to installations, plant, and documentation. A fixed penalty of £10,000 is proposed for low-level administrative infractions that may not warrant prosecution, whereas more serious offences are liable to a fine without limit upon prosecution.

3.2.4 Implementation of a Polluter Pays regime (Section 5.7) through introduction of application fees, penalty notices for incidents of non-compliance, and extension of the liability scheme for environmental damage currently in force under the Offshore Minerals Ordinance.

4. Background and Links to Islands Plan and Directorate Business Plan

4.1 Executive Council paper 70-13 approved a policy decision to adopt a goal-based environmental regime for the regulation of Oil & Gas activities. Following that decision, work carried out by the Department of Mineral Resources identified a number of legislative gaps and priorities and it was agreed to engage a consultant to develop those gaps into a more detailed policy proposal.

4.2 Paper 155-15 approved the release of a Tender Document for the engagement of suitable consultants to carry out the policy development (Lot 1) and consequent drafting of the new regulations and required amendments to the Offshore Minerals Ordinance (Lot 2). Law firm Pinsent Masons was the successful bidder for both lots and commenced work in early 2016.

4.3 A preliminary round of stakeholder consultation was held in June 2016, whereby the contractor met with the Minerals Portfolio Holders, the Governor, relevant FIG departments, licence operators, and relevant NGOs. A final consultation document was completed and has been reviewed internally by the Department. A presentation on the proposals was also given to the Hydrocarbons Offshore Forum in October.

4.4 Parallel to the above, the Head of Environmental & Safety Policy gave a presentation on the proposed legislation to the Department of Business, Energy and Industrial Strategy (BEIS, previously known as DECC), the environmental regulator for the UK Oil & Gas Industry. This presentation, which was also attended by the FCO, aimed to give BEIS (and ultimately, the Foreign & Commonwealth Office) assurance that legislation being proposed will allow the oil and gas industry to be regulated to a standard equivalent to, or higher than, that of the UK industry. Following the presentation, BEIS were provided with a draft copy of the consultation document for comment. Comments and questions have been addressed by the Department. No material concerns were expressed by BEIS.

4.5 The paper was first put to Mineral Resources Committee in November 2016, whereupon the then Attorney General requested that further clarity be sought on a number of issues, namely: The definition of "The Regulator" (addressed in section 5.1), the inclusion of fixed over variable penalty notices (addressed in section 5.4.4), and provisions for compensation in respect of certain directions issued by FIG (addressed in section 5.6).

4.6 The proposed legislation is fundamental in fulfilling the following Island Plan Objectives:

- Economic Theme (Oil & Gas): *"Agree and implement new legislation to ensure effective regulation"*

- Economic Theme (Oil & Gas): *"Develop clear plans to assist resourcing for regulation"*

- Protecting the Environment Theme: "*Address gaps in FI environmental legislation to ensure fit for purpose for hydrocarbons production"*

5. Options and Reasons for Recommending Relevant Option

5.1 The Regulating Body

5.1.1 The original paper submitted to Mineral Resources Committee included proposals referring to "the Regulator" as the regulating body for the proposed legislation. The Regulator, as it was proposed was defined as the Governor in Executive Council with the ability to delegate certain low-level approvals to the Director of Mineral Resources. It was felt by the Attorney General at the time that having a named Regulator created confusion, as it suggested a distinct executive body or watchdog completely removed from political spheres (much like the UK Health & Safety Executive, for example). As this was not what was being proposed, references to the Regulator have now been removed, and the regulatory hierarchy for the proposed legislation follows that of the existing Minerals Ordinance, i.e. executive power rests with the Governor in Executive Council and the Department of Mineral Resources acts as the regulating administrative body (except where certain decisions may be delegated to the Director of Mineral Resources under the provisions of section 43 of the Interpretation and General Clauses Ordinance 1977).

5.2 Scope of the Proposed Legislation

5.2.1 The legislation proposed in this paper only applies to relevant activities under the Offshore Minerals Ordinance 1994 (as amended). Those activities include: the exploration and exploitation of minerals in controlled waters, the offshore storage of gas, certain pipelines, and offshore accommodation associated with an offshore installation.

5.2.2 The proposed legislation therefore does not apply to possible in-shore transfer operations. That is not to say that certain aspects of the legislation being proposed should not apply to in-shore transfer, but those aspects may well be best applied under marine or even planning legislation; indeed, many of the impacts of such an operation are already addressed under existing requirements (for example, planning EIA requirements and MARPOL).

5.2.3 More specifically, work is currently being carried out by the Mineral Resources, Natural Resources, and Law & Regulation Departments to determine the best way to extend the Oil Pollution Emergency Plan requirements to any inshore crude oil transfer operation. The Maritime Bill as it stands includes provisions for regulations to control such operations, and it is likely that the legislation proposed below will be applied to in-shore transfer by that mechanism.

5.2.4 Equally, the proposed legislation does not apply to oil & gas onshore or near-shore (e.g. TDF) operations. There has been no policy instruction to regulate those activities other than through planning requirements, and in any event, it would be difficult to separate oil & gas related onshore activities in law. Furthermore, it could be considered as unduly discriminatory to regulate oil &

gas onshore activities if there are non-oil & gas activities of equal or greater environmental risk that are not subject to the same level of regulation.

5.3 **Environment Case**

5.3.1 The Environment Case incorporates two separate approvals: Part 1, the Environmental Impact Assessment (EIA); and Part 2, the Environment Plan (EP). The EIA is designed to seek approval in principle that a certain activity is acceptable, and that the potential environmental impacts and risks have been identified and suitably mitigated. This is very much the same as the existing EIA requirements in the Offshore Minerals Ordinance. The EP is the compliance document associated with an EIA, where an operator makes quantifiable commitments related to the activity's environmental risks and allows regulatory action to be taken if those commitments are not met. As a broad analogy, the EIA may be considered as equivalent to outline planning permission, whereby wider public and policy acceptability is sought for a project; and the EP as equivalent to a building permit, which lists the technical detail that must be adhered to within the project.

5.3.2 Under the current Ordinance, an EIA is obligatory for all activities that require a well being drilled. For all other activities that require a relevant consent, an EIA may be required if the environmental risk merits it. Equally, an operator may apply for an exemption to a requirement for an EIA if the activity in question is covered by an previous EIA and the environmental impacts are not likely to be significantly different to or substantially greater than those in the original EIA. It is proposed that this be left unchanged.

5.3.3 However, under the proposed legislation, all activities falling under the Offshore Minerals Ordinance, including those falling under exploration (survey) licences, will require an Environment Plan. This adds a measure of regulatory oversight that the Department does not currently apply, and to ensure that no unnecessary regulatory burden is placed on FIG or industry, it is anticipated that guidance will be published that will allow the EP to be tailored to an activity's environmental risk. For example, an EP for a benthic survey (very low risk activity) may just be a pre-agreed pro-forma and a copy of the contractor's proprietary environmental management system. Conversely, a drilling campaign would require a full EIA followed by a more involved and project-specific EP.

5.3.4 Where an activity is being carried out that may not require an EIA, a scoping report must be submitted by the operator to FIG outlining why the environmental risk is sufficiently low as to not require an EIA. FIG may agree that an EIA is not required, or may request an EIA subject to a screening report; that is to say, an EIA where only certain higher-risk impacts are considered and the lower risks are screened out.

5.3.5 The Environment Plan or Part 2 submission is centred on the concept of Performance Standards as the key to compliance. Where an environmental risk is identified, that risk will be subject to a control measure to ensure that

the risk is kept to a defined level, usually associated with a performance outcome. Performance Standards represent the commitments made by the operator to ensure a given control measure can continuously achieve the relevant performance outcome. For example, there may be an environmental risk associated with discharge of chemical X, and to ensure that risk is minimised, a filter will be used to ensure only a given amount of X is discharged. The filter represents the control measure, and the amount to be discharged the performance outcome. A number of performance standards can then be applied to ensure that filter continuously operates at the desired level, and may include: calibration, maintenance, inspection, and replacement. Performance Standards must be measurable (e.g. inspection every week, replacement every 3 months etc) and adherence must be recorded so that it is clearly auditable. In other words, in addition to limiting environmental impacts, the proposed legislation spreads the onus of compliance throughout the process and shifts the focus away from mere end-point limits.

5.3.6 The EP will have a number of monitoring and reporting obligations associated with it, whereby compliance to performance standards and outcomes will have to be reported on a regular basis, and any events of non-compliance are to be reported immediately.

5.3.7 A full environment case application will be subject to application and annual subsistence fees. These fees will be determined in a charging scheme that takes into account the complexity of a given application and the regulatory effort required to ensure that an Environment Case is being adhered to throughout its life-span. Such a charging regime will be subject to separate consultation and ExCo approval as and when it is formulated.

5.3.8 It is proposed that an approved Environment Case will have a validity of five years, but will have to be reviewed in the event of a material change to the activity or the environmental risk.

5.3.9 As discussed in section 5.2 it is proposed that the Environment Case requirements apply to all activities requiring a relevant consent under the Offshore Minerals Ordinance. This will mean that all activities carried out under production and exploration licences, even those that do not involve drilling, will require a valid Environment Case, albeit one that is subject to scoping / screening decisions and which is commensurate with the specific risk of the activity.

5.4 **Enforcement and Inspection**

5.4.1 Under existing safety legislation, appointed inspectors are granted certain powers to allow them to carry out their duties, such as powers to take samples, obtain relevant documentation, among others. Under the proposed legislation, powers equivalent to these would be granted to inspectors acting in an environmental capacity.

5.4.2 Existing safety legislation also allows for certain orders to be issued to operators in respect of enforcement action, namely: improvement notices, which require certain actions to be taken by a certain date; and prohibition notices, which require certain activities to be altogether stopped until certain measures are taken. As above, the proposed legislation seeks to implement a similar system of enforcement orders for instances of environmental non-compliance.

5.4.3 In addition to the above, the proposed legislation will include a system of Fixed Penalties for instances of non-compliance that are serious enough to merit further regulatory action, but where a full prosecution is not considered appropriate. It is anticipated that this will mainly apply to instances where deliberate action or negligence has not taken place, but where a fine is merited in order to encourage the operator to improve its management systems. A fixed penalty amount of Level 6 on the standard scale (currently £10,000) is proposed.

5.4.4 While the figure may seem surprisingly low compared to the administrative penalties that can be levied under the Fisheries (Conservation and Management) Ordinance 2005 - one third of the relevant Standard Scale fine applicable upon conviction[1] - it is important to note that the penalties seek to achieve different ends under the two different ordinances. The fixed penalty system being proposed in this paper is **not** a means of seeking a compromise to a situation that may have merited a full conviction under the letter of the law. That is: where the offender accepts responsibility and a fine, the Government accepts reduced penalty revenue, and both avoid what may be an onerous conviction process. This is essentially the policy logic behind the administrative penalty regime imposed by the Fisheries (Conservation and Management) Ordinance 2005. However, the fixed penalty system being proposed herein aims to address offences that would not merit prosecution, where neither deliberate action nor negligence may necessarily have taken place, but which are still considered serious enough to penalise. It is, colloquially speaking, a regulatory shot across the operator's bow to encourage it to tighten-up its management systems. In short, while the two pieces of legislation contemplate administrative penalties, they do so with a focus on different levels of infraction, and therefore it is not appropriate to compare them on monetary terms alone.

5.4.5 The figure may further seem excessively low when taking into account the financial resources of the oil industry sector. To provide some context in this regard, it is perhaps worth noting that equivalent penalties levied by the UK Environment Agency (applicable onshore only) under the Regulatory Enforcement and Sanctions Act 2008 is £300 (three hundred) for businesses. Equally, under the UK Offshore Chemicals Regulations 2002, the maximum fine for a summary conviction is of £40,000.

[1] ExCo Paper 101/17, which proposed amendments to the Fisheries (Conservation and Management) Ordinance 2005, proposed that this be increased to one half of the relevant Standard Scale fine.

5.4.6 The figure proposed, which sits in between those two reference figures, therefore recognises not only the relatively low level of infraction, but also aims to provide a meaningful incentive to ensure administrative compliance throughout an operator's management systems without having to resort to prosecution.

5.4.7 The possibility of including variable monetary penalties (VMPs) was suggested by the previous Attorney General as a means of adding flexibility to the punitive measures available to FIG. Such measures are used in onshore environmental regulation in the UK, but not offshore, and are normally used in circumstances where there has been proven deliberate non-compliance. VMPs in this context are a function of a number of factors, most importantly the monetary benefit to the operator as a result of that non-compliance. While this can be easy to calculate in some instances (for example, in illegal fishing, the market value of the illegal catch), if the advantage is one of time it is far more complicated to calculate, particularly when the regulator is relying on the offending party for those figures. Furthermore, there are other factors, such as the extent to which a VMP should act as a deterrent to other operators, which have a qualitative nature to them and are therefore equally resource-intensive to calculate.

5.4.8 As previously mentioned, VMPs exist in the Fisheries Ordinance as a means of attaining a quick resolution to an offence that may have otherwise resulted in a conviction. This is possible because the offences themselves are linked to a certain Standard Scale level fine upon conviction. This is not the case under the current Offshore Minerals Ordinance, which proposes a fine without limit for any conviction in the Magistrate's Court (i.e. non summary conviction). Similarly, it is being proposed that offences under this legislation be liable to a fine without limit.

5.4.9 The potential impact of incidents leading on from serious offences under this legislation, as well as the financial resources of oil operators, mean that the Standard Scale as it currently exists may not be a proportional punitive measure and deterrent for serious offences. VMPs are therefore not proposed under the proposed legislation as a means of retaining the ability to impose fines without limit through prosecution if the nature of the offence merits it.

5.4.10 The high spread costs of oil activities mean that certain enforcement and intervention powers, in particular prohibition orders, carry an associated risk of high costs for operators if a given notice results in prolonged lost revenue.

5.4.11 This is a risk that already exists under powers to issue prohibition orders in safety legislation. That risk is mitigated to a certain extent through FIG's Letter of Understanding with the UK Health & Safety Executive, which secures access to a wide range of specialist expertise and ensures enforcement action is not taken lightly. It therefore follows that the enforcement power provided by the proposed legislation will need to be wielded under a clear and consistent enforcement policy and after drawing on an appropriate level of technical expertise, be it proprietary or contracted.

5.4.12 Ultimately, this is a necessary risk associated with any enforcement regime. The alternative is to rely on operators to prioritise wider environmental risk, which can be speculative and qualitative, over an operator's financial and operational concerns, which are tangible and often immediate.

5.5 Oil Pollution Emergency Plan (OPEP)

5.5.1 Existing licence conditions require operators to submit an Oil Spill Contingency Plan (OSCP) prior to drilling activities. Having this requirement as a licence condition makes it cumbersome to enforce, as it means it has no associated compliance offences other than those associated with breach of licence conditions. It was therefore necessary to make the requirement a statutory one through specific legislation.

5.5.2 The UK has a well-established requirement for Oil Pollution Emergency Plans[2] (OPEPs) under the Oil Pollution Preparedness, Response, and Co-Operation Regulations 1998. These regulations were amended in 2015 to reflect changes brought in by the 2013 EU Offshore Safety Directive, which in turn reflected post-Macondo regulatory best practice. The proposed Falkland Islands legislation largely mirrors the 2015 UK regulations.

5.5.3 Under the proposed legislation, a valid OPEP would be required for offshore installations and pipelines. A valid OPEP may be a single all-encompassing document, or divided into an offshore OPEP (for small oil spills that can be managed using resources available on the installation) and an onshore OPEP that requires shore-based resources and management. While the responsibility for an offshore OPEP can be delegated to the installation owner or operator, the responsibility for the onshore OPEP and co-ordination with the offshore OPEP always falls to the licence operator.

5.5.4 The OPEP will not be subject to full public consultation, but would undergo stakeholder or interested party consultation with previously agreed or appointed parties.

5.5.5 The OPEP will be a necessary pre-requisite in the approval of a Part 2 environment plan and therefore must be considered or approved either prior to submission of part 2, or concurrently. It is also important to stress that while the three documents are closely interlinked, an EIA, an Environment Plan, and an OPEP are all legal requirements in their own right. In other words, approval of an EIA does not pre-suppose acceptance of the other two documents. This puts the onus on operators to ensure that the mitigation measures and consequent residual risk is accurately and realistically portrayed in the initial EIA. It is proposed that an OPEP be valid for five years unless the operation or the relevant environmental risks are subject to material changes.

[2] Oil Spill Contingency Plans and Oil Pollution Emergency Plans are interchangeable terms for the same document.

5.5.6 Proposed OPEP regulations will be prescriptive regarding the contents of such documents, and will require operators to include: relevant major incident and environmental risk assessment; procedures, roles, and responsibilities in the event of a major incident; and risk mitigation and response measures (including an evaluation of their likely effectiveness); among other matters.

5.5.7 Much as is currently the case in the UK, acceptability of the OPEP will be contingent on the operator demonstrating that they have the financial capacity to fund such a plan in the event of a major incident. It is proposed to include requirements making such a demonstration a requirement for an OPEP to be approved. Relevant guidance on this matter will be published by the Department. It is worth noting that under the current Offshore Minerals Ordinance, operators are required to have in place adequate insurance[3] to meet any liability or compensation arising out of environmental damage. That provision is, as the legislation states, aimed at addressing environmental damage, and therefore does not relate to the delivery of the initial mitigation and recovery stages of an OPEP.

5.5.8 It is proposed that an OPEP approval be subject to an application fee dictated by the complexity of the project and pre-agreed through a relevant charging scheme.

5.6 Intervention Powers

5.6.1 The proposed legislation seeks to introduce powers in line with those outlined in the UK Offshore Installations (Emergency Pollution Control) Regulations 2002. The proposed powers would allow the Governor (or a representative thereof) to direct an operator to take certain actions, or to take those actions directly, in order to prevent or reduce pollution or the risk of pollution. Such actions could include moving an offshore installation, taking certain remedial measures and, if the Governor were to take the actions directly, taking control of an installation and, in very extreme circumstances, even taking steps to destroy or sink that installation.

5.6.2 The situations in which such powers could be exercised will be limited to circumstances where an accident causing material damage, or threat of material damage, has occurred or is in imminent danger of occurring, and the accident may cause significant pollution.

5.6.3 Nonetheless, a direction issued under these powers could incur considerable costs for an operator, which may in turn result in a considerable liability for FIG if the direction is later subject to a judicial challenge and found to be wrongfully issued[4].

[3] As a minimum that level must be equivalent to that provided by the Offshore Pollution Liability Association, a oil industry mutual protection fund. That level is currently USD $250m

[4] Where such a direction is found not to be reasonably necessary to prevent or reduce pollution or the risk of pollution, or: where the benefit of the direction is disproportionately less than the expense or damage incurred in taking the relevant action.

5.6.4 For this reason, equivalent UK legislation includes provisions whereby the operator is eligible to seek compensation from the Government in such instances.

5.6.5 Inclusion of equivalent provisions would simplify any such occurrences; indeed, such a pay-out would be preferable to drawn-out and costly civil proceedings.

5.6.6 Legal advice sought on the matter indicates that the Crown Proceedings Act 1947, as it applies to the Falkland Islands, allows for the State (or Government) to be sued for damages if it is found in breach of a statutory duty or common law. In order for such a suit to be brought, it must be shown that the Government acted over and above its powers and that the decision which caused the loss was taken at an operational rather than a policy-making level. This means that if an order or direction taken under enforcement or intervention provisions was found in excess of Government's powers, a claim could be brought against FIG regardless of whether provisions allowing for operator compensation were included in the legislation. In other words, operator compensation provisions do not provide any protection against additional claims for damages. Crucially, nor does the exclusion of said provisions limit an operator's non-statutory compensation rights.

5.6.7 It is possible that the inclusion of such provisions in UK legislation aim to satisfy the terms of Protocol 1, Article 1 of the European Convention on Human Rights (ECHR), which enshrines the right to property. By not affording a right to compensation in legislation, it is possible that a case could be brought against a Government for deprivation of right to property under ECHR. That particular section of ECHR does not apply in the Falkland Islands, and therefore need not be taken into account unless there are policy plans for its future application. However, there are constitutional protections under Section 15 of the Constitution that would be likely to be used to challenge any action by Government.

5.6.8 There is no clear means to limit the Government's potential liability; while exclusion of such provisions may make compensation more complex, Government may still face a liability in respect of claims in tort.

5.6.9 There are practical implications, too: A lack of a framework to obtain compensation may act as a deterrent to potential operators looking to farm-in if they consider it an additional risk. Furthermore, a lack of compensation measures may mean that directions issued during an event are open to lengthy debate at a time when quick action is required. Conversely, a compensation framework may make a regulator more reluctant to issue certain directions or orders if there is a fear that it will open the Government up to immediate liabilities. Clearly there is some mitigation against the latter to be found in a clear and consistent enforcement policy and availability of suitably qualified personnel to advise the Government when issuing such orders, such as is currently the case with FIG's Letter of Understanding with the Health & Safety Executive. This must also be viewed within the industry context, where the situations in which these powers are used are rare; and instances in which

they are proven to be wrongfully issued rarer still. In any event, a capable and fit-for-purpose regulator is key in providing reassurance to taxpayers and operators alike.

5.6.10 It is recommended that such provisions for compensation are included in the legislation as a means of not only providing reassurance to operators (both from wider regulatory fairness perspective and that directions given during an event are proportionate and necessary), but also of ensuring that directions issued by the Government are backed by the necessary evidence and judgement. This, in turn, will limit the wider liability to which FIG may be exposed through civil proceedings and claims in tort and well as statutory compensation.

5.7 **Polluter Pays Regime**

5.7.1 The current Offshore Minerals Ordinance imposes strict liability[5] on operators for damage to the environment, loss of an established use of an ecosystem, damage to third party property, and costs incurred by any necessary response action. This damage to the environment, however, is limited to that caused by petroleum, not other fuel oils or chemicals.

5.7.2 The proposed legislation seeks to extend the focus of those onto prevention as well as remediation by placing an obligation on operators to take necessary steps to prevent environmental damage, and giving FIG suitable powers to issue specific directions. This is in line with the UK Environmental Damage (Prevention and Remediation) Regulations 2015.

5.7.3 Whereas the above regulations have a wide application in the UK, it is proposed that its application be limited to oil and gas activities falling under the Offshore Minerals Ordinance. It is proposed that those activities requiring a production or exploration licence under the Ordinance would be subject to strict liability, whereas contracted parties undertaking other oil and gas activities will need to be shown to have been negligent or at fault to be held liable,

5.7.4 In order to be able to issue a notice on an operator, FIG will be required to establish that there has been environmental damage. The operator is then required to propose measures to investigate and remediate that environmental damage to FIG, who in turn may consult with interested third parties and stakeholders.

5.7.5 In the event of an emergency, or if the operator fails to comply with a notice, FIG shall have powers to take any reasonably necessary action and to recover costs from the operator, including: the cost of the remediation itself, costs incurred in determining who the operator is, establishing required remediation, consulting, and monitoring of the remediation. Such costs would be recoverable as a charge on the responsible operator's premises.

[5] Liability without it being necessary to prove negligence on the operator's part

5.7.6 As with powers of intervention discussed in section 5.6, certain directions could be subject to judicial challenge and generate a liability, particularly if those directions themselves result in further pollution that the operator has to address under the requirements of this legislation. The same arguments apply as those discussed above, and therefore it is recommended that compensation provisions be included in respect of directions issued under a Polluter Pays scheme.

5.7.7 It is proposed that the Polluter Pays regime exclude environmental damage arising out of certain circumstances, namely: war or terrorism, exceptional natural phenomenon, activities to protect against natural disasters, activities to serve defence or international security, and incidents where liability falls within the scope of the International Convention on Civil Liability for Oil Pollution Damage, the International Convention on the Establishment of an International Fund for Compensation of Oil Pollution Damage, or the International Convention on Civil Liability for Bunker Oil Pollution Damage.

6. Resource Implications

6.1 Financial Implications

There are no immediate financial implications arising from the proposals detailed in this paper. There are long-term financial implications associated with possible human resource implications (see section 6.2) but those are contingent on the level of future activity and therefore cannot be quantified at this stage.

As mentioned above, certain approvals will be subject to application fees and subsistence fees, allowing for cost recovery in respect of certain regulatory activities.

6.2 Human Resource Implications

A competent and fit-for-purpose regulator is vital in order to strike a balance between sufficient environmental protection and proportionality of enforcement. This is required to ensure that neither Government nor industry is exposed to undue risks and liabilities. If the industry moves into a production phase there will be a requirement on the Department of Mineral Resources (and other Departments with a regulatory function over the oil & gas industry) to increase relevant technical knowledge and resources. This may be done through a variety of ways, including: training existing staff, contractual arrangements with third party consultants, creating new posts within the department, or a mixture of all the above. There are pros and cons associated with each of those options, and each will be better suited to a specific level of activity. The use of 3rd party consultants as inspectors, for instance, may be financially preferable in low activity levels, where inspections are likely to be rare. Conversely, such arrangements may represent poor value for money if inspections are carried out on a regular basis. There are other factors to consider, such as the need to have locally-based investigators for swift deployment, and the value of an in-house inspection capacity that is not subject to the distraction of contractual and commercial concerns.

As such, decisions on the required human resources to enforce the legislation will need to be pragmatic and based on the likely level of activity and Departments' existing resources. Where capacity allows, training and development of existing staff will be considered a priority by the Department.

The legislation proposed in this paper does not place any immediate human resource implications on FIG. It is further felt that when human resource implications do become clear, the regulatory capacity to enforce the legislation can be tailored to the level of industry activity without placing an undue burden on Government.

6.3 Other Resource Implications

None

7. Legal Implications

7.1 The legal implications are discussed at length above and in the attached consultation document. Ultimately, draft amendments to the Offshore Minerals Ordinance and relevant regulations will be put before Executive Council and Legislative Assembly.

7.2 With regards section 5.4.4, the obvious concern is that penalties are perceived to be low and in a self-regulatory environment penalties are often seen as being disproportionate excessive for fairly minor infractions to encourage strict compliance. The alternative approach is to have relatively modest penalties for minor non-compliance but a more active enforcement regime, as is being proposed here. There are a number of advantages to this not least the likelihood of challenge by the defendant is reduced, and given the comparative size of resources available that may have benefits.

7.3 In respect of the limitation of liability issues the potential benefits are likely to outweigh the costs of litigation so a challenge must be anticipated. In general terms if the state has acted unwisely in respect of the property of another a court will usually try and find a way to assist the aggrieved party. Ultimately it may even look to the constitution to assist in finding an equitable outcome. Therefore an acknowledgement and creation of a statutory mechanism may assist the state in limiting but not excluding risk.

8. Environmental & Sustainability Implications

8.1 The environmental implications are discussed at length above and the attached consultation document.

9. Significant Risks

9.1 The biggest risk is that the legislation proposed does not represent a sufficiently robust deterrent to non-compliance or that it contains significant loopholes. This has been mitigated through considerable research of other regimes, as well through a number of "stress-testing" and quality assurance steps in the drafting programme.

10. Consultation

10.1 It is proposed that a public consultation period be held from late November until mid-February, giving interested parties 6 weeks to comment and respond. This will include a public presentation and engagement with specific stakeholder groups. The consultation document has already been viewed by the UK regulator, BEIS, on behalf of the FCO.

11. Communication

11.1 The consultation will be advertised in local media.

Schedule of suggested deletions to enable publication of paper 05/17

- No suggested deletions for paper itself. Consultation document is not to be released in its current draft form, it will be released (subject to any changes requested by Executive Council) as part of the wider consultation programme planned by the department.