

26 January 2020

Hon Dr Megan Woods
Minister of Energy and Resources
Parliament Buildings
WELLINGTON

By email: m.woods@ministers.govt.nz

Dear Minister

Terms of Mineral Exploration Permits: Block Offers 2019 and 2020

1. Lawyers for Climate Action NZ Incorporated (**LCANZI**) is an incorporated society whose purpose is to ensure more effective action in New Zealand against climate change. Background information about our organisation is available at www.lawyersforclimateaction.nz. We write regarding the Block Offer tender processes for petroleum exploration permits for 2019 and 2020.
2. Decisions regarding the issuance of such permits under s 25 of the Crown Minerals Act 1991 (**CMA**) have the potential to contribute directly to climate change. If permits are granted and petroleum is found, mined and burnt, substantial quantities of carbon dioxide will be released into the atmosphere, increasing global warming and accelerating climate change.
3. The New Zealand Government has acknowledged the requirement to act urgently and decisively to address climate change, including, most recently, by declaring a climate emergency. It has also entered into various international and national commitments to do so, including the UNFCCC, the Paris Agreement and the Climate Change Response Act 2002 (**CCRA**).
4. For New Zealand to meet these commitments it will need to play its part in reducing the production and use of fossil fuels. Yet permit holders have been granted permits under the CMA that do not include any ability for the Crown to moderate fossil fuel extraction from permit areas to address the climate emergency.
5. It therefore appears highly likely that existing permit rights will need to be modified retrospectively to enable New Zealand to meet its climate obligations and for the Crown to meet its obligations generally to the people of Aotearoa New Zealand. If that occurs, we anticipate that permit holders will seek compensation from the Crown for the economic losses caused by modification of their permit rights.

6. The present permit round under the CMA, and any future permit renewals, provide an opportunity for the Crown to avoid accruing further, almost inevitable, liabilities to compensate fossil fuel extractors when extraction must be brought to an end.
7. We In this context we note that:
 - (a) You have a right to withdraw the Block Offer 2019 Invitation for Bids notwithstanding the closing date has passed;¹
 - (b) In response to tenders received, you have a general discretion as to whether to issue a petroleum exploration permit or permits under s 25 of the CMA, and in doing so are not limited to considering only those matters set out in s 29A of the CMA;²
 - (c) You have an express power to decline to issue permits and, subject to limited statutory exceptions, have no obligation to issue a permit to any applicant even where there are suitable bids;³
 - (d) You have the right to impose such conditions on a permit as you think fit,⁴ including conditions limiting the duration of the permit⁵ and authorising future changes to the permit.⁶
8. We also note that, in exercising your functions and powers under the CMA, you have:
 - (a) Under s 4 of the CMA, an express obligation to have regard to the principles of Te Tiriti o Waitangi;
 - (b) In exercising your discretion under s 25 of the CMA, implied obligations to have regard to mandatory relevant considerations including:
 - (i) New Zealand's international obligations under the UNFCCC and Paris Agreement, including New Zealand's Nationally Determined Contribution (**NDC**) to reduce greenhouse gas emissions by 30% below 2005 levels by 2030 (we also note the review of the NDC currently being undertaken by the Climate Change Commission and that the NDC is likely to be amended to require deeper cuts to emissions by 2030, following the acknowledgement by the Government last year that the existing NDC is not consistent with limiting global warming to 1.5C with no or limited overshoot);⁷
 - (ii) Targets and emissions budgets set under the Climate Change Response Act 2002 (**CCRA**), including the 2050 target prescribed in s 5Q of the Act.⁸

¹ Block Offer 2019 Invitation for Bids cl 8.3(b).

² Section 25(1) affirms “the Minister *may* grant ... an exploration permit ...” and that the Minister may make the permit “subject to any conditions that the Minister may impose, as the Minister thinks fit”.

³ Section 25(2), a point also affirmed in the Block Offer 2019 Invitation for Bids at cl 8.3(g).

⁴ Section 25(1).

⁵ Section 35(1)(b)

⁶ Section 36(1)(c) read alongside s 25(1).

⁷ In accordance with the general principle affirmed in *Tavita v Minister of Immigration* [1994] 2 NZLR 257 (CA).

⁸ The Petroleum Programme 2013, in cl 1.4(2)(c), affirms that the CCRA “which sets out how New Zealand’s greenhouse gas emissions are to be managed” is “relevant to prospecting for, exploring for and mining petroleum”. Section 5ZN of the CCRA affirms that emissions reduction targets and emissions budgets are generally permissive considerations.

9. Regarding the express obligation under s 4 of the CMA to have regard to the principles of Te Tiriti, we acknowledge you have a separate duty to act consistently with the Minerals Programme⁹ and that the Petroleum Programme 2013 interprets the obligation to have regard to the principles of Te Tiriti as effectively discharged through pre- and post-permit consultation with iwi and hapu.¹⁰ However, the duty to comply with the Minerals Programme is subject to other provisions of the CMA including s 4,¹¹ and it is well-established that the principles of Te Tiriti require far more than consultation. Under Article II of Te Tiriti, iwi and hapu were guaranteed tino rangatiratanga in respect of their taonga. The appellate courts have affirmed the principles of Te Tiriti include an obligation on the Crown actively to protect the ability of iwi and hapu to exercise these rights of tino rangatiratanga.¹² This and other relevant principles must also be taken into account under s 4 of the CMA regardless of what is set out in the Petroleum Programme.
10. Decisions you make on these issues must also give effect to fundamental rights and freedoms at common law, under customary law and under the New Zealand Bill of Rights Act 1990 (**NZBORA**). The rights implicated by climate change include the right to life and the rights of ethnic minorities including Māori.
11. For these reasons LCANZI considers that no permits should be issued in response to the Block Offer 2019, and that the Block Offer 2020 should not proceed following the completion of consultation. These decisions are both permitted under the CMA and are the only rational exercise of the power conferred by s 25 of the Act when proper regard is had to the existential threat to ecosystems and human populations posed by global warming and climate change.
12. In the event you are not minded to decline to issue or renew permits, LCANZI requests that you confirm that:
 - (a) in determining the extent and duration of any permit issued or renewed, you will have specific regard to the matters set out above; and in particular
 - (b) you will impose conditions when issuing or renewing permits that will allow the Crown to reduce the amount of fossil fuels being extracted in New Zealand if this is deemed necessary to address the threats posed by climate change and/or to meet New Zealand's climate obligations under international or domestic law without triggering any obligation or potential obligation to compensate permit holders.
13. Separately, LCANZI also respectfully requests, under the Official Information Act 1982, copies of all advice, research, and modelling procured or considered by MBIE or you in connection with the 2019 and 2020 Block Offers that addresses the estimated costs that would be associated with shortening or withdrawing petroleum exploration permits granted under the CMA. This request extends to information held by the Treasury and the Ministry for the Environment. We have copied the Minister of Finance, the Minister for the Environment and the Minister for Climate Change Issues in anticipation that you will consult with these Ministers on your response.
14. We look forward to hearing from you.

⁹ Section 22(1)

¹⁰ Petroleum Programme 2013, cl 2.1(2).

¹¹ Section 22(2)

¹² The foundational cases are well known, but for more recent examples see *Ngāi Tai ki Tāmaki Tribal Trust v Minister of Conservation* [2018] NZSC 122, [2019] 1 NZLR 368 and *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2020] NZCA 86.

Yours faithfully

A handwritten signature in black ink, appearing to read 'Jenny Cooper'.

Jenny Cooper QC
President
Lawyers for Climate Action NZ Inc.

cc:

Hon Grant Robertson
Minister of Finance

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Hon David Parker
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