GOVERNMENT OF
WESTERN AUSTRALIA

Financial Assurance

Position Paper
29 July 2020

Implementation of the Government's response to the Independent Scientific Panel Inquiry into Hydraulic Fracture Stimulation in Western Australia

Contents

INTRODUCTION

In September 2017, the Western Australian Government (the Government) announced an Independent Scientific Panel Inquiry into Hydraulic Fracture Stimulation in Western Australia (the Inquiry). The Inquiry handed its final report (the Report) to the Government in September 2018. The Report contains 91 findings and 44 recommendations. The Government has accepted in-principle all recommendations resulting from the Inquiry.

Many submissions to the Inquiry expressed concerns over the potential risk for the State and subsequently the community to inherit financial liabilities and costs associated with remediating environmental and health impacts that may arise over the life of an unconventional oil or gas project, rather than costs befalling operators or titleholders.

The Report found that current financial assurance measures were ineffective and did not offer adequate protection to mitigate potential financial risks posed by hydraulic fracture stimulation activities. This finding culminated in Recommendation 39.

PURPOSE

In July 2019, the Government released an Implementation Plan in the form of 20 consolidated Actions detailing how and when the Inquiry's recommendations and subsequent Government policy decisions will be implemented.

This paper addresses Action 19 of the Implementation Plan, which outlines the Government's response to Recommendation 39 of the Report.

Action 19: *The Government will implement financial assurances to adequately protect the State from potential liabilities associated with hydraulic fracture stimulation occurring in Western Australia.*

Recommendation 39: *The Government should require appropriate financial assurances or insurances to cover potential environmental liabilities, as well as contributions to a fund to cover liabilities defaulted by other unconventional oil and gas petroleum operations associated with hydraulic fracture stimulation in Western Australia.*

The purpose of this paper is to:

- outline currently accessible financial assurance instruments that apply to petroleum activities in Western Australia (WA) under existing petroleum and environmental legislation;
- identify elements of the Commonwealth's existing financial assurance framework for implementation into the WA petroleum regime; and
- identify proposed amendments to broaden existing financial assurance mechanisms and options under the *Petroleum and Geothermal Energy Resources Act 1967* (PGERA).

Further detail regarding the specific legislative amendments will be provided in the Bill, which will be released for public comment later this year.

SCOPE

Financial assurance can take many forms, however in the context of regulating the petroleum industry, financial assurance can be taken to mean that adequate funding is available to address the key environmental issues throughout all phases of a petroleum development, including:

- **operational** risks of discharged petroleum to the environment;
- **decommissioning** of installed/operated infrastructure and site rehabilitation; and
- **long-term** post-relinquishment obligations, including abandoned well/s.

In addressing some of the Implementation Plan actions it is neither practical nor logical to restrict the amendments in this way, given the broader considerations of the State's petroleum regime. Therefore the financial assurance amendments are proposed to apply across all onshore petroleum activities regulated in WA.

CURRENT PETROLEUM FINANCIAL ASSURANCE REGIME IN WA

Petroleum and Geothermal Energy Resources Act 1967

The onshore extraction and development of petroleum resources in WA is primarily administered in accordance with a regulatory regime provided by the PGERA and subsidiary legislation. This regime requires insurance to be held for operational risks by active titleholders, however does not ensure financial assurance coverage of decommissioning or long-term risks.

Operational Risk

Currently, financial assurance for PGERA petroleum activities in WA is regulated via an insurance system. In accordance with s.91A of the PGERA, a titleholder must maintain, as directed by the Minister for Mines and Petroleum from time to time, insurance against expenses or liabilities arising in connection with petroleum activities, including in respect to clean-up or other remedying of the effects of the escape of petroleum. This legislative requirement does not differentiate between petroleum activities involving hydraulic fracture stimulation and those that do not.

The precise terms of a contract of insurance will vary on a case-by-case basis. Therefore the extent to which an insurance policy mitigates the risks of liabilities arising from petroleum activities is dependent upon a variety of factors – notably the scale of coverage and clauses applicable to the policy. Currently, the Government does not mandate the type and level of insurance coverage to be undertaken, nor do titleholders provide the Government with detailed particulars of the terms and conditions of their insurance policies.

However, as the most significant expense or liability likely to necessitate reliance on financial assurance measures is related to the escape of petroleum during a well activity, titleholders are required under Schedule 1 of the Petroleum and Geothermal Energy Resources (Resource Management and Administration) Regulations 2015 to provide details of their insurance prior to receiving approval of their well management plan. This is typically demonstrated by a certificate of currency listing the sum and class of insurance.

Generally, such insurance cover is maintained for sudden and accidental pollution in respect of the given activity, and broadly covers:

- costs associated with regaining control of a well, for example fighting and extinguishing fire or managing the unexpected release of oil;
- seepage and pollution costs, for example costs associated with containing and cleaning up spills; and
- third party liability (including pollution liability) on a sudden and accidental basis.

The current insurance mechanism manages risk while there is an active titleholder.

Decommissioning and Long-Term Risks

Insurance does not address costs arising from long-term obligations on the title, for instance where a well site is no longer in title or where a transfer of title ownership has occurred and future abandonment of the site eventuates. There are currently no financial assurance measures available to protect the Government from inheriting financial liability when a petroleum titleholder is unable to meet its long-term obligations concerning decommissioning and rehabilitation, or post-closure liability, once the land is transferred back to the State, for instance in a case of abandonment.

Environmental Protection Act 1986 – Ministerial Statements

As per the WA Government's Policy Statement in response to the Independent Scientific Panel Inquiry, "All applications for onshore exploration and production hydraulic fracturing activities will now be referred to the Environmental Protection Authority (EPA) for assessment under the *Environmental Protection Act 1986*".

Financial assurances can be imposed under Part IV of the *Environmental Protection Act 1986* (EP Act) where:

1. A proposal is referred to the EPA;
2. The EPA has determined it will assess the proposal; and
3. Financial assurance is required as an implementation condition (s.86B(1)).

The imposition of a financial assurance condition on a Part IV Ministerial Statement can be done through the procedure for deciding if the proposal may be implemented outlined in s.45 of the *EP Act.*

Part VA of the *EP Act* specifies the process and decision-making considerations for imposing a financial assurance requirement through an implementation condition under Part IV or a condition of authorisations provided under Part V. The decision to impose a financial assurance requirement may be based upon (among other factors) the degree of risk and likelihood of environmental harm arising as a result of the activity; and the environmental record of the responsible person seeking to undertake the proposed activities. Depending on the source of risks for a particular significant proposal, financial assurance imposed under the *EP Act* may not be limited to operational risks.

The financial assurance is usually in the form of a bank guarantee, however the *EP Act* also provides for insurance policies or another form of security specified by the CEO of Department of Water and Environmental Regulation.

Historically, it has been rare for proposed petroleum activities to be assessed by the EPA under the *EP Act.*

CURRENT PETROLEUM FINANCIAL ASSURANCE REGIME IN COMMONWEALTH WATERS

Offshore Petroleum and Greenhouse Gas Storage Act 2006

The Commonwealth's financial assurance framework operates through the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (OPGGSA) and Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations 2009 (Environment Regulations), with the National Offshore Petroleum Safety and Environmental Management Authority (NOPSEMA) as regulator.

Operational Risk

Currently, financial assurance is required throughout the life of an offshore petroleum project. Section 571 of the OPGGSA requires a titleholder to maintain financial assurance sufficient to give the titleholder the capacity to meet costs, expenses and liabilities arising in connection with, or as a result of: the carrying out of a petroleum activity or the doing of any other thing for the purposes of the petroleum activity or complying (or failing to comply) with a requirement under the OPGGSA, or a legislative instrument under the OPGGSA, in relation to the petroleum activity.

The OPGGSA also requires that the form of financial assurance must be acceptable to NOPSEMA and, as outlined under ss.571(4) of the OPGGSA, may include (but is not limited to): insurance; self-insurance; a bond; the deposit of an amount as security with a financial institution; an indemnity or other surety; a letter of credit from a financial institution; or a mortgage.

Further, regulation 5G of the Environment Regulations provides that compliance with the financial assurance requirement must be demonstrated, in a form acceptable to NOPSEMA, as a prior condition to the regulator's acceptance of an environmental plan. NOPSEMA must not accept an environment plan (or proposed revisions) unless it is reasonably satisfied that the titleholder is compliant in a form acceptable to NOPSEMA. Failure to maintain financial assurance is grounds for withdrawal of acceptance of an environment plan and cessation of the petroleum activity. It can also, as a matter of non-compliance with the OPGGSA and regulations, be a ground for cancellation of the title.

Oversight of the financial assurance requirement is supported by the ability for the CEO of NOPSEMA to appoint a NOPSEMA inspector to undertake an inspection of financial assurance where it is deemed warranted.

NOPSEMA's policy and guideline on its administration of the financial assurance requirements is on the NOPSEMA website: https://www.nopsema.gov.au/environmental-management/financial-assurance/.

Decommissioning and Long-Term Risks

While financial assurance mechanisms are in place for the operational phase, these may be insufficient in their current form and application to ensure successful decommissioning and rehabilitation as well as associated long-term and post-closure cost liabilities to be met in all circumstances. There is no express provision enabling government to directly access financial assurance instruments of the titleholder if it becomes necessary to arrange for appropriate actions to be undertaken, should a titleholder fail to meet its requirements.

Furthermore, any financial assurance provided by a titleholder is limited in so far as a titleholder's financial capacity to meet any future decommissioning or long-term requirements is only considered at the time of initial granting or upon transfer of a title. However, where a titleholder fails to decommission appropriately, the Commonwealth government may become liable to coordinate necessary work to satisfy ongoing and residual remediation requirements.

The Commonwealth's Department of Industry, Science, Energy and Resources is currently reviewing the policy, regulatory and legislative frameworks for the removal of property and restoration and remediation of title areas under the OPGGSA.

POOLED FUNDS

The creation of a pooled fund approach was identified in the recommendations as a possible option for longer-term risks. An example of a possible model is in the regime provided by the *WA Mining Rehabilitation Fund Act 2012*. The WA's Mining Rehabilitation Fund (MRF) provides a pooled fund, levied annually according to the environmental disturbance existing on a tenement at the annual reporting date. Levies paid into the MRF are available for rehabilitation where an operator fails to meet their rehabilitation obligations and every other effort has been made to recover the funds from the operator. Interest generated on the fund is available for the administration of the MRF and to undertake rehabilitation works on 'legacy' abandoned mine-sites throughout the State.

Presently no state or territory in Australia has an orphan wells fund, or rehabilitation fund specifically for the petroleum industry. WA is the only state to have a large pooled mining rehabilitation fund.

Currently, onshore abandoned wells in WA pose a low risk and the level of onshore exploration and development activities in WA is relatively low. Therefore it is not anticipated from the current level of activity that future long-term risks will cumulatively justify the establishment of a special purpose fund, nor be able to support a functional fund model.

PROPOSED CHANGES

The Government has identified key provisions within the Commonwealth's existing OPGGSA regulatory framework that suitably align with the WA petroleum regime, for instance:

- Amendments to the OPGGSA, which commenced on 29 November 2013, replaced the previous requirement to maintain insurance. The amendments clarified and confirmed the compulsory nature of the requirement for a petroleum titleholder to maintain sufficient financial assurance to ensure it can deal with extraordinary costs, expenses or liabilities arising in connection with the carrying out of a petroleum activity undertaken under the title, including expenses relating to the clean-up or other remediation of the effects of an escape of petroleum. In addition, the revised section 571 extended the previous narrow concept of insurance to instead include and recognise a variety of forms of financial assurance by which the titleholder may demonstrate compliance, including, but not limited to, self-insurance (as defined), bank guarantees, and indemnities, in addition to traditional insurance products.
- Regulation amendments that required compliance with the revised financial assurance requirement, in an acceptable form, to be demonstrated as a prior condition of acceptance of an environment plan for a petroleum activity, commenced in December 2014. These amendments also provided that a failure to maintain such compliance, in an acceptable form, is grounds for the withdrawal of acceptance of an environment plan for the activity.

The broadening of financial assurance mechanisms and options for titleholders, and the State's ability to investigate, audit and enforce compliance with financial assurance requirements will be included in a Bill amending the PGERA, with subsequent amendments required for the Petroleum and Geothermal Energy Resources (Environment) Regulations 2012. Failure to maintain financial assurance would be grounds for withdrawal of acceptance of an environment plan by the Department of Mines, Industry Regulation and Safety, under delegation from the Minister for Mines and Petroleum.

CONCLUSION

The Western Australian Government is committed to ensuring all petroleum activities, whether utilising conventional or hydraulic fracture stimulation techniques, are conducted in a responsible manner.

The current WA petroleum financial assurance regime has existing insurance arrangements that cover operational risks, consistent with the Commonwealth and other Australian jurisdictions. These requirements will be broadened through proposed amendments to the PGERA, and also supported by financial assurance mechanisms available where petroleum developments are assessed under the *EP Act.*

The proposed amendments will be included in a Bill amending the PGERA with consequential amendments also required to the PGER Environment Regulations prior to commencement. These amendments will ensure that the State is adequately protected from potential liabilities associated with onshore oil and gas activities in Western Australia.

Further detail regarding the specific legislative amendments will be provided in the Bill, which will be released for public comment later this year.

Government of Western Australia
www.hydraulicfracturing.wa.gov.au
info@hydraulicfracturing.wa.gov.au

DMIRSSEPT20_6673