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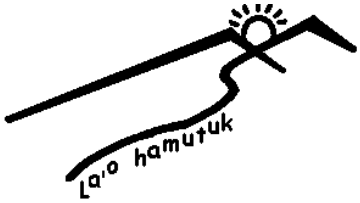

Submission to the

Designated Authority

for the Joint Petroleum Development Area

from

La'o Hamutuk

regarding the

Technical Regulations for the Exploration and Exploitation of Petroleum in the Joint Petroleum Development Area

5 June 2008

Summary of major points

- Despite the very brief time for this consultation, La'o Hamutuk has identified many flaws in these draft regulations, and there are undoubtedly many more. The Consultation should be re-opened by the new NPA before the regulations are put into effect.
- This public consultation is far too short, not publicized, linguistically limited and inappropriately conducted.
- These Technical Regulations are part of an excessively complex regime applying to JPDA Annex F and non Annex F projects, and potentially to Timor-Leste's sovereign territory after the TSDA becomes part of the NPA. Efforts should be made to simplify them and bring them into line with Timor-Leste regulations.
- These Regulations apply under two Petroleum Mining Codes, which creates ambiguity, contradictions and lack of clarity. Definitions and other language should be incorporated in the regulations rather than referring to the Codes.
- Some safeguards in the Australian Petroleum (Submerged Lands) Act from which much of these regulations were derived have been lost.
- At least six types of documents and plans described in the Technical Regulations should be circulated for public comment prior to their approval.
- At least 15 additional categories of documents, plans and reports described in the Technical Regulations should be published or made available for public inspection.
- Waivers and exemptions to operators from these Technical Regulations should only be used in rare, exceptional circumstances, if at all.
- Operators must be legally required to implement approved plans, with effective sanctions for noncompliance with regulations.
- Representatives of other oversight and law enforcement agencies should have oversight of TSDA Inspections.
- Health and safety should be to a "reasonably achievable" standard, not "reasonably practicable."
- Provisions for worker representation, health and safety committee operations, and rights of health and safety representatives contain many loopholes and should be strengthened.
- Regulations regarding health and hazardous materials need to be strengthened.
- Environmental regulations need to be applied more widely, without exception, and include global climate impacts.
- Decommissioning should be planned from the start of a project, with explicit standards and objectives.
- There is no clear legal basis for the fees described in these regulations.

Introduction

La'o Hamutuk thanks the Timor Sea Designated Authority (TSDA) for the opportunity to participate in this important consultation. To our knowledge, this is only the second public consultation the TSDA has held during its five-year history, the first being on the model Production Sharing Contract (PSC) and Petroleum Mining Code (PMC) held jointly with the Government in 2004. As the TSDA will soon cease to exist, this is most likely its final public consultation. Therefore, we will not offer recommendations about how to improve the manifestly inadequate public consultation process, although our ideas in this area can be read in previous La'o Hamutuk submissions.[1]

Given the very limited time for this consultation, we were unable to get input from outside experts or lawyers, and thus could not fully evaluate these draft regulations. We are concerned that the relevant parts of the Government of Timor-Leste may also have limited capacity to evaluate them, especially regarding health, safety and environment.

As this submission shows, the draft Technical Regulations contain many oversights, omissions and errors. If they are implemented as drafted, regulation and supervision of petroleum projects in the Joint Petroleum Development Area (JPDA) will not adequately protect Timor-Leste, Australia, companies, workers or the environment. The changes we suggest should be seen as illustrative, rather than comprehensive for the entire document, which we did not have enough time to review in detail.

We strongly encourage the imminent Timor-Leste National Petroleum Authority (NPA) to re-open consultation and revision on these regulations as soon as it is able to, with a view toward strengthening them to better serve the nation and its people. The Regulations should not be put into effect until an adequate and deliberative consultation and revision process has been completed.

La'o Hamutuk is ready to continue to participate in this consultation, which we hope will also include public hearings and analysis from outside experts, oil companies, labor unions, the Australian government and others. We realize that advice from some of these was probably used by TSDA in the process of drafting the Technical Regulations, but as their input has not been made available to us, we do not know how comprehensive, competent, objective or complete it was. The experiences of other countries prove that left to their own devices, oil companies often do not protect workers and the environment from potentially dangerous activities.

The consultation process

The announcement of this consultation said that it will last two weeks, but in fact it was considerably shorter. The draft Technical Regulations were quietly posted to the TSDA website[2] on Friday night 23 May, and the first newspaper announcement did not happen until five days later, barely one week before the deadline. On the same day, the TSDA emailed a few NGOs about the consultation. The announcement and draft Tech-

[1] See, for example, La'o Hamutuk's April 2007 submission to the MNRMEP on the legislative package on reorganizing Petroleum Activities in Timor-Leste, available at http://www.laohamutuk.org/Oil/PetRegime/Restruc/LHSubmissionPetrolRestructureEn.pdf

[2] The announcement is at http://www.timorseada.org/pdf_files/230508_Media Release.pdf and the draft regulations are at http://www.timorseada.org/pdf_files/Technical Regulations for the JPDA.pdf

nical Regulations were only in English, not in either of Timor-Leste's official languages, nor in Bahasa Indonesia which is understood by most people here.

La'o Hamutuk asked the TSDA if we could submit our comments on Monday 9 June, but this was denied because "The Technical Regulations will need to be submitted to the Joint Commissioners for review and approval by the 10th of June 2008." We appreciate the TSDA's offer to be available for discussions between 5 and 9 June, and are happy to meet with them if any of the information or suggestions in this submission are unclear or require elaboration.

According to the cover page of the TSDA draft Technical Regulations, the draft under discussion was signed off on 30 June 2007, almost a year ago. Since La'o Hamutuk has made detailed submissions to every petroleum-related public consultation in Timor-Leste, we would have appreciated more timely and complete notice to enable us and others to give this consultation the attention it deserves.

Legal consistency

These Regulations will apply to both Annex F and non-Annex F projects, and therefore need to be harmonized with both the 2003 interim Petroleum Mining Code (iPMC) and the 2005 Petroleum Mining Code (PMC).

In the long term, it is desirable to phase out the interim PMC and replace it with the 2005 PMC and new Technical Regulations (TR). This would require consent from the Annex F contractors, especially the Bayu-Undan ones. Since Greater Sunrise development hasn't started, it may be easier to persuade its joint venture partners to comply with the newer regime. Regulatory authorities should negotiate with Annex F contract holders to see if it is possible to harmonize the various regimes, without sacrificing the greater protection and oversight included in more recent ones.

Use of these Regulations under two Codes creates problems. For example, the PMC is much better in transparency and accountability than the iPMC. Also, TR Clause 1(2) says "all definitions are taken to have the same meaning as the definitions in the Petroleum Mining Code or Interim Petroleum Mining Code as applicable." But definitions of "pipeline" and the "block" system of graticulation, among others, are different in the two codes, so there are hidden differences in the TR depending on which project it applies to. Where possible, the Regulations should include language from the PMC to eliminate such confusion, rather than using references with two destinations. In particular, definitions should be spelled out in the Technical Regulations to resolve ambiguities when a term (such as "petroleum" or "good oil field practice") is defined in the PMC but not in the iPMC.

Regulation of JPDA projects will soon merge with regulation for projects in Timor-Leste's sovereign territory, so it may be advisable to make them as consistent as possible with Timor-Leste's 2005 Petroleum Activities Act. The accidents of history should not complicate Timor-Leste's regulatory regime any more than absolutely necessary.

We expect that "Designated Authority" will be replaced by "NPA" throughout the TR early next month. Since the NPA will also be responsible for regulating petroleum activities in Timor-Leste's sovereign territory, will these or similar regulations also apply to such projects, or will another set of Technical Regulations be developed? In any event, regulations for the sovereign area will require additional provisions to encompass on- and near-shore activities, with greater environmental risks.

Given the overlapping and contradictory regimes, these Technical Regulations should explicitly incorporate some basic principles and requirements, especially in areas of transparency, accountability, oversight, and checks and balances.

Many of these Technical Regulations appear to have been adapted from the Australian Petroleum (Submerged Lands) Act (1967) as amended (PSLA).[3] We have not had time to do a section-by-section comparison, but the Australian law appears to give better protection of health and safety than these proposed TSDA regulations.

The TR also makes a number of references to (presumably) other Australian laws, such as in the definition of "controlled substance" in Clause 4, which needs to be more specific. In this case, what happens if Timor-Leste decides to control a substance which is allowed in Australia?

Transparency and public information

This submission identifies many documents and reports which should be available to the public. In order to simplify and facilitate transparency, we are not suggesting a Public Register or Document Library, as La'o Hamutuk did in our submissions on the Petroleum Act[4] and Petroleum Fund Act.[5] We are also not suggesting translation into languages other than English, although this of course would be desirable, especially for more important documents. Timely publication to an accessible web site would suffice, at least until Timor-Leste's NPA has a more accessible way of disseminating information to the public.

The Technical Regulations describe numerous Plans with processes for submission, approval, revision, termination, and/or withdrawal. La'o Hamutuk recommends that most of these be made available to the public, and that the more important ones be presented for public comment prior to their approval by the Designated Authority.

The following documents, at minimum, should be published when they are submitted for approval, with public comment considered before they are approved or modified by the regulatory authority, and notice given in a timely manner. The approved version, as well as all subsequent revisions, terminations or withdrawals should also be published:

- Applications for and waivers and exemptions granted under Clauses 1(3) - 1(8) or Clause 112, together with the reasons given by the Operator and the DA for the waiver.
- Environmental Impact Assessments (Clause 118 and following) when submitted for acceptance by the DA. The public comment period could run simultaneous with the 60-day period for comment by Contracting States (Clause 124). For EIAs which relate to projects that could have significant impacts on land or in littoral areas, public hearings should be held in the potentially affected areas. This could be specified in a

[3] Available, with revisions incorporated, at http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/0/A0C37474F76FD685CA2572BF001B085A/$file/PetrolSubmerLand1967_WD02.pdf

[4] La'o Hamutuk submission on the Petroleum Act is available from www.laohamutuk.org/Oil/PetRegime/04submission.html#LHSubmission

[5] Three La'o Hamutuk submissions on the Petroleum Fund Act are available from www.laohamutuk.org/Oil/PetFund/Act/05FundActConsult.htm

new clause after Clause 124. Clause 124(3) should say "shall" instead of "may" and should specify that "interested parties" include the public, civil society organizations, and local community residents.

- Submitted Environmental Management Plans (Clause 129), with public comment during the 30 days prior to their approval or rejection (Clause 130) by the DA. The DA's action in response to the plan should also be published, as should any revisions (Clauses 137-139) and withdrawals of acceptance (Clause 143).
- Development Plans should be published when they are submitted (Clause 238), with public comment received and considered by the Joint Commission before it approves or rejects a plan (Clause 239). Accepted Development Plans should also be published, as should any amendments, variations, or withdrawals thereto.
- Survey Safety Management Plans described in Clauses 176 and afterwards should be published when they are submitted (Clause 183), with public comment prior to their acceptance (Clause 184). Revisions and withdrawals should also be published.
- Well Operations Management Plans should be published when they are submitted (Clause 221), with public comment prior to their acceptance (Clause 223). Variations, terminations and withdrawals should also be published.

The following additional documents, at minimum, should be published when they are approved, and any revisions, terminations or withdrawals should also be published:

- Division 2B (Clauses 10-16) describes a number of reports and should clearly indicate which of these will be available for public inspection, to auditors, to Inspectors or other investigators.
- Reports of inspectors which require an Operator to take action to correct a problem (Clause 45, especially 45(2)(b)) and the Operator's response.
- Safety Cases and related reports described in Division 5 (Clause 91(1)) should be published to enable independent oversight of the Operator's and DA's assessments and actions to ensure worker safety. In addition, exceptions granted under Clauses 101 and 112, and revisions under Subdivision 5C should be published, together with the reasons they were granted. Other reports mentioned in Clause 91 should also be published.
- Accidents and Dangerous Occurrences reports required under 114(2) and 115(3) should be open to public inspection.
- Written reports of reportable and recordable incidents, as required under Clauses 11(2)(k), 146, 147 and 149, should be made available to the public. Clause 11(2)(k) should refer to Clauses 145 and 146 to specify how a drilling incident report is to be done.
- Other records described in Clauses 148 and 149 should be made available to the public upon request.
- Diving Safety Management Systems referred to in Subdivision 7(A) should be published, and the registers (Clause 156) should be available for public inspection.
- Approvals to Drill granted under Clauses 198 and 201 should be announced, with summary details published.

- Decommissioning Plans (Clause 250) and Consents to Decommission (Clause 281) should be published when granted or rejected.
- Accepted Pipeline Management Plans (Clause 256) should be published, as well as all revisions, modifications or withdrawals of acceptance.
- Petroleum Recovery applications (Clause 271(1)(e)) should be required to specify P50 and P90 estimates of the remaining crude oil, condensate, and gas in the reserve. This information should be published.
- Consents to construct (Clause 274) and to use (Clause 275) Facilities should be published when they are granted.
- Consents to recover petroleum (Clause 276 and following) should be published, as well as any recycling or injection according to Clause 280.
- All payments by companies to the DA, RDTL government or Petroleum Fund should be reported publicly, consistent with the Government's commitment to EITI.
- Monthly totals from the reports of shipments of petroleum (Clause 286) should be published for each contract area. (The Australian Stock Exchange already require publication on a quarterly basis for projects in which Australian Companies are involved, and the TSDA currently publishes monthly dollar receipts, although shipment volumes are not yet published.)

Compliance

Waivers and exemptions described in Clauses 1(3) and 112 undermine the overall objectives of the Technical Regulations, and should be used very sparingly if at all. The sloppiness with which violations of the rule of law were incorporated is exemplified by Clause 246(1)(a), where "and" instead of "or" requires the Operator to have a waiver of the requirement for a Development Plan before they can recover petroleum.

The Technical Regulations require numerous plans, with procedures for application, acceptance, modification and withdrawal. However, in most cases, there is no requirement that an Operator follow the plan nor any penalty if the activity is not carried out according to the plan. For example, an Environment Management Plan or Survey Safety Management Plan can be withdrawn for violation of the PMC or a direction to the operator (Clauses 143(2) and 191(1)) or if the Operator refuses to revise the plan, but there's no sanction for failing to follow it (Clause 127(1)) or for continuing the activity without a plan (Clause 126(1)).

These Regulations do not describe any penalties or sanctions to be imposed on Operators who willfully or negligently violate these Regulations or their Plans, or commit other malfeasance, other than Note 2 in Form 2, referring to Clause 37(3). This is a major oversight – regulations are pointless if they are not enforced. Although the DA has the authority to deny approval of various activities and plans, the regulations do not envision any sanctions other than withdrawing approval. If a person, company or Operator commits an offense they should be held accountable, and with the unresolved sovereignty over the JPDA (on all issues except petroleum development), it is the DA's responsibility to assess and enforce the penalty. For companies, the penalties should be severe enough to compel compliance with the law, rather than being ignored as a cost of

doing business. Where violations are intentional or result from negligence or recklessness, the penalty should be appropriately increased.

Clause 33 regarding inspectors should explicitly say that DA inspectors can be accompanied by experts or personnel from the offices of the Prosecutor-General, the Provedor, the Inspector General or other relevant agencies so that those institutions can receive information and carry out oversight of Operator and/or DA activities. This is required by Section 15.6 of the PMC (but not the iPMC), but it is not mentioned in the regulations. Similarly, DA decisions under Clauses 44-45 and others regarding the results of inspection should be reviewable by other agencies, and other agencies should be able to perform inspections and compel information to help protect against possible collusion and "regulatory capture."

Safety

Health and Safety duties are described in many places as being implemented with "all reasonably practicable steps." This is insufficient when human life is concerned, and we propose a standard of "all reasonably achievable steps." Health, safety environment should not be endangered unnecessarily for pragmatic reasons. This applies to Clauses 46(1), 46(2), 47(1), 47(2), 48(1), 69(3), 74(1)(e), 77(2), 79, 82(2)(h), 85(2)(g), 88(2), 90(2), 122(c)(i), 131(1)(b), 134(3), 154(2)(e)(iii), 164(1), 168(1)(a)(i), 169, 182(b) and 260(1)(b).

Clause 50 does not clearly require that every worker be included in a work group. Workers who are not in a work group will be denied many of the health and safety protections established by the regulations, and this should be clarified.

Clause 51 should require an Operator to establish a health and safety committee when 20 or more workers are normally present at a Facility, as well as when a representative requests that such a committee be established. The proposed threshold of 50 is too high, as this may exclude some platforms and vessels.

Clause 52 refers twice to Clause 85, but the relevance is not clear.

Clause 53(1) should require that all health and safety representatives are elected by the workers, rather than appointed according to an optional procedure defined by the operator.

Clause 56, regarding disqualification of health and safety representatives, allows disqualification too readily and perhaps should be entirely removed. In comparison with PSLA Schedule 7, Part 3, Division 1, Clause 21, TR Clause 56 is much broader. It effectively prevents such an representative from doing his or her job – the Operator can claim that any request to remediate a health and safety concern which would cost money has "the intention of causing harm to the Operator … or a work group employer's business." Clause 56(2)(a) should be deleted.

Clause 56(2)(c) could deter health and safety representatives from consulting with outside experts (the qualifier "for a purpose not connected with a power of a health and safety officer" is inadequate), and should be deleted. Corporate confidentiality can be protected in other ways.

Clause 58(1) refers to "subclause 58" – it is unclear what the correct reference should be.

Clause 58(4) allows an Operator to invoke an unverified, unjustified claim of "legal professional privilege" to conceal information from a health and safety representative. This

is a significant change from the Australian PSLA (Schedule 7, Part 3, Clauses 16(6)(a), 19(3) and 25(3)), which allows the company to deny access to "any information in respect of which the operator or employer **is entitled to claim, *and* does claim**, legal professional privilege." Clause 58 of the draft TSDA Regulations, however, allows denial of access to "any information, in respect of which the Operator, or work group employer, **is entitled to, *or* does, claim** legal professional privilege." Since petroleum companies would prefer to conceal everything on the basis of "confidentiality," this effectively cripples the health and safety provisions of the Technical Regulations.

"Legal professional privilege" needs to be defined, and a standard and process for evaluating the entitlement to such claims should be spelled out. There should also be provision for a health and safety representative to appeal any denial of information by the Operator to the DA or another authority independent of the Operator and employer.

Clause 60(2) initiates a process which could suspend implementation of a Provisional Improvement Notice indefinitely, and should include time limits.

Clause 62(f) should have "or to a health and safety representative" appended at the end, protecting employees from reprisal if they make use of the processes outlined in preceding clauses of these Regulations.

Health

In Clause 63(2), a maximum period of continuous work without a break (perhaps two hours) should be specified in addition to "a duration that could reasonably be expected to have an adverse effect on the health or safety…"

In Clause 66, provision needs to be made to protect workers from exposure to hazardous substances in addition to those listed in Schedule 2.

In Clause 79, "and" is missing after "Regulations."

Clause 80(1) should include "working with hazardous materials" in the list of work activities requiring systems for safe performance, and perhaps also "any other task which could endanger the worker's health or safety."

The occurrences specified in 114(1) and 114(2) appear to be identical; it would be clearer to specify them once and require both notice and a report of such events.

Clause 116(1)(d) should be part of 116(1), rather than included in the list of events covered by the subclause.

Environment

Clause 117 should be strengthened to clarify that any activity not listed in (a) through (k) which has a potential impact on the local or global environment (e.g. greenhouse gas emissions) is covered by this Division. For example, transport or shipping without petroleum (such as delivering supplies or an empty tanker arriving to pick up petroleum) should be included. In addition, the exceptions listed in sub-clause (4) of the definition of "Facility" in Clause 4 should not be exempted from environmental regulation.

Clause 118 should not allow the DA to consent to exceptions to the Environmental Impact Assessment process.

Clause 120(c) should be amended to include global climate impacts, especially since both Timor-Leste and Australia have recently acceded to the Kyoto Protocol.

In Clauses 150(3) and 150(4), there is a reference to "subclause (3)" which is misplaced or confusing. Other cross-references in this clause may also be incorrect.

It is now widely recognized that venting and/or flaring natural gas is destructive of the local and global environments and should be avoided whenever possible. Clause 152(2) should require the Operator to make a written application each time they want to flare (rather than annually), including reasons why flaring is preferred over other alternatives, before receiving approval for flaring. If flaring becomes necessary in an emergency, it could be done without application but needs to follow the incident reporting procedures in Clauses 145 and 146.

Pipelines

Due to differences in definition between the interim and final PMC, it is not clear if "pipeline" includes field gathering and flow lines. This should be clarified.

Given that pipelines may cross the boundaries of the JPDA into Australian, Timor-Leste or disputed waters, the Technical Regulations need to describe how a Pipeline Management Plan will interface with other authorities. This could be incorporated in Clause 261.

Reports of shipments of petroleum (Clause 286) should also include natural gas and other hydrocarbons which enter into a pipeline which leaves the JPDA. Since "petroleum" is not defined in these regulations, we are unclear whether it includes natural gas, as it would if the definition in the PMC applies.

Decommissioning

There should be a process for the Designated Authority to approve, reject or require modifications to a Decommissioning Plan (Clause 250), and the possibility for later revision and withdrawal, just as for other plans described by these Regulations.

Article 12.2(e) of the PMC requires authorized persons to "abandon, decommission, transfer, remove and/or dispose of all structures, facilities, installations, equipment and other property, clean up the Authorised Area and make it good and safe, and protect the environment, to the satisfaction of the Designated Authority," but there's no discussion of decommissioning (other than in the sense of ceasing to use a pipeline) in the Technical Regulations or in the interim PMC.

These Regulations should specify the standard to which decommissioning must be carried out – i.e. that areas where facilities were located should be restored to the condition they were in before the start of petroleum activities. No waste materials or structures should be left above, on, or within 50 meters of the surface of the sea. All toxic fluids and solids should be removed and safely disposed of. If it is necessary to leave some non-toxic structures on the seabed, these should be clearly enumerated in the Decommissioning Plan.

A Decommissioning Plan should be submitted much more than a year before a facility should be decommissioned. In fact, a basic decommissioning plan and financing should be part of the Production Sharing Contract as required under PMC Section 7.4, with

more details in the Development Plan, and approved before the project begins construction.

Decommissioning pipelines (Clause 271) would appear, according to the definition of "decommissioned pipeline" in Clause 4, to mean permanent cessation of operation. This is insufficient. Potentially environmentally damaging substances in the pipeline must be removed, and any parts of the pipeline, at its ends or along the pipe, which could affect the environment during the indefinite future must be properly disposed of. Although it may be unavoidable to leave some steel pipe lying on the sea floor, other materials and components should not be dumped or abandoned, and this should be specified in regulations.

Other

Clause 20(1) implies that the operator should **police the entire boundaries** of the JPDA and prevent people, ships and aircraft from entering without a detailed application procedure. Since these are international waters of disputed economic sovereignty, and commercial ships routinely transit the area, this requirement seems impossible to implement and contrary to the rights of transit and innocent passage in the UN Convention on the Law of the Sea.

These regulations refer to **"good oilfield practice"** in three definitions, as well as in clauses 212(2), 222(1)(c), 222(2)(d) and 238(3)(b). This phrase is not defined in the Technical Regulations but is defined in the PMC. We propose that the same definition be incorporated into these Regulations, and that Petroleum Operations undertaken pursuant to Clause 235 should be required to follow "good oilfield practice" in actual operation as well as in their plans.

The approval process for a JPDA Development Plan needs to conform to the Timor Sea Treaty. A Development Plan for the Greater Sunrise field must also be approved in accordance with Article 12 of the International Unitization Agreement (IUA), as well as the iPMC and other Authorisations. Some of the specifics in Clause 239 are different from those in the IUA, and the Regulations should make an exception for the Greater Sunrise field.

Sub-clauses 278(1)(c) and 278(1)(d) should be subsidiary to 278(1)(b), not at the same level.

We find no reference to **Contract Fees, Retention Fees, or Development Fees** (Clauses 282-285) in the PMC, interim PMC, model PSC for the JPDA, or redacted Bayu-Undan PSC. Is it permissible to impose such fees solely by Regulation? What is the legal basis of such fees? Are they paid into the Petroleum Fund or directly to the Designated Authority or its successor?