CONTRIBUTION TO PUBLIC CONSULTATION

Directive on the safety of offshore oil and gas operations 2013/30/EU

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In WWF Greece's view, the Offshore Safety Directive (OSD), currently under evaluation, does not effectively reduce the risks from offshore installations. The shortcomings of the OSD include the following:

i) *An absolute focus on "major" hazards and accidents*. This affects practically every aspect of the directive – the report on major hazards [cf. arts. 6(5), 6(6)], the power of the competent authority with respect to operations [e.g., art. 18(1)(a) and (b)], the scope of the corporate major accident prevention policy (e.g., art. 19), the notification of emergencies [cf. art. 30(1)] and so forth. By way of contrast, Directive 2012/18 on the control of major-accident hazards involving dangerous substances contains many provisions on "near misses" [e.g., 10(5) on updating the safety report, 20(6) on investigations]. A similar approach should have been adopted by the OSD. Among other shortcomings, this limited view does not and will not allow the OSD to address the main hazards originating from all oil inputs to the marine environment due to oil exploration and production, including repetitive "smaller" accidents and leaks, "produced water" and drilling discharges, and operational pollution: these hazards, cumulatively, may affect both personnel health and safety and marine environment more than the "major" ones: thus, the OSD has failed to address one of the most important inputs of oil into the marine environment.[1]

ii) *Inadequate risk regulation*. The OSD focuses exclusively on the reduction of risk to an "acceptable" level, i.e., a level of risk abstractly defined as the level for which the time, cost or effort of further reduction would be grossly disproportionate to the benefits [cf. art. 2(8)]. More specifically:

- The OSD opts for an ALARP (As Low As Reasonably Practicable) – type of risk level, which is not lowest possible, as would be the case, say, for an ALAP (As Low As Practicable) level of risk. Any consideration of the very real possibility that the level of environmental risk be grossly disproportionate to the anticipated benefits is unjustifiably missing.
- The OSD does not include in this approach emissions, technical and performance standards and prescriptions, which could possibly ensure a significant part of the desired risk level reduction. By way of contrast, IED installations are subject to similar standards and prescriptions ("best available techniques"), despite the fact that the dangers stemming from their operation are often better understood and more manageable [cf., by way of contrast, art. 14(3) of Directive 2010-75 on industrial emissions (integrated pollution prevention and control) (recast), according to which "BAT conclusions shall be the reference for setting the permit conditions"].
- In addition, the important decision of suspending the operations when an immediate danger to human health arises or the risk of a major accident is increased is essentially outsourced to the owner or operator [cf. art. 20(9)].

[1] GESAMP. (2007). Estimates of oil entering the marine environment from sea-based activities, 43-48.

- The OSD lacks concrete definitions of "costs" and "benefits", which would define which costs are considered disproportionate to which benefits, how they are assessed in practice, through which methodology, and by whom. This gap leaves room for the petroleum industry (or national authorities) to claim "disproportionate costs" in an arbitrary way, for instance by excluding certain types of environmental or health benefits from the equation, or by exaggerating the costs of compliance with optimal practices.

iii) *A lack of substantive limitations on offshore installations and operations.* The OSD contains many procedural and disclosure obligations, but it lacks any significant substantive restrictions on offshore oil operations. By way of indication, the OSD should adopt a "zero oil discharge in European waters" policy by 2020 (in accordance with the Polar Code[2] and the Esjberg declaration[3]). It should also clearly ban offshore installations from within or near Natura 2000 areas altogether, as well as from all ecologically sensitive areas already subjected to significant environmental cumulative pressures.

iv) *Lack of provisions for meaningful public participation*. The OSD should have required public participation for the totality of oil exploration (and production) operations, and not just before the drilling of exploration wells [cf., instead, art. 5(1)]. Offshore seismic surveys, despite their environmental and hardly understood impact (esp. in the Mediterranean), are, as a result, currently outside the scope of the OSD. In addition, public participation should be "early and effective": thus, should take place not just before "the drilling of an exploration well from a non-production installation", but also before the granting of licences [cf., instead, art. 5(1)]. For public participation purposes, the OSD contains a "grandfathering" provision [cf. art. 5(3)], which should be abolished immediately: all offshore installations should be subject to the OSD public participation requirements without any exception. Finally, the art. 6(8) tripartite consultations should also involve local communities (quadripartite consultations), which bear the brunt of the health and environmental impacts of petroleum operations.

v) *Limited transparency:*

- The minimum publicly available information is included in Annex IX [cf. art. 24(1)]. This Annex is noteworthy by what it does not include, e.g. the report on major hazards (cf. arts. 12 and 13), the notification of well operations (cf. art. 15), and the corporate major accident prevention policy [art. 19(1)]. For example, although the OSD directs the competent authority to pay special attention to "environmentally sensitive marine and coastal environments, in particular ecosystems which play an important role in mitigation and adaptation to climate change, such as salt marshes and sea grass beds, and marine protected areas", when assessing the capabilities of an applicant, these assessments are not, at least by default, public. The OSD should stipulate the proactive publication of all submissions by licensees and operators, as a precondition for their evaluation from the competent authority.
- Where publication is required, inexplicable restrictions are inserted: for example, in the case the findings of investigations of major accidents, only a "non-confidential" version is made publicly available [cf. art. 26(2)(b)]: however, major accidents invariably involve emissions to the environment (or significant risk thereof), and similar restrictions are hardly in accordance with the Aarhus Convention on access to

[2] Art. 1.1.1 of Part II-A, Annex 10 [International Code for Ships Operating in Polar Waters (Polar Code)] ("in Arctic waters any discharge into the sea of oil or oily mixtures from any ship shall be prohibited…").

[3] Ministry of Environment and Energy, Danish Environmental Protection Agency. (1995). Esbjerg Declaration (4th International Conference on the Protection of the North Sea), § 17 ("[t]he Ministers AGREE that the objective is to ensure a sustainable, sound and healthy North Sea ecosystem. The guiding principle for achieving this objective is the precautionary principle. This implies the prevention of the pollution of the North Sea by continuously reducing discharges, emissions and losses of hazardous substances thereby moving towards the target of their cessation within one generation (25 years) with the ultimate aim of concentrations in the environment near background values for naturally occurring substances and close to zero concentrations for man-made synthetic substances….").

information, public participation in decision-making and access to justice in environmental issues and other relevant European law. Similarly, it is incomprehensible why only "summaries" of relevant competent authority policy, process and procedures should be made available to the public [cf. art. 9, point (d)]: the OSD should not encourage secret decision making.

- Despite its detailed stipulations, the OSD does not include any monitoring requirements, as it is the case, say, for IED [cf. art. 16 of Directive 2010-75 on industrial emissions (integrated pollution prevention and control) (recast)].

vi) *Weak and dependent competent authorities*. According to article 8(3)(b), where the total number of normally attended installations is below six, the member state concerned may decide not to separate the regulatory functions of the competent authority and any authority relating to the economic development of the offshore natural resources and licensing of offshore oil and gas operations. This is, currently, the case of Greece. This provision should be abolished: even when the number of attended installations is small, the risks from offshore oil operations remain significant, and the independence to the competent authority should be safeguarded. Art. 8(7) should also be abolished, as it creates an obvious conflict of interest and the conditions for the "regulatory capture" of the competent authority. In the case of Greece, at least, these dangers are real: according to the European Commission's own Annual Report on the Safety of Offshore Oil and Gas Operations in the European Union for the Year 2016 (the last reporting year), Greece has not reported any inspections to offshore installations. Similar reports question the ability of the competent authority to conduct inspections and secure compliance in accordance with arts. 18 and 23. Furthermore, according to the national report for 2017, which was compiled by the Hellenic Hydrocarbons Resources Management SA, no inspections were on offshore installations for a second consecutive year.

vii) *Unclear distinction between licensee and operator*. From the standpoint of public interest, the distinction between licensee and operator introduced by arts. 6(4) and 6(5) are difficult to comprehend or justify. Instead, the OSD should specify that licensees and operators are jointly and severally responsible for the discharge of all OSD duties and the covering of all liabilities under European law arising from oil operations.

viii) *Inadequate understanding of oil contract structures*. Some of the OSD requirements overlap with or are pre-empted by oil contacts. For example, art. 4(6) states that "the licensing procedures for offshore oil and gas operations relating to a given licensed area shall be organised in such a way that information collected as a result of exploration can be considered by the Member State prior to production commencing". However, at least in the case of Greece, oil contacts are concessions: according to those contracts, exploration and production are legally interconnected, and only the licensee is allowed to materially reconsider its position at the end of exploration phase. The concerned member state has already agreed to proceed to the production phase, if the licensee agrees.

ix) *Corporate major accident policy*. The OSD demonstrates an unjustified reliance on the corporate major accident policy [cf. art. 19(1)]. This is incomprehensible: at a minimum, this policy will co-exist with other corporate policies, which are at least equally binding to management and invisible to either the competent authority or the public at large. This "policy" is, at best, a statement of intentions or voluntary self-regulation without any legal value. No

effort has been applied to link possible violations of this corporate policy with criminal liability of the legal person of licensee or contractor (cf., by way of comparison, art. 6 of Directive 2008/99 on the protection of the environment through criminal law). [In fact, OSD is not even included to Annex A of Directive 2008/99, which contains the list of Community legislation adopted pursuant to the EC Treaty, the infringement of which constitutes unlawful conduct pursuant to Article 2(a)(i) of that Directive].

x) *Reporting on major hazards*. The role of the report on major hazards is crucial. It is essential, therefore, to highlight and cure its shortcomings.

The art. 12(3) option for a report on major hazards that covers "a group of installations" should be abolished, at least where those installations are not geographically, environmentally, technically or operationally related: otherwise, the operator is invited to submit blanket, generic reports, that lack the necessary detail and focus. Art. 12(7) periodic reviews should not be the prerogative of the operator, and the competent authorities should be required to also undertake them on their own initiative. For reporting on major hazards purposes, there should be a presumption that all changes are material, unless the operation supplies evidence that this is not the case.