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SUBMISSION ON MANAGING OUR OCEANS: A DISCUSSION DOCUMENT ON THE REGULATIONS PROPOSED UNDER THE EXCLUSIVE ECONOMIC ZONE AND CONTINENTAL SHELF (ENVIRONMENTAL EFFECTS) BILL

Introduction

The Environmental Defence Society (EDS) welcomes the opportunity to comment on the discussion document.

EDS is a public interest environmental law group, formed in 1971. It has a membership that consists largely of resource management professionals. It operates by litigating on environmentally important matters and as an environmental think tank. EDS has had a long interest in marine management.

In 2011, EDS released a policy paper on the subject of the regulations, titled *Governing our Oceans: Environmental Reform for the Exclusive Economic Zone*. This reviews the international context for management of the exclusive economic zone (EEZ) and recommends changes to the New Zealand framework. In 2012 we made comprehensive submissions on the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Bill 2011 (the Bill).

Key issues

EDS welcomes the development of regulations to support the Bill. We consider that the discussion document is generally sound and well thought through. We do, however, have some key issues and concerns as follows:

Bar too high for prohibited activity status: the requirements proposed for prohibited activity status mean that it will never be used in practice, effectively rendering this category null and void. The regulations need to provide for the prohibition of activities to, *inter alia*, address potential cumulative impacts, protect high value ecosystems, provide reference areas against which impacts can be measured and address risk.

Need for a more cautious approach: Clause 33A(2) of the Bill requires the Minister to favour caution and environmental protection where the information available is uncertain or inadequate. The discussion document appears to take the opposite approach at a number of points, for example, it proposes that no areas will be closed off because of “the limited information on the baseline environment in the EEZ” and that activities will be classified as prohibited only if “there is enough

information to determine that the effects of the activity would be unacceptable in every case". The precautionary approach is a fundamental principle of environmental management and is recognised in the Bill. It will need to be applied in these regulations where there is a clear lack of scientific knowledge.

No spatial protection of sensitive areas: the discussion document does not propose closing off any geographical areas to activities. EDS considers that spatial protection is an essential tool to ensure the adequate management of cumulative effects. For example, the areas currently protected under the Fisheries Act 1996, as Benthic Protection Areas (BPAs) and closed seamounts, should be similarly protected under the EEZ regulations. The discussion document notes that massive sulphide deposits have been identified as particularly sensitive by NIWA and suggests according those areas greater protection. BPAs and seamounts have been protected under the Fisheries Act because of their vulnerability. It would be a failure of integrated management if these areas were protected from trawling under one piece of legislation but other activities with similar effects were permitted under a parallel piece of legislation.

Unclear if seismic surveying code of conduct is mandatory: the discussion document states that the Code of Conduct will be implemented during 2012 and mandatory regulations will be considered after a three year period, however the document uses mandatory wording ("must") when referring to the Code as a condition that will be imposed on seismic activity, etc. It is essential that the regulations specify that the Code of Conduct is a mandatory and enforceable condition for the carrying out of permitted activities given the potential negative impacts on marine mammals of these activities. The discussion document foresees the Code being imported by reference, therefore if adjustments to the Code are required, these will not need to wait for a review of the regulations.

Support discretionary status for oil and gas prospecting drilling: these activities can potentially have very significant impacts and therefore should not be permitted activities. In particular, well drilling and the capping of wells are highly risky activities, because if the well explodes it can have major impacts on the marine environment. This was aptly demonstrated by the Gulf of Mexico oil spill which resulted from the drilling and capping of an exploratory well. These activities need to be at least discretionary, and, as discussed above, they should be prohibited where a spill could damage sensitive and vulnerable marine environments and species.

Failure to address sediment plumes from seabed mining: the discussion document suggests that the creation of a sediment plume in the water column during the exploration or production stages of seabed mining is unlikely to have adverse effects and therefore regulations are not required. EDS does not agree with this assessment. Heavier particles will sink rapidly to the sea floor and are likely to smother benthic organisms. Lighter particles may become suspended in a plume, which could travel some distance with ocean currents before settling out. Such sediment can be a considerable problem for suspension feeding organisms, such as sponges and corals, as the fine particles can clog their filtering apparatus. It may also impact on important vent communities and deep-sea fish living within the water column. Where the sediment remains in the water it can reduce light levels in upper levels of the sea. Bacteria can grow on the suspended particles resulting in oxygen depletion within the plume. As the sediment resettles on the sea floor it could smother and even entomb slow moving and sessile organisms living within or on top of seabed sediments.

No requirement for monitoring: the discussion document suggests that cumulative effects will be managed by the collection of monitoring data which will guide review of regulations. However, the document is silent on the monitoring regime and does not propose a requirement on the Environmental Protection Authority or other agency to undertake this activity. Two decades of experience with the Resource Management Act has shown that unless agencies are compelled to undertake monitoring, it will generally not be undertaken.

No requirement for review: the discussion document refers to the review of the regulations at five year intervals and suggests that this will provide an opportunity for the insertion of measures addressing cumulative effects and the closing of sensitive areas to certain activities. This review needs to be included as a requirement within the regulations.

Timing of regulations: EDS considers that the regulations, and therefore the Bill, should be brought into force as soon as possible. There is currently an interregnum period, where much activity looks likely to take place, and it is important that the new environmental framework is put in place as soon as possible to manage the environmental impacts of this activity.

Consultation questions

Our specific responses to the consultation questions are appended to this letter.

Conclusion

EDS welcomes the initiative to put in place regulations to better manage the environmental impacts of activities within the exclusive economic zone and continental shelf. In the main the proposals are sound so long as the issues raised above are addressed. We would welcome further opportunity to contribute to the development of the regulations.

Yours sincerely



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Consultation questions

Assessment criteria

1. Do you agree with the proposed assessment criteria and the way that they have been arranged?

YES

2. Do you agree that international obligations should be considered first, environmental effects second, and other matters third?

YES

Criterion 1: Does New Zealand have binding international obligations to permit the activity?

3. Do you agree with the proposed criterion for considering international obligations and how it is arranged within the assessment criteria?

YES

4. Do you agree with the impacts of this criterion?

YES

Criterion 2: Are the environmental effects of the activity minor, or can they be avoided, remedied, or mitigated so they are minor?

5. Do you agree with the proposed environmental threshold for a permitted activity being minor environmental effect (after the consideration of conditions to avoid remedy or mitigate)? How would you assess the impacts of this proposal?

YES, however we do not agree that the minor effect threshold will “allow multiple activities to occur without significant cumulative effects”. A succession of minor effects can very quickly result in significant cumulative effects. Our long history with the implementation of the RMA has shown that it is very difficult to manage cumulative effects on a case-by-case basis and effective management of cumulative effects requires strategic planning and spatial identification of off-limits areas where there are sensitive and high value environments and species.

The discussion document does not close off any geographical areas. EDS considers that it is essential to do this if cumulative effects are to be adequately managed. EDS considers that spatial protection is an essential tool to ensure the adequate management of cumulative effects. For example, the areas currently protected under the Fisheries Act 1996, as Benthic Protection Areas (BPAs) and closed seamounts, should be protected under the EEZ regulations as discussed above.

The discussion document refers to effective monitoring as the mechanism to identify if significant cumulative effects are occurring but does not suggest a requirement to monitor should be included in the regulations. Project specific monitoring is unlikely to be sufficient to identify cumulative effects which may occur over large spatial areas and timeframes. The

document also refers to regular reviews of the regulations but does not propose to require such reviews in the regulations. A review at least every 5 years should be required.

6. Is there a different threshold you consider would better manage the environmental effects of a permitted activity and result in classifications proportionate to the level of environmental effect?

NO

7. Do you agree with the impacts of this criterion?

YES

Criterion 3(a) Are there any other matters, including the effects on existing interests, that would make it more appropriate to consider the activity as part of a marine consent?

8. Do you agree with how non-environmental impacts are considered in the assessment criteria?

YES

9. Do you agree with the potential impacts of this criterion?

YES

Criterion 3(b) Will the environmental effect of an activity be unacceptable in every case, bearing in mind the potential for an adaptive management approach?

10. Do you agree with the proposed environmental threshold for a prohibited activity being unacceptable environmental effect? How would you assess the impacts of this proposal?

NO, it should also provide for, inter alia, prohibiting activities to address potential cumulative impacts, to protect high value ecosystems, to provide reference areas against which impacts can be measured and to address risk. There is also a need to adopt a precautionary approach in line with clause 33A(2), as detailed above.

Having a criterion that an activity can be classified as a prohibited activity only "if there is enough information to determine that the effects of the activity would be unacceptable in every case" is far too high as it could probably never be reached in practice given the complexity of the marine environment and paucity of science. This means that the prohibited activity status is rendered null and void in practice.

11. Is there a different threshold you consider would be more appropriate for prohibited activities?

YES, "Is the environmental effect of the activity likely to be significant and unable to be adequately avoided, remedied or mitigated."

12. Do you agree with the impacts of this criterion? How would you describe the impacts? How would you assess the impacts of alternative thresholds?

YES

Net impacts of proposals

Costs and benefits of different classifications

13. Do you agree with the assessment of costs and benefits of different classifications?

YES

14. What costs and benefits are you aware of that have not been included? How should these be assessed?

Net impact of proposed assessment criteria

15. What do you consider to be the net impacts of the proposed classifications criteria? How should we value those impacts? What evidence do you have to support this assessment?

Potential volume of activities

16. What do you consider to be the potential volume of activities in the EEZ? What evidence do you have to support this assessment?

Detailed costs and benefits of the proposed permitted classifications

17. Do you agree with the assessment of costs and benefits of the proposed permitted classifications? What evidence do you have to support an alternative assessment?

YES, however we note that the reference to self-reporting and do not favour that option as it lacks independence and transparency. For example, the use of self-reporting in the fishing industry has not resulted in accurate information, particularly in relation to protected species bycatch.

18. Are you aware of any costs and benefits that have not been included? How should these be assessed?

Detailed costs and benefits of the proposed discretionary classifications

19. Do you agree with the assessment of costs and benefits of the proposed discretionary classifications? What evidence do you have to support an alternative assessment?

IN PART, we note again that case-by-case consenting is not usually effective in addressing cumulative effects and this requires additional measures as described above.

20. Are you aware of costs and benefits that have not been included? How should these be assessed?

Grouping of activities for assessment

Criteria

21. Do you agree with the proposed criteria for how the activities should be grouped for assessment? If not, what other criteria would you suggest?

YES, but there should be an additional criteria which should read "best helps achieve the protection of the marine environment".

Options for grouping activities

22. Do you agree with the options for how activities will be grouped for assessment? Are there any other options that should be considered?

YES

Assessment of options

23. Do you agree with the assessment of the options for grouping activities? How would you assess these options differently?

YES

Preferred option and impacts

24. Do you agree with the preferred option for grouping activities? What alternative option would you prefer?

YES, regulations grouped by industries are easier to develop and implement and more user friendly. This has been demonstrated by experience under the RMA where, although the legislation focused on environmental effects, in practice rules in most plans focused on activities.

25. What do you consider are the net impacts of the proposed grouping? What are the net impacts of an alternative grouping option?

Industries proposed to be classified

26. Do you know of any other activities that should be covered under the scope of this discussion document (ie, that are currently occurring in the EEZ or are likely to be operative over the next five years and are not covered by other legislation)?

NO

How conditions for permitted activities are considered

How conditions for permitted activities are considered in this section

27. Do you agree with the objectives for setting conditions on permitted activities? What objectives would you set?

YES

Monitoring of activities by the EPA

28. What information do you consider is important for the EPA to collect?

29. How should this information be collected?

30. Have all feasible monitoring options been identified? What other options should be considered?

31. What are the potential impacts of these options? How should we value these impacts?

Involvement of relevant iwi

32. Which of the two proposals for operators to engage with iwi/Māori for permitted activities do you prefer, ie, formally notify iwi, or formally notify iwi and receive consent from iwi about known wāhi tapu? What other options should be considered?

33. Of the two proposals to seek information on wāhi tapu, what would be your preferred approach? What other options should be considered?

34. What are the potential impacts of these options? How should we value these impacts?

Notification of local authorities

35. Do you agree that regional councils and unitary authorities should be notified where the effects of a permitted activity might cross the boundary with the territorial sea?

YES

36. What are the potential impacts of this option?

Seismic surveying

37. Do you consider the activities listed for seismic surveying cover the current seismic surveying activities in New Zealand? If not, what isn't included in this list?

38. Do you agree that seismic surveying should be a permitted activity? If not, how else would you classify the activity and why?

39. Do you agree with the potential conditions for seismic surveying? If not, what changes would you propose? What evidence supports changes to the conditions?

IN PART, it is unclear whether the Code of Conduct will be immediately mandatory under the regulations. As discussed above, it is essential that the regulations specify that the Code of Conduct is a mandatory and enforceable condition for the carrying out of permitted activities given the potential negative impacts on marine mammals of these activities.

40. Do you agree with the estimated costs to comply with the DOC Code of Conduct? What would you estimate the costs to be? How would you value the benefits?

Submarine cabling

41. Do you consider the activities listed in submarine cabling cover current cabling activities in New Zealand? If not, what isn't included in this list?

42. Do you agree that the above submarine cabling activities should be permitted? If not, how else would you classify the activities and why?

YES, provided it is not permitted in benthic protection areas, over protected seamounts and other sensitive areas.

43. Do you agree with the potential conditions for the above submarine cabling activities? If not, what changes would you propose? What evidence supports these changes to the conditions?

IN PART, it is unclear whether the Code of Conduct will be immediately mandatory under the regulations. As discussed above, it is essential that the regulations specify that the Code of Conduct is a mandatory and enforceable condition for the carrying out of permitted activities given the potential negative impacts on marine mammals of these activities.

44. What impacts do you consider result from obtaining written consent for submarine cabling from existing permit/licence holders?

Marine scientific research

45. Do you consider the activities listed in marine scientific research cover current marine research activities in New Zealand? If not, what isn't included in this list (the question relates to both lists of in-scope and out-of-scope activities)?

46. Do you agree that the above marine scientific research activities should be permitted? If not, how else would you classify the activities and why?

YES

47. Do you agree with the proposed conditions for the above marine scientific research activities? If not, what changes would you propose? What evidence supports these changes to the conditions?

IN PART, it is unclear whether the Code of Conduct will be immediately mandatory under the regulations. As discussed above, it is essential that the regulations specify that the Code of Conduct is a mandatory and enforceable condition for the carrying out of permitted activities given the potential negative impacts on marine mammals of these activities.

48. What do you consider are the impacts of some marine scientific research activities not being permitted on massive sulphide deposits? What would you estimate the scale of these impacts to be?
49. Do you agree that the use of seafloor explosives should be a discretionary activity? If not, how else would you classify the activity and why?

YES, because it could potentially have significant effects.

Oil and gas

50. Do you consider the activities listed in the oil and gas section cover current oil and gas activities in New Zealand? If not, what isn't included in this list?
51. Do you agree that oil and gas exploration (surveying the seabed for deposits) should be a permitted activity? If not, how else would you classify the activity and why?

YES, provided it is not undertaken in benthic protection areas, over protected seamounts and other sensitive areas.

52. Are you aware of any specific costs that might relate to the conditions for oil and gas activities?
53. How do you consider that operators should provide information on the environmental impacts of decommissioning during the production phase?
54. Do you agree that exploration/appraisal, development well drilling/production and decommissioning should be discretionary activities? If not, how else would you classify the activities and why?

YES, because these activities can potentially have significant impacts. In particular, any well drilling, and the capping of wells, are highly risky activities, because if the well explodes and oil or gas is released it can have major impact on the marine environment. This was aptly demonstrated by the Gulf of Mexico oil spill which resulted from the drilling and capping of an exploratory well.

Seabed mining

55. Do you consider the activities listed in the seabed mining section cover current and potential seabed mining activities in New Zealand? If not, what isn't included in this list?

The discussion document suggests that the creation of a sediment plume in the water column during the exploration or production stages of seabed mining is unlikely to have adverse effects and therefore regulations are not required. The creation of such a plume can have significant adverse effects on marine life and habitats as it smothers and clogs gills and filter feeders. The regulations should address the creation of a sediment plume in the water column and provide conditions or require a marine consent as appropriate.

56. Do you agree that activities related to seabed prospecting should be permitted? If not, how else would you classify the activities and why?

YES

57. Do you agree with the potential conditions for seabed prospecting activities? If not, what changes would you propose? What evidence supports these changes to the conditions?

IN PART, seismic surveying should only be permitted if it complies with the Code of Compliance (which needs to be mandatory and enforceable). ROVs or submersibles should not be permitted on benthic protected areas or protected seamounts, as well as massive sulphide deposits. Prospecting activities should not be permitted in benthic protection areas, protected seamounts or other important habitats.

58. What do you consider are the impacts of some seabed mining activities not being permitted on massive sulphide deposits? What would you estimate the scale of these impacts to be?

59. Do you agree that the activities associated with exploration and production for seabed mining should be discretionary? If not, how else would you classify the activities and why?

IN PART, as they can have effects on the environment that are more than minor and need to be carefully managed through a transparent and public process. Exploration and production for seabed mining in benthic protection areas, protected seamounts or other important habitats should be prohibited.

60. Of the two proposals for operators to consider the environmental impacts of decommissioning at the production phase, what would be your preferred way for operators to provide this information?

The environmental impacts of decommissioning should be considered both in a decommissioning plan and the impact assessment.

Cost recovery

61. For each of the EPA's following functions do you consider the benefit to be public, private or mixed?

EDS considers that assessment criteria should also include the principle that the funding should be recovered from the person(s) "whose actions or inaction gives rise to the exercise of the function" as set out in clause 134(3) of the Bill and on page 77 of the discussion document:

Pre-application assistance

The applicant should pay this cost being "person(s) 'whose actions or inaction gives rise to the exercise of the function'".

Processing and deciding applications

The applicant should pay this cost being 'person(s) "whose actions or inaction gives rise to the exercise of the function"'.

Processing notifications of permitted activities

The applicant should pay this cost being 'person(s) "whose actions or inaction gives rise to the exercise of the function"'.

Monitoring of marine consents

The consent holder should fund the costs of monitoring the impacts of the marine consent being person(s) “whose actions or inaction gives rise to the exercise of the function” and the function relates directly to the exercise of the consent.

Enforcement of conditions on marine consents

The consent holder should fund this cost being person(s) “whose actions or inaction gives rise to the exercise of the function” and the function directly relates to the exercise of the consent.

Appeals

The Crown should cover these costs.

Monitoring of permitted activities under regulations

The person undertaking this activity should fund this cost being person(s) “whose actions or inaction gives rise to the exercise of the function” and the function directly relates to the undertaking of the activity.

Other monitoring (e.g. cumulative effects)

This has a mixed public, private and consent holders benefit, and some of the need to do this relates to the exercise of consents and permitted activities, so some of the cost should be covered by those undertaking activities which may contribute to cumulative effects.

Reporting

This is largely a public benefit and should be funded by the Crown.

Information awareness

This is largely a public benefit and should be funded by the Crown.

62. For each of the functions or services of the EPA listed in section 14.4, which cost recovery method do you consider to be the most equitable, efficient, transparent and justifiable?

See above.

63. Do you agree with the proposed methods for cost recovery? What methods would you use?

See above.