Submission on the Offshore Renewable Energy Bill

SUBMITTER DETAILS

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Introduction

1. The Environmental Defence Society (**EDS**) thanks the Select Committee for the opportunity to make a submission on the Offshore Renewable Energy Bill (**Bill**).

2. EDS is a not-for-profit, non-government national environmental organisation. It was established in 1971 with the objective of bringing together the disciplines of law, science, and planning to promote better environmental outcomes in resource management. EDS is keenly interested in the intersection between the promotion of renewable electricity generation and the protection of the natural environment. Both can occur if policy settings are right.

3. EDS recognises the need to facilitate the deployment of offshore renewable energy and to have a robust regulatory regime. New legislation is necessary, and the Bill fills an important gap. However, it requires some improvements.

General comments

4. The Bill addresses three key stages of offshore renewable energy projects:

    (a) Feasibility permits (to select whether, and which, projects should proceed to conduct feasibility studies).
    (b) Commercial permits (which, alongside approvals under the Resource Management Act 1991 (**RMA**) and Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 (**EEZ Act**), allow a project to proceed).
    (c) Decommissioning plans (at the end of project life).

5. Most aspects of the Bill are positive. EDS is generally supportive of the development of offshore renewable energy (including wind) if the legal settings are carefully designed. Offshore wind has potentially less environmental impact overall than onshore projects, and it is an important part of New Zealand's efforts to decarbonise the electricity sector and support greenhouse gas emissions reduction commitments.

6. It is sensible to provide for a feasibility and commercial permitting framework separate to environmental consenting frameworks under the RMA and EEZ Act. It is similar to how Crown mineral exploration and exploitation are managed under the Crown Minerals Act 1991 and

RMA / EEZ Act. The frameworks would have quite different purposes (for example, the RMA does not allow consideration of whether a project would be in the national interest, or the comparison of different proposals) and would be complementary.

Order of approvals

7. EDS supports the Bill's proposal (via its amendments to the RMA and EEZ Act[1]) that a feasibility permit to be obtained *before* a person can apply for a consent under the RMA or EEZ Act. This means that only a single project can proceed for assessment under these Acts, and that any competition between different renewable energy applicants would be resolved prior to that point. Doing it the other way round (multiple projects applying for consent even if only one could proceed) would be inefficient.

8. A commercial permit is then required before consents under the RMA or EEZ Act can be "given effect to" (i.e., before construction can begin). It is not, however, required before an application for those consents can be made or granted. This means that, following the grant of a feasibility permit, there is some flexibility as to when a commercial permit and environmental approvals can be applied for and granted. EDS supports the Bill's proposal to allow for those consents to occur contemporaneously.

9. EDS also supports clause 35, which states that obtaining a feasibility or commercial permit under the Bill does not affect any other approvals (i.e., under the RMA or EEZ Act). This should, for transparency, be replicated in section 104 of the RMA[2] so that it is clear to decision-makers and participants involved in RMA processes that obtaining a feasibility or commercial permit does not provide any expectation of an RMA consent being granted.

10. Efforts should also be made to align or coordinate the commercial permitting process with RMA and EEZ Act processes where possible (given that they are likely to be concurrent). Regulations may be able to provide guidance.

Scale of projects

11. Given the investment required in offshore wind projects, it will be important to facilitate only reasonably large-scale developments. There should be flexibility in setting maximum or minimum geographical sizes of projects, including allowing them to be put forward by applicants and assessed for reasonableness and the public interest. EDS supports the Bill's proposed approach in clause 16, which refers to the need for a "reasonable size" when considering feasibility permits. Guidance should be provided as to what this means in different contexts.

Nature of the applicant

12. The provision of renewable energy generation in the marine area is of public importance and justifies a requirement that operators themselves are suitable and can be relied upon to provide development outcomes.

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[1] Clauses 175 and 179

[2] Which allows for broad consideration of any matter that is relevant and reasonably necessary to determine an application.

13. EDS supports the proposed suitability requirements of the Bill.[3] This includes the need to have regard to an applicant's compliance record generally (which would encompass compliance with the RMA and EEZ Act, or other environmental legislation).

14. It could usefully be clarified, however, that this includes an applicant's track record in environmental performance (not just formal compliance), including how successfully the applicant has addressed environmental issues like bird strike or acoustic harm to marine life in other projects/jurisdictions, reputation in the market, and past and current success in other projects.

15. It will also be important to be able to look 'behind the curtain' at the reality of applicants' corporate arrangements when assessing previous environmental performance of those involved (which may be broader than the formal 'applicant' listed on an application). This should be clarified in clause 19 of the Bill or in the definition of an 'applicant'[4] by referring to, for example, an applicant's corporate management, directors, related parties or those holding significant influence over the applicant.

16. Note that clause 44 and following address the situation where there has been a *change* in 'significant influence' over a permit holder (for example a change in shareholding). But an assessment of the suitability of those holding significant influence over an applicant also needs to be considered at the feasibility permitting stage.

17. The suitability requirements in clause 19(1)(e) should also be expanded to include an applicant's likelihood of future compliance with the requirements of the RMA and EEZ Act, not just with the requirements of the Bill. Although the exact nature of RMA and EEZ Act approvals would not be known at the feasibility stage (since consents could not be applied for until such a permit was granted), the general ability of an applicant to comply with environmental requirements should be a relevant factor to the extent this is known.

Other considerations for granting feasibility permits

18. EDS considers that the list of mandatory considerations for granting feasibility permits (clause 19) is generally appropriate. However, an additional matter should be added to clause 19(2):

The benefits that the project would have for the natural environment.

19. Adding this consideration (and associated information requirements for an applicant) would incentivise applicants to at least consider, at the early project design stage, synergies that could be achieved between economic and environmental outcomes. For example, the potential for wind turbines to act as reef structures supporting marine biodiversity/productivity, or for safety zones to constrain activities that may be harmful to benthic environments as well as infrastructure.

20. The RMA and EEZ Act are not themselves well-positioned to achieve such environmental benefits through their consenting processes because they are largely reactive to whatever is put forward in a project's proposal. They largely assess the suitability of a proposal's adverse effects rather than requiring positive effects or that a proposal be redesigned. It is therefore vital to incentivise such benefits at the earlier feasibility permitting stage.

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[3] Clause 19

[4] Applicant is not defined in clause 4.

21. EDS agrees that there should be a mechanism for government to be able to compare two or more projects at the feasibility permitting stage (clause 20), and consideration of environmental benefits is particularly important where there are two or more competing applications. This can create virtuous competition and a 'race to the top', without heavy handed regulatory intervention that demands environmental benefits be provided. This reflects the following conclusion reached in the discussion document that preceded the Bill:[5]

> *… given that feasibility is the primary point in the overall permitting process at which projects will be compared, and most overlaps resolved, we consider it appropriate for the assessment to consider all the outcomes that government has an interest in. This is also an opportunity to incentivise developers to embed key outcomes into projects right from the start.*

22. As such, EDS submits that clause 20 should be amended to clarify that the project with the most "merit" includes consideration of which project would provide the most environmental benefit (alongside other factors). While it is appropriate that the specific weighting to be given to various factors be determined by regulation (as currently drafted), environmental considerations should be expressly within scope of such regulations.

Power to reject feasibility permits

23. It is appropriate under clause 18 that the Minister can reject an application for a feasibility permit on the grounds it would pose a significant risk to national security or public order, and on any other ground.

24. However, to avoid doubt, it should be specified in clause 18 that significant adverse environmental impacts, which cannot be avoided, mitigated or managed, are a ground on which the Minister can reject a permit at feasibility stage. For example, this might be where a proposal, because of its location, will have obvious impacts on a protected area like a marine reserve, or where it is a prohibited activity under relevant RMA or EEZ Act instruments. There will be little point investing in a project, and a potentially expensive competitive permitting process, if it is clear that environmental permits will not subsequently be granted due to a fundamental flaw in the proposal.

25. For the same reasons, there should be legislated criteria for the geographical areas the Minister can and cannot proactively open up for application rounds in the first place (under clause 13). As currently drafted, the Minister can launch application rounds for any geographical area in the EEZ or territorial sea, without consideration of whether environmental approval in those areas would then be likely or even possible under other legislation, or the potential incompatibility of renewables with environmental values. Clause 13 should make it clear that the Minister must at least have regard to the likelihood of other approvals being granted when deciding the geographical scope and other conditions of application rounds. Some kinds of marine area should be specifically excluded, notably marine reserves.

The need for more strategic planning for competing new activities

26. The Bill is concerned only with offshore renewable energy. This means it is well positioned to resolve competing applications for different types of renewables (for example wind and tidal)

[5] Ministry for Business, Innovation and Employment *Developing a regulatory framework for offshore renewable energy* (Second discussion document, August 2023) at 12.

and between different applicants (for example two applications for a wind farm in the same location). This happens at the feasibility permitting stage.

27. However, it does not resolve bigger picture strategic choices about alternative and conflicting uses of marine space (for example mining or aquaculture), or areas requiring protection in the future (marine protected areas).

28. A broader framework for marine spatial planning is urgent. Its absence from the Bill puts offshore renewables at a disadvantage relative to competing marine uses by virtue of having a multi-stage permitting process (which most other activities do not have). Our concerns are as follows:

    (a) Under the Bill environmental approvals for offshore renewables cannot be applied for until a feasibility permit has been granted (with feasibility permits only available once an area has been opened up by the Minister).[6] The *grant* of a feasibility permit only confers an exclusive right to apply for RMA / EEZ Act consents vis-à-vis other renewables proponents, not vis-à-vis other activities.

    (b) In the meantime (during feasibility studies), an applicant could apply for an activity under the RMA or EEZ Act to use the same space. Such rights are usually conferred on a first in first served basis irrespective of other (potentially better) uses, meaning that incompatible uses could 'cut in line' and render offshore renewable feasibility and commercial permits redundant. Once granted, an RMA or EEZ Act consent cannot be derogated from in favour of another.

29. There is a need for some mechanism to designate suitable parts of the marine environment as priority areas for renewable energy generation (flowing through to regional coastal plans and EEZ Act regulations). This will provide certainty of investment. Identification of suitable areas should involve consideration of the environmental synergies that renewables projects might have relative to other uses (for example, the potential for safety zones to be used to create protected areas excluding damaging activities like seabed mining or bottom trawling).

30. A more proactive mechanism to resolve competition between sectors may take time and needs to be part of a broader marine spatial planning exercise. The Bill could resolve the issue in the meantime by stating that an applicant that has made a feasibility application under the Bill has priority under the RMA/EEZ Act in the event that another application for the same natural resource (marine space) is made under those Acts. This would be desirable where a first in first served process is being used under the RMA (preventing other activities 'jumping the queue').[7]

Relationship with the Fast-track Approvals Act 2024

31. The relationship between the Bill and the Fast-track Approvals Act is of significant concern.

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[6] An application for a feasibility permit may be made only during an application round

[7] Giving automatic priority to holders of a feasibility permit (i.e. renewables proponents) may be less appropriate to the extent that a competitive mechanism like tendering or auctioning (rather than first in first served) is used under the RMA to allocate coastal space. However, our understanding is that there are no competitive allocation mechanisms in marine areas where offshore renewables, notably wind generation, are likely to be deployed (the South Taranaki Bight, the Western Waikato coast, Cook Strait and the Southland coast).

32. An "activity undertaken for the purposes of an offshore renewable energy project" is ineligible under the Fast-track Approvals Act 2024 (**FTAA**).[8] This means the FTAA cannot be used to obtain necessary RMA / EEZ approvals for an offshore renewables project even if a project would have significant national or regional benefits.

33. However, an application for a coastal permit (under the RMA) or marine consent (under the EEZ Act) for potentially incompatible activities (like seabed mining) *could* be granted under the FTAA. It would also be possible for such activities to be consented despite the area already being subject to a feasibility permitting round for offshore renewables. This is because of how the FTAA treats "competing activities".

34. The FTAA (s 47) only allows a fast-track application to be progressed (i.e. given to a Panel for decision) once any "competing applications" have been determined (i.e. a decision made and appeals exhausted on the competing application). A "competing application" is defined to mean an application (1) under a specified Act, which (2) relates to the same natural and physical resources, and which (3) could not be fully exercised if the fast-track approval were to be granted. This covers a situation, for example, in which an application for a coastal permit to occupy marine space has already been lodged under the RMA (which is a "specified Act").

35. However, it would not cover a situation where a renewable energy proponent has made significant investment in applying for a feasibility permit or in conducting feasibility studies, but not yet lodged a consent application under the RMA or EEZ Act. Indeed, as mentioned above, an RMA/EEZ Act approval *cannot be applied for* until a feasibility permit has been granted. This creates a window in which considerable effort and expense may have been incurred to obtain 'exclusive' rights (relative to other offshore renewable proponents) but where other conflicting activities can still prevent the actual use of the space. It would undermine the purpose and utility of the Bill.

36. This is a very real issue. Trans-Tasman Resources' proposal for iron sands mining off the South Taranaki coast has been included as a listed project in the FTAA (and the proponent has indicated its intention to lodge an application under the Act), despite the existence of an offshore wind project seeking to use the same space (but not yet able to apply for consent). The two activities are incompatible (for example, due to the overlap between the proposed mining area and offshore wind cables on the seafloor).[9] Without greater certainty of rights, there is a real risk that investment in offshore wind will not occur, with one developer, Blue Float Energy, already signalling its withdrawal from the New Zealand market.[10]

37. There are limited locations where offshore wind generation is currently feasible, with South Taranaki offering the most attractive conditions. Known suitable locations for offshore renewable generation should therefore be identified and made 'off limits' for fast-tracking (at least for referred projects) to provide greater certainty of investment.

38. At minimum, the Bill should amend the FTAA to include the Bill as a "specified Act".[11] This means that applications for feasibility permits would become "competing applications" which would need to be resolved before fast-track approvals could proceed to Panels for decision.

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[8] Fast-track Approvals Act, s 5(1)(n)

[9] See an open letter to the Minister penned by various offshore renewables interests, dated 10 May 2024: https://www.documentcloud.org/documents/24675240-briefing-paper-offshore-wind-seabed-mining-10-may-2024-final/

[10] https://newsroom.co.nz/2024/10/24/offshore-wind-developer-pulls-out-of-nz-amid-seabed-mining-concerns/#:~:text=%E2%80%9CThe%20granting%20of%20a%20consent,ahead%2C%E2%80%9D%20that%20letter%20stated. www.documentcloud.org/documents/24675240-briefing-paper-offshore-wind-seabed-mining-10-may-2024-final/

[11] Under section 4 of the FTAA.

The FTAA should also be amended to specify that an application is for an ineligible activity if it would conflict with a feasibility or commercial permit granted under the Bill.

The need for more strategic planning with respect to impacts on existing activities

39. Offshore renewables may come into conflict with *existing* activities (for example navigation, fishing), not just compete for space with new activities.

40. There needs to be a more strategic assessment of the trade-offs involved when the Minister is considering opening up areas for applications (for example, whether that space would be suitable, or could be adequately managed, given the existence of various existing rights).

41. As currently drafted, the Bill proposes that the Minister must have regard to "the applicant's approach to identifying, engaging with, and managing existing rights and interests in the proposed permit area" when considering a feasibility permit application. This does not apply to the Minister's decision to open up an application round in a particular area in the first place. This provides little reassurance for offshore renewables proponents (or existing rights holders) about how different interests are to be balanced, or when existing interests would be sufficient to decline a feasibility permit.

42. Impacts on existing users can also be raised as part of an environmental effects assessment under RMA and EEZ Act consenting processes. This means that a feasibility permit and commercial permit might be obtained (at considerable cost), but then not be able to be actioned because of conflicting uses. The issue needs to be addressed at the earliest possible opportunity, not left to the end of the process.

43. Many renewables operations may also require safety zones that exclude other users (including fishing) for their own safety or for the protection of infrastructure. An application for the declaration of a safety zone can only be made after approval has been obtained under the RMA or EEZ Act. Under clause 67, it is unclear whether the impacts of a proposed safety zone on existing uses is relevant and can justify a refusal to declare such a zone.[12]

44. This needs to be clarified much earlier to provide certainty to renewables proponents that a project relying on safety zones for effective operation will be able to proceed. Proposals for safety zones, and their impacts on existing interests (as well as potential benefits as marine protected areas), should be included as a matter to be considered when the Minister is deciding to open an area for permitting and at the feasibility permitting stage.

Decommissioning

45. EDS agrees that there needs be clear obligations and financial security with respect to decommissioning of offshore renewables operations. The legal framework should not risk stranded assets or burdens on the public purse for what should be private responsibilities. Part 3 of the Bill (concerning decommissioning) seems broadly appropriate, as does the requirement in clause 26 to include a decommissioning proposal and financial security arrangement before a commercial permit is granted.

[12] Clause 67(3)(c) provides that the Minister must take into account the impact of the "development" on existing activities in the proposed safety zone, which suggests that this is referring to the need to protect activities from the dangers of renewable energy activities themselves (ie in favour of establishing a safety zone), not the need to consider the negative impacts that establishing a safety zone would have on such interests.

46. However, clause 80 should clearly specify that a financial security arrangement is in addition to any bond required by consent conditions under the RMA or EEZ Act.

47. It should also be made clearer that decommissioning proposals and financial security arrangements are *conditions* of a commercial permit, and therefore (by virtue of clause 34) enforceable. At present, the status of decommissioning 'obligations' are unclear (under clause 73 this seems to refer to obligations that will arise under the RMA or EEZ Act in the future, rather than those linked to a decommissioning proposal provided as part of the commercial permitting process).

48. EDS supports clause 73(3), which states that decommissioning may include leaving infrastructure in place where in accordance with the RMA or EEZ Act (for example the foundations of turbines that may provide environmental benefits as habitat). However, statutory criteria for decommissioning plans (notably with respect to environmental expectations) could be made clearer.

49. It is, however, unclear to us why detailed requirements for decommissioning plans, including assessment by the Environmental Protection Authority and public consultation, are to be inserted into the EEZ Act (for projects in the EEZ) but not the RMA (for projects in the coastal marine area).[13]

Permit duration

50. With respect to permit duration, EDS agrees that 40 years seems an appropriate default duration for commercial permits. Note that there may be misalignment with coastal permits under the RMA (required for occupation of the coastal marine area, among other things), which currently have a maximum duration of 35 years.[14] These should be aligned.

Revocation and expiry

51. The Act makes it clear that the revocation, expiry or surrender of a permit granted under the Bill automatically cancels associated consents under the RMA and EEZ Act.[15] This is appropriate.

52. However, although clause 60 specifies that this does not release a permit holder from ongoing obligations under a commercial permit, the Bill (via its amendments to the RMA and EEZ Act in Part 5) does not specify the same thing about associated RMA and EEZ Act consents. While RMA case law has addressed the issue of continued enforceability of conditions after expiry, it would be prudent to include in the amendments to the RMA (proposed section 88AB) and EEZ Act (proposed section 38B) that the expiry, revocation or surrender of a commercial permit does not release a permit holder from continuing obligations under these other legislative frameworks.

Occupation charging

[13] Clause 176, inserting new sections 100E-100H into the EEZ Act.
[14] Maximum duration of 35 years for long-lived infrastructure and renewable energy is proposed to be left unchanged by proposed section 123B under the Resource Management (Consenting and Other System Changes) Amendment Bill. Instead, this proposes to make 35 years the default duration, and limit the grounds on which shorter durations can be imposed.
[15] Clauses 175 and 179.

53. In the longer-term, there may be a case for a more consistent approach to occupation charging or resource rentals as a *quid pro quo* for use of a non-private resource (marine space) for private profit. However, this is a conversation that needs to cover a range of sectors that occupy the seabed.

Concluding comments

54. Overall, EDS is supportive of a framework that seeks to enable the establishment of offshore renewables. These projects (notably offshore wind) will play a key role in Aotearoa New Zealand's decarbonisation plan for the electricity sector. They will also help the country meet its climate commitments in a way that could also benefit the environment (if done right).

55. EDS supports the Bill, subject to the changes set out herein.

56. EDS wishes to be heard in support of its submission.