



12 January 2012

Chairperson  
Local Government and Environment Committee

Royal Forest and Bird Protection Society  
of New Zealand Inc.

National Office:  
Level One, 90 Ghuznee St  
PO Box 631, Wellington 6140  
New Zealand

P: +64 4 385 7374

F: +64 4 385 7373

[www.forestandbird.org.nz](http://www.forestandbird.org.nz)

## **EXCLUSIVE ECONOMIC ZONE AND CONTINENTAL SHELF (ENVIRONMENTAL EFFECTS) BILL**

### **FOREST & BIRD SUBMISSION**

1. Forest & Bird is an independent community-based conservation charity, established in 1923. Our mission is to be a voice for nature, on land, in fresh water, and at sea, on behalf of our 70,000 supporters and 50 branches.
2. As an organisation, our conservation work to protect the natural environment includes field office-led campaigns, restoration projects, education through the Kiwi Conservation Club, participation in collaborative governance models, advocacy and lobbying.
3. This Bill is of particular interest to Forest & Bird. New Zealanders are guardians of a large and unique marine environment, 23 times bigger than the land area of New Zealand. Marine reserves (including those proposed by the Minister) cover just 0.4% of our Exclusive Economic Zone. By contrast, more than 30% of our land mass is protected in parks and reserves. New Zealand also has international obligations under the Convention on the Law of the Sea to “protect and preserve” this environment.
4. Over 86 types of sea-birds breed in New Zealand, giving us the honorary title of the “seabird capital of the world”. Our marine biodiversity is internationally significant, and New Zealand waters are a breeding ground and transit route for many marine and seabird species, including threatened and endangered species.
5. There are risks for seabirds, marine species and marine conservation from accidents that may result from activities in the EEZ, particularly offshore oil activities. They are risks that the EEZ Bill as presently drafted fails to address.

### **Summary**

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6. The proposed new regime is a step forward. It establishes a decision-making process to manage activities in the exclusive economic zone (EEZ) and on the continental shelf beyond 12 nautical miles. This is important, and long overdue. But it is less robust than we would like.

7. Although the Bill allows marine consent applications to be declined if the adverse environmental effects of proposed activities would be too large, it has such big policy flaws that it will barely protect the environment, and will put it at risk.
8. The Bill is modelled on the Resource Management Act (RMA). However, it differs from that Act in some important ways. It offers less protection for the environment than does the RMA. It has no environmental bottom lines. As the purpose clause says, it is all about balance between the environment and the economy.
9. The absence of any bottom lines is inconsistent with the situation on land, and unacceptable to Forest & Bird. The Bill explicitly says in clause 61 that everything in the environment is tradable, provided the economic value of a proposed development is sufficiently high.
10. The Bill needs a number of changes to address these issues. The main points of our submission are:
  - 10.1. The purpose clause in **clause 10(1)** needs to be redrafted. It should provide for sustainable economic development, and preservation and protection of the marine environment, to ensure compliance with UNCLOS, and closer alignment with section 5 of the RMA. Consistent with government policy, this would support future economic wellbeing.
  - 10.2. Insert a new **clause 11A**, setting out environmental protection and preservation matters to be recognised and provided for by a decision-maker under the Act.
  - 10.3. Revise some of the matters to be taken into account in decision making in **clause 12**, and change that clause heading to “other” matters.
  - 10.4. Use the language of “precaution” in **clause 13**. Amend the **clause 4(1)** definition of “adaptive management” by adding “*but does not include allowing an activity to commence if its effects are likely to be serious or irreversible*”.
  - 10.5. Delete **clause 61(2)**, which provides for a direct trade off between the environment and the economy, regardless of environmental values, if they are outweighed by economic values. It is the purpose clause and decision-making factors that should govern decision making.
  - 10.6. Make minor changes to some clauses to ensure that the Bill will comply with international conservation laws to which New Zealand is a party.
  - 10.7. Set out in the legislation how the EPA must constitute itself for decision-making in these cases, with possible provision for secondments to ensure the necessary expertise.
  - 10.8. Allow appeals de novo to the Environment Court, and applications to that Court for declarations to resolve legal interpretation issues.
  - 10.9. Review the adequacy of the penalties provided for in the Bill. In particular, provision for a term of imprisonment for a natural person needs to be included, and higher maximum fines ought to be provided for, given the economic values and environmental risks of offshore oil and gas exploration.

## Submission

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### Overview: what the Bill does, and our policy

11. The Bill establishes, for the first time, a proper environmental management regime for the EEZ and continental shelf. There is currently no such regime. There are gaps and complications in the law, that everyone agrees need to be addressed, to protect the environment, meet our international obligations, and facilitate proper use of ocean resources. The status quo is an environmental risk, due to unregulated activities. There is no mechanism for public participation in decision-making, and our obligations under the United Nations Convention on the Law of the Sea to “protect and preserve” the ocean environment are not being met.
12. For all of these reasons, a Bill of this kind is necessary.
13. However, there are some major policy and drafting problems with the Bill which, far from protecting the environment, will put it at risk.
14. In 2011, Cabinet agreed to rescind some earlier Cabinet policy decisions that had been taken about this Bill, so that it would “have a much stronger emphasis on balancing the environmental effects of activities with the benefits they provide – rather than solely focusing on preventing adverse effects” and “a greater emphasis on supporting economic development opportunities”.
15. Nonetheless, under the heading “purpose of legislation”, the Minister said: “I propose that the purpose of the legislation be to manage the adverse environmental effects of activities in the EEZ and ECS”.
16. This Bill as drafted will not achieve this purpose, nor does it comply with our UNCLOS legal obligations.
17. The largest problem with the Bill is the absence of any environmental bottom lines. In this, the Bill marks a fundamental departure from our UNCLOS obligations to “protect and preserve”, and the RMA, which governs resource management on land and to 12 nautical miles offshore. It offers much less effective protection for the marine environment.
18. The function of the EEZ legislation is, in principle, the same as the function of the RMA. There is no reason, in principle, for the philosophies of the two Acts to differ. If anything, UNCLOS requires a higher, not a lesser, standard of protection.
19. The EEZ Bill has been clearly based on the RMA in terms of the type and sequence of its provisions. But the RMA is about sustainability, and establishes environmental bottom lines, through its purpose clause in section 5, which says:

#### **Purpose**

*(1) The purpose of this Act is to promote the sustainable management of natural and physical resources.*

*(2) In this Act, **sustainable management** means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural well-being and for their health and safety while—*

*(a) sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and*

*(b) safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and*

*(c) avoiding, remedying, or mitigating any adverse effects of activities on the environment*

20. By contrast, the EEZ Bill is about balance, and allows all economic and environmental factors to be traded off against one another, no matter what the environmental costs and with no indication given about priorities.
21. As a minimum the EEZ Bill, like the RMA, needs to require the sustainable management of ocean resources, to put in place a baseline for environmental protection. It is doubtful whether even this would be sufficient to give effect to the UNCLOS obligation to also “protect and preserve”. It is from UNCLOS that our right to use the EEZ for economic purposes comes.
22. Having established a bottom line, experience with the RMA shows that balance and facilitation of economic development opportunities can then be achieved. Infrastructure and economic development are not impeded, in other words.
23. Responsible Minister Hon Nick Smith has said that for the small number of decisions under the EEZ Bill (something in the region of 10-20 consents per year), the level of complexity in the RMA is not justified. Also, that the RMA requires consideration of some factors, such as social and cultural factors, which are not applicable offshore; therefore, the focus needs to be on economic and environmental factors.
24. We do not disagree with either point. However, we think that the Minister’s approach confuses issues about the Bill’s level of sophistication and context-specific drafting with the overriding question of its basic purpose and philosophy. We support the Minister’s desire to simplify and streamline, provided it can be achieved without doing damage to our own goals of properly protecting the environment. We think that it can. We also think that properly protecting the environment is essential to the Minister’s goals, of supporting (long term) economic development.
25. Also contrary to what has been claimed, this Bill is not a response to offshore oil drilling threats – nor should it be. Forest & Bird has been among those calling for an inquiry into the response to the Rena incident and a review of New Zealand’s response capacity, before offshore oil development proceeds, with a moratorium in the meantime.
26. An aspect of the Bill that we support is its notification requirements on application for a marine consent. Under **clause 46**, once the EPA is satisfied that the application is complete, it must give public notice. This is an improvement on the RMA, where public notification is discretionary, based on the application of some statutory criteria. Implicitly, everything that happens offshore, or the types of activities likely to happen offshore, are so environmentally significant, and otherwise unlikely to come to attention, that notification in all cases is in the public interest and should be required. We agree with this assessment.

## Sustainability and an obligation to “protect and preserve”

### *Clause 10: the purpose clause*

27. The purpose of the Bill is in **clause 10**. It “seeks to achieve a balance between the protection of the environment and economic development” in relation to activities in the EEZ and on the continental shelf.
28. The purpose clause of the Bill is fundamental. A whole Act is interpreted in the light of its purpose.
29. The drafting of this clause is in contrast with the purpose of the Resource Management Act, in section 5 of that Act: to promote the sustainable management of natural and physical resources, with sustainable management further defined as safeguarding the life supporting capacity of those resources, and their potential to meet the reasonably foreseeable needs of future generations.
30. Similarly, section 8 of the Fisheries Act 1996 says that “The purpose of this Act is to provide for the utilisation of fisheries resources while ensuring sustainability”. “Utilisation” means conserving, using, enhancing, and developing fisheries resources to enable people to provide for their social, economic, and cultural well-being.
31. The concept of sustainability is important. It defines the threshold for what is acceptable in natural resource use, and what is not. It is an internationally well-established principle, from the UN on down. It means meeting our needs whilst sustaining the health and viability of natural systems so that they can in turn meet the needs of future generations.
32. Certainly in 2006 Cabinet’s intention was to “promote the sustainable development of New Zealand’s ocean resources”: Cab Min (06) 47/4B. And in 2007 Cabinet agreed that the purpose of the legislation be “to provide for uses of EEZ resources, and to regulate the effects of those uses in order to protect the environment and ensure that any uses (or the effects of those uses, in the case of non-renewable resources) are environmentally sustainable (consistent with New Zealand’s obligations under the United Nations Convention on the Law of the Sea)”.
33. Those decisions have now been rescinded. The May 2011 Cabinet paper says: “I propose that the purpose of the legislation be to manage the adverse environmental effects of activities in the EEZ and ECS”.
34. UNCLOS, by contrast, would seem to require the prevention, as opposed to the management, of such effects, in its obligation to “preserve and protect”.
35. Small but significant changes to the drafting would be sufficient to give effect to UNCLOS, which is, in our view, essential. New Zealand is, simply, legally obliged to do this.
36. We do not agree that this can be achieved by a policy of balancing adverse effects with the benefits of activities. Nor does the obligation in the Bill to avoid, remedy or mitigate the adverse effects of activities assist. Environmental protection at some point is simply incompatible with some kinds of economic development activity in some places: hence our submission that to achieve the stated purpose, the legislation does need to provide for a bottom line.

37. The government has stated its intention to revive and pass Marine Reserves legislation within the next three years. This is a positive move, but that Bill in itself cannot achieve marine protection, without careful decisions being made about resource management in other parts of the marine environment. It is all the same environment.
38. We acknowledge the government's preference for simplifying and streamlining this Bill wherever possible, and supporting economic development in the EEZ.
39. For two reasons, consistent with these purposes, we think that closer alignment with the RMA in the purpose clause is desirable, and compliance with UNCLOS is essential. We propose redrafting the clause as follows:
- (1) The purpose of the Act is to provide for sustainable economic development while protecting and preserving the ocean environment of the exclusive economic zone and continental shelf, consistent with international obligations, including the (UNCLOS) Convention.*
- (1A) **Sustainable** means managing the use and development of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their economic well-being through economic development while—*
- (a) sustaining the potential of the ocean environment (excluding minerals) to meet the reasonably foreseeable needs of future generations; and*
- (b) safeguarding the life-supporting capacity of the ocean environment and marine ecosystems; and*
- (c) avoiding, remedying, or mitigating any adverse effects of activities on the ocean environment*
40. The Bill as currently drafted risks some practical difficulty in cross-boundary cases where the proposed activity is in the EEZ and another part in the territorial sea, and it would be necessary for decision-makers to reconcile two different sets of criteria under the EEZ and RMA Acts. The Bill says that cross-boundary consents "will need to comply with the relevant requirements under both statutes". It would therefore make practical sense for the requirements to be similar. Certainly, at the margins, it makes no sense in principle to manage ocean and its resources completely differently, depending which side or other of the 12 nautical mile line it falls.
41. A model based on the RMA as we propose will also allow decision-makers to rely on 20 years of RMA precedent, rather than the inefficiency of re-litigating a newly drafted Act.
42. Without the sustainable management of offshore resources, we will have neither environmental protection nor other parts of our marine-related economy. Sustainable management is no less a key to the economy than to the environment. Incorporating a requirement for the sustainable management of ocean resources is therefore just as much to do with long-term economic wellbeing, as environmental wellbeing.

**Submission:**

Redraft clause 10(1), as follows:

*(1) The purpose of the Act is to provide for sustainable economic development while protecting and preserving the ocean environment of the exclusive economic zone and continental shelf, consistent with international obligations, including the (UNCLOS) Convention.*

*(1A) Sustainable means managing the use and development of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their economic well-being through economic development while—*

*(a) sustaining the potential of the ocean environment (excluding minerals) to meet the reasonably foreseeable needs of future generations; and*

*(b) safeguarding the life-supporting capacity of the ocean environment and marine ecosystems; and*

*(c) avoiding, remedying, or mitigating any adverse effects of activities on the ocean environment*

### *Clause 12: Matters to be taken into account in decision-making*

43. The Bill's purpose clause is supported by two further clauses. **Clause 12** sets out matters to be taken into account in decision-making, to achieve the purpose of the Act. **Clause 61** provides that a marine consent may be granted if economic benefits outweigh adverse effects on the environment, or declined if adverse effects on the environment outweigh economic benefits.
44. The list in **clause 12** includes adverse effects on the environment, the economic wellbeing of New Zealand, "efficient" (not "sustainable") use and development of natural resources, protection of ecosystems and threatened species.
45. These are not listed in order of priority. In this, the approach taken in the Bill can be contrasted with section 6 of the RMA, which, along with section 7, are the equivalent provisions in that Act.
46. Section 6 of the RMA lists "matters of national importance". These are all about preservation and protection. Then, "other matters", about the importance of infrastructure and so on, are set out in section 7.
47. By contrast, in **clause 12** of the EEZ Bill, the matters are all together, with equal weighting, and with much less emphasis on environmental protection or sustainability. The priorities conflict, with no guidance to decision-makers about the relative weight to be given to them, or which interest to favour.
48. The effect of this, we suggest, will be that short-term economic considerations are more likely to be focused upon and given weight by decision-makers, because the latter are so much easier to quantify, and there is no express requirement in the Act to do otherwise.
49. We propose two types of changes, to deal with this. The first is some slight amendment of the section 12 factors. Secondly, a new section setting out environmental protection and preservation matters.
50. Cabinet agreed that the present and future economic wellbeing of New Zealand should be provided for. This is, essentially, a policy decision in favour of sustainability. Sustainability is what future economic wellbeing requires. They are the same thing.
51. Given that, it would be preferable simply to say so. Sustainability is a well understood concept, and failure to use that language implies a different intention, which would not give effect to the policy. For clarity, to save litigation and confusion, we would prefer to see it spelled out. We therefore propose the redrafting of para (b):

*(b) the economic wellbeing and environmental sustainability of New Zealand,*

52. Para (c) is about the “efficient” use and development of natural resources. “Sustaining” natural resources long term is a different matter, that again needs to be provided for, for New Zealand’s economic and environmental future wellbeing. Resources can be used and developed efficiently, and yet, unsustainably. We propose the addition of a new para:

*(c) the efficient use and development of natural resources*

*(ca) the sustainable use and development of natural resources,*

53. Section 12(h) does not fully implement the requirements under article 194(5) of UNCLOS which requires states to take measures “necessary to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life”. This is an environmental bottom line which New Zealand needs to put into place to fulfil its international obligations. The para should be reworded in order to do so:

*(h) the need to ~~protect~~ and preserve rare or fragile ~~and vulnerable~~ ecosystems and the habitats of depleted, threatened or endangered species*

54. The deep water and offshore environment means that there are high risks associated with many potential activities, particularly oil drilling. Clause 12 currently addresses the adverse effects of the “activities” themselves, but not risks of accidents and other unplanned events. We consider that explicit reference to this is important. A further para (i) should be added:

*(i) the risks and consequences of activities causing adverse environmental effects through accidents and other unplanned events.*

**Submission:**

We propose the following drafting changes to “matters to be taken into account to achieve purpose” in clause 12:

*(b) the economic wellbeing and environmental sustainability of New Zealand,*

*(c) the efficient use and development of natural resources*

*(ca) the sustainable use and development of natural resources,*

...

*(h) the need to protect and preserve rare or fragile ecosystems and the habitats of depleted, threatened or endangered species*

*(i) the risks and consequences of activities causing adverse environmental effects through accidents and other unplanned events.*

***New clause 11A: environmental protection and preservation matters***

55. We join the Environmental Defence Society in proposing a new draft clause, which would align the structure and function of this part of the EEZ Bill with the RMA, and give effect to our international legal obligations to “protect and preserve” the ocean environment, before exploiting it economically.

**Section 11A Environmental protection and preservation matters**

All persons exercising or performing functions, duties, or powers under this Act shall recognise and provide for the following environmental protection and preservation matters:

- (a) Ensuring the integrity of marine ecosystems (including ecosystem complexity, structure, function, productivity, dynamism, natural viability and boundaries)
- (b) Maintaining biological diversity, including the physical features and biogenic structures that support biological diversity
- (c) Maintaining diverse and heterogenous marine habitats and connectivity between different habitats and populations
- (d) Protecting unique, rare or fragile populations, communities, habitats, ecosystems and geomorphological features from adverse environmental effects
- (e) Protecting threatened species, keystone species and vulnerable areas and ecosystems from adverse environmental effects, including protecting the habitats of depleted, threatened or endangered species
- (f) Avoiding where possible, otherwise remedying or mitigating, the adverse effects of activities
- (g) Managing the cumulative effects of all activities on the receiving environment

56. Under clause 12 as it is currently drafted, the marine environment would be fully exposed to a balancing exercise of economic against environmental benefit. This is not consistent with New Zealand's UNCLOS commitments at international law, to "protect and preserve" the ocean environment, on which the right to use our EEZ depends.

57. If our submission is accepted and this new clause is included, the **clause 12** heading would need to be changed to "Other matters to be taken into account to achieve purpose", and paras (g) and (h) of clause 12 could be deleted.

**Submission:**

Insert new clause 11A, listing environmental protection and preservation matters:

**Section 11A Environmental protection and preservation matters**

All persons exercising or performing functions, duties, or powers under this Act shall recognise and provide for the following environmental protection and preservation matters:

- (a) Ensuring the integrity of marine ecosystems (including ecosystem complexity, structure, function, productivity, dynamism, natural viability and boundaries)
- (b) Maintaining biological diversity, including the physical features and biogenic structures that support biological diversity
- (c) Maintaining diverse and heterogenous marine habitats and connectivity between different habitats and populations
- (d) Protecting unique, rare or fragile populations, communities, habitats, ecosystems and geomorphological features from adverse environmental effects

(e) Protecting threatened species, keystone species and vulnerable areas and ecosystems from adverse environmental effects, including protecting the habitats of depleted, threatened or endangered species

(f) Avoiding where possible, otherwise remedying or mitigating, the adverse effects of activities

(g) Managing the cumulative effects of all activities on the receiving environment

Change clause 12 heading to “Other matters to be taken into account to achieve purpose”.

### *Clause 13: the cautious (precautionary) approach*

58. **Clause 13**, called “information principles”, says that if the information available to a decision-maker is uncertain, or inadequate, the person making the decision must favour caution and environmental protection.
59. However, if favouring caution and environmental protection means that an activity is likely to be a prohibited activity or a marine consent is likely to be refused, consideration must be given to an “adaptive management” approach. An adaptive management approach, defined in **clause 4**, includes allowing an activity to commence on a small scale or for a short period so its effects can be monitored, allowing it to be undertaken on the basis that consents can be revoked if its effects are more than minor, or any other approach that allows an activity to be undertaken so that its effects can be assessed and the activity therefore possibly discontinued.
60. Indications are that the policy intention was to take a *cautious* rather than a *precautionary* approach. We are advised that this was a deliberate distinction. The previous Cabinet in 2007 had been explicit about its desire to implement a precautionary approach, defining it in terms roughly consistent with the proper understanding of that term. In 2011 Cabinet instead agreed to adaptive management as a tool for exercising *caution*.
61. Aside from the natural inference that *pre-caution* is a step further along from caution, “precautionary approach” is a well-understood basic principle of environmental protection at international law (see, for example, the Rio Declaration of 1992, to which New Zealand was and remains a party).
62. It says that where there is risk and uncertainty, the onus shifts on to those wishing to undertake the activity, to show that it will not cause significant harm. In 1982, the United Nations World Charter for Nature said the principle meant that, when “potential adverse effects are not fully understood, the activities should not proceed”. And as defined by the Rio Declaration: “Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation”.
63. It is, therefore, about acting to *prevent* serious and irreversible threats despite uncertainty, and *not* acting when risks are not fully understood.
64. Clause 13, by contrast is about allowing activity to start. It turns the precautionary approach on its head.
65. Cabinet [“Proposal for Exclusive Economic Zone Environmental Effects Legislation”, 2011, para 59], was advised that even if the Bill does provide for some form of adaptive management, it does not negate the need to put in place a bottom line:

*I propose that the legislation enable decision-makers to take an adaptive management approach as a means of exercising caution in decision-making ... However, while adaptive management is a management tool expressly developed to deal with uncertainty, it does not negate the need to exercise caution in situations where there is a threat of serious or irreversible environmental damage occurring.*

66. If a precautionary approach was what was intended in **clause 13**, it would be preferable simply to use that language. This would achieve environmental protection.
67. The Bill could also be improved by making the following change to the definition of “adaptive management” in **clause 4(1)**, adding:
- but does not include allowing an activity to commence if its effects are likely to be serious or irreversible.*
68. The effect of this would be to put in a bottom line, with the onus then on applicants, consistent with the precautionary principle as it is normally understood, to show why serious or irreversible damage is not likely. This ought to be done, regardless of whether our other suggestions relating to clause 13 are adopted.
69. **Clause 13(1)(b)** requires decision-makers to base decisions on the best available information’. We think that this paragraph in the clause is legally unnecessary; were a decision-maker not to do this, he she or they would be subject to judicial review. We note EDS’ [draft] submission that this has been used in the Fisheries context, where it has been problematic, and has resulted in a “litigious minefield”. It, and clause 13(4) which refers to it, should simply be deleted.

**Submission:**

The definition of adaptive management in clause 4(1) of the Bill should be amended, by adding the following subclause:

*but does not include allowing an activity to commence if its effects are likely to be serious or irreversible.*

The precautionary approach is an internationally standard approach to protect the environment at international law. Using this language in clause 13 would be preferable.

Delete clause 13(1)(b) and 13(4).

### *Clause 61: Decisions on applications for marine consents*

70. **Clause 61(2)** provides that the EPA may grant an application for marine consent “if the activity’s contribution to New Zealand’s economic development outweighs the activity’s adverse effects on the environment” or “may refuse the application if the adverse effects of the activity on the environment outweigh the activity’s contribution to New Zealand’s economic development”.
71. This is a direct trade off of economic benefits against environmental costs. In effect, it says that provided the economic rewards are sufficiently high, any lesser amount of environmental destruction or damage may be consented to by the EPA.
72. We concur with EDS’ [draft] submission to you that:

*In EDS's view this provision is highly inappropriate and fails to reflect prudent or responsible environmental management practice because:*

*It potentially enables consideration of all environmental effects, irrespective of their severity, to be over-ridden in favour of short-term economic benefits*

*There is no robust methodology by which the 'weight' of economic development benefits can be compared against the 'weight' of adverse environmental effects. There is no common metric to apply. In many cases it is not possible or even appropriate to attempt to put a monetary value on environmental damage, such as the irreversible loss of a species or unique habitat.*

*It fails to recognise that there are environmental limits which should not be breached irrespective of the short-term economic benefits which may be derived*

*It fails to comply with New Zealand's international obligations under the United Nations Convention on the Law of the Sea (UNCLOS) which includes an obligation on nations to 'protect and preserve the marine environment' (article 192) which must be undertaken irrespective of economic benefits which may be derived from exploiting the marine environment.*

*It fails to comply with New Zealand's international obligations under the Convention on Biodiversity which include regulating where necessary for the protection of threatened species and populations and promoting the protection of ecosystems and natural habitats and the maintenance of viable populations of species in natural surroundings. This provision means that there is no certainty that biodiversity will be protected.*

*There is a strong international interest in how New Zealand manages its EEZ and continental shelf because of the very high biodiversity of the area. New Zealand is a steward of this resource for the humankind. There is a very strong reputational risk to New Zealand's environmental reputation if legislation fails to provide even basic protections for the environment.*

*It will almost certainly lead to the degradation of the natural environment because in practice short term economic considerations which can be relatively easily given a dollar value will be given greater weight in decision-making than longer term environmental considerations which are more uncertain and usually very difficult if not impossible to quantify in monetary terms*

73. Subsection 2 of clause 61 must be deleted. It is unnecessary as well as dangerous. It is the purpose and principles in subpart 2 that must govern all decision making, as is the case under the RMA.

**Submission:**

Subsection 2 of clause 61 must be deleted.

## Bill gives inadequate effect to international conservation standards and laws

74. In several clauses in the Bill, it is drafted in a way that breaches international commitments, or fails to give full effect to international conservation standards. It does not meet New Zealand's obligations under the UNCLOS or the Convention on Biodiversity.
75. As already noted in our previous submissions, **clause 10**, the purpose clause, fails to comply with the United Nations Convention on the Law of the Sea, which includes an obligation on nations to "protect and preserve" the marine environment irrespective of economic benefits. And **clause 12(h)** does not fully implement the requirements under article 194(5) of UNCLOS and should be reworded as follows in order to do so: *"the need to protect and preserve rare or fragile ecosystems and the habitats of depleted, threatened or endangered species"*.
76. The threatened species definition in **clause 4(1)** only refers to species formally declared by the Minister of Conservation as threatened. Protection of threatened species, particularly marine species, is an international matter which should be based on internationally peer-reviewed and independent science.
77. The definition of threatened species therefore needs to be amended by adding new paras (d) and (e) :
- (d) the New Zealand Threat Classification System lists:*
- (e) the International Union for the Conservation of Nature and Natural Resources Red List of Threatened Species*
78. Clause 11, which requires the legislation to be interpreted in accordance with international obligations, needs to either include reference to the Convention on Biological Diversity as well as UNCLOS, or could refer more generally to "New Zealand's international environmental obligations". The latter may be a more effective method of future-proofing the legislation.

### Submission:

The clause 4(1) definition of threatened species needs to be amended by adding new paras:

*(d) the New Zealand Threat Classification System lists:*

*(e) the International Union for the Conservation of Nature and Natural Resources Red List of Threatened Species*

Clause 11, which requires the legislation to be interpreted in accordance with international obligations, needs to either include reference to the Convention on Biological Diversity as well as UNCLOS, or more general reference to "New Zealand's international environmental obligations".

## Procedure and enforcement

### *Information included in applications*

79. We think that information needs to be included in applications about not just the effects of an activity, but the effects or risk of adverse effects of the *applicant*. We therefore join EDS in calling for a requirement on applicants to provide details of their reputation and previous

environmental performance including environmental litigation, financial status, and management and response capability to demonstrate that they are capable of responsibly carrying out the proposed activities.

80. We suggest that **clause 40** could be modified to achieve this, by including new paras:

*(ca) Fully describe the past record and capabilities of the applicant to safely undertake the activity, including environmental litigation, financial status, and risk management and response capability; and*

*(cb) Fully describe the applicant's environmental management plan addressing risks of potential adverse environmental effects*

**Submission:**

Information needs to be included in applications about not just the effects of an activity but the effects or risk of adverse effects of the *applicant*. We therefore join EDS in calling for a requirement on applicants to provide details of their reputation and previous environmental performance including environmental litigation, financial status, and management and response capability to demonstrate that they are capable of responsibly carrying out the proposed activities.

*Restriction on EPA power to delegate – have they the necessary expertise?*

81. We think there is a problem with the lack of specification in the Bill or anywhere else about how the EPA must be constituted for this decision-making. At present, it seems to be totally within the discretion of the EPA, as to how it would manage its processes around EEZ consent decisions – whether, for example, all members of the EPA must sit, what constitutes a quorum, are majority decisions acceptable, and so on.

82. We agree with the EDS that both legal and marine environment expertise is likely to be essential in these cases, but there is no requirement for either, in the establishment of the EPA. We note that Cabinet [“Proposal for Exclusive Economic Zone Environmental Effects Legislation”, 2011, para 66] initially agreed that there ought to be provision in the Bill for delegation to an expert panel, which has not been given effect in the draft. To the contrary, the Bill expressly provides that there is no delegation power.

83. An alternative approach might include provision for a certain number of secondments to the EPA for the purpose of marine consent decision-making, comprising people with the necessary expertise.

84. We suggest more attention needs to be given to these matters: they are matters for Parliament to decide. In these important cases, the EPA should not be left with full residual discretion to run its own processes without any guidance from Parliament.

**Submission:**

Parliament, in the Bill, needs to specify how the EPA would be constituted to deal with marine consent applications, including possible provision for secondments to ensure the proper expertise.

## *Appeal rights*

85. The above problem is compounded by a lack of full appeal rights.
86. The EEZ Bill differs significantly from the RMA on the matter of rights of appeal. It provides for appeals to the High Court against the whole or part of an EPA consent, by applicant, holder, or any submitter, but only on a question of law. Under section 120 of the RMA, submitters and others may appeal in whole or part to the Environment Court, without the same question of law constraint.
87. This was a deliberate policy decision by Cabinet, on the basis that these would be decisions already made at national level by an expert body, therefore de novo appeal rights are unnecessary and would waste time and resources.
88. However, we note that in nationally significant cross-boundary matters, the Bill provides for decisions to be referred to a board of inquiry or the Environment Court under **clause 97**. This indicates that in terms of its standing and expertise, the EPA does not have the same standing and expertise as these other decision-makers (from whom appeals do go to the High Court only on a point of law: section 149V).
89. Given this, and our comments on EPA expertise above, we submit that the Environment Court is the proper appeal forum and appeals de novo should be allowed.
90. In the early days of the RMA, it was the process of appeals to the Environment Court that drove case law and further policy development. We have already noted that in a number of respects, the drafting of this Bill is novel. If our other submissions are not accepted and this drafting does proceed into law, without a process of Environment Court appeals, the law will be developing without the benefit of that guidance.
91. EDS has also proposed that provision should be made for any party to seek an Environment Court declaration in relation to the legal interpretation of the legislation or a marine consent, as parties can under the RMA. This would be more cost effective than requiring parties to go to the High Court on a point of law, and consistent with desire to streamline and simplify. We agree.

### **Submission:**

The Bill needs to provide for a right of appeal to the Environment Court from EPA decisions, not confined to points of law.

It would be desirable for provision to be made for any party to seek an Environment Court declaration in relation to the legal interpretation of the legislation or a marine consent.

## *Enforcement – penalties*

92. The Bill reproduces the same maximum fines as the RMA: for a person other than a natural person (corporations), a maximum fine of \$600,000, and \$300,000 for a natural person, plus provision for continuing fines of \$10,000 for each day the offence continues.
93. However, the RMA in the case of a natural person also provides for a maximum 2-year prison term.

94. Furthermore, in the offshore oil scenario, the provision for maximum fines is inadequate, given the value of these activities and the potential catastrophic consequences in the worst class of case, for which a maximum penalty is designed, such as deepwater well blowout.
95. We invite the committee to seek advice from their officials on options for substantially increasing the maximum fines, to reflect the likely nature of economic developments offshore and their very serious risks.
96. There is no reason to omit a prison term, in the case of a natural person, and this should be re-included.
97. The provision for application for an enforcement order also differs from the RMA, in providing that only an enforcement officer should apply. In our view, any person should be able to apply at any time, as in the RMA.

**Submission:**

We invite the committee to seek advice from officials on options for raising the maximum penalties currently provided for in the Bill. There is no reason to omit a prison term, in the case of a natural person. This should be reincluded, and the provision for fines should be substantially increased.

Any person should be able to apply for an enforcement order at any time, consistent with the RMA.

Claire Browning  
Conservation Advocate