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The Committee Secretariat  
Local Government and Environment Committee  
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## **SUBMISSION ON THE EXCLUSIVE ECONOMIC ZONE AND CONTINENTAL SHELF (ENVIRONMENTAL EFFECTS) BILL**

### ***Introduction***

The Environmental Defence Society (EDS) welcomes the opportunity to comment on the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Bill.

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 2005 EDS published a report on oceans governance titled *Looking out to sea: New Zealand as a model for ocean governance*. In 2007 EDS published a report investigating integrated coastal management titled *Beyond the tide: Integrating the management of New Zealand's coasts*. The report was reprinted in 2009 with support from the Hauraki Gulf Forum.

In 2009, EDS also released a policy paper on the established of an Environmental Protection Authority (EPA) titled *Improving environmental governance: the role of an Environmental Protection Authority*. This paper canvassed gaps in current marine management (amongst other things) and proposed a role for the EPA which would include oversight of coastal and marine management.

In 2011, EDS released a policy paper on the subject of this Bill, 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. A copy of the policy paper is enclosed.

EDS welcomes the Bill. The recent grounding of the *Rena* on the Astrolabe Reef in the Bay of Plenty has highlighted the high risk associated with activities undertaken in New Zealand's oceans, and the dreadful consequences which can occur if things go wrong. It is essential that New Zealand has robust environmental legislation in place to manage activities within the EEZ and continental shelf. Such legislation needs to reflect international best practice and our local circumstances.

The Bill, as currently drafted has some very good features. These includes putting in place a consenting regime for activities in the EEZ and continental shelf which will require an assessment of environmental effects and will enable consent to be declined if the risks and potential adverse environmental effects are too large. EDS supports the role of the EPA being expanded to manage the new consenting process. EDS supports the requirement that all applications for marine consents are to be publicly notified. EDS also supports the provision for regulations which identify activities as

either permitted, discretionary or prohibited and which can also spatially identify marine areas which are off limits to specific activities.

A major flaw of the Bill, however, is the lack of any environmental bottom lines, and the provision for environmental considerations to be outweighed by short-term economic interests when decisions are made. In EDS's view, such provisions will inevitably result in environmental degradation, loss of precious biodiversity, and damage to New Zealand's international reputation.

The Bill also does not adequately address issues of risk, including the identification of the sources of risk, how they will be managed, and what the response will be if a mishap occurs.

In EDS's view, the Bill as it is currently drafted, does not meet New Zealand's obligations under the *United Nations Convention on the Law of the Sea* or the *Convention on Biodiversity*. This is likely to be of international concern because of the significant proportion of the world's marine species including seabirds and marine mammals which are present here.

Detailed submissions on the Bill are contained in the sections below. EDS requests the opportunity to present these submissions in person to the Select Committee.

### ***Detailed submissions***

#### *Part 1 Subpart 1 – Outline, definitions and application*

#### **Clause 4(1) Definition of 'adaptive management approach'**

This clause provides a definition of an adaptive management approach. Such an approach is not appropriate in all circumstances, particularly where there is a risk of causing irreversible environmental damage, including loss of species, as a result of undertaking an activity even on a small scale. The definition needs to be amended to include this consideration as follows:

**adaptive management** approach includes—

- (a) allowing an activity to commence on a small scale or for a short period so that its effects can be monitored:
- (b) allowing an activity to be undertaken on the basis that consent can be revoked if the effects are more than minor:
- (c) any other approach that allows an activity to be undertaken so that its effects can be assessed and the activity discontinued on the basis of those effects;

but does not include allowing an activity to commence where there is a risk of causing irreversible environmental damage.

#### **Clause 4(1) Definition of threatened species**

The definition of threatened species in this clause is unnecessarily restrictive and only refers to species formally declared by the Minister of Conservation as threatened under the various pieces of legislation. The determination of whether a species is threatened or not, should not be a political decision, but should be based on peer reviewed and independent science. Such internationally peer

reviewed science is used to compile the New Zealand Threat Classification System lists and the IUCN Red List of Threatened Species. These lists are specifically referred to in the New Zealand Coastal Policy Statement 2010 which applies to species within the territorial sea. Species on the lists should also be included in the definition of threatened species for the purposes of management of the Exclusive Economic Zone. The following amendments to the clause would address this issue:

**threatened species** includes any species that falls within the definition of threatened species in any 1 or more of—

(a) section 2(1) of the Biosecurity Act 1993:

(b) section 2(1) of the Marine Mammals Protection Act 1978:

(c) section 2(1) of the Wildlife Act 1953:

(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.

#### *Part 1 Subpart 2 – purposes and principles*

##### **Clause 10 Purpose**

The purpose of the Bill as currently drafted 'seeks to achieve a balance between the protection of the environment and economic development in relation to activities in the exclusive economic zone and on the continental shelf'.

EDS considers that this purpose is inadequate because:

- It fails to reflect the well-established international principle of environmental sustainability, which recognises the importance of sustaining the health and viability of natural systems for future generations
- It fails to establish an environmental bottom line, recognising 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) irrespective of economic benefits which may be derived from exploiting the marine environment
- It will likely lead to the degradation of the natural environment because in practice short term economic considerations which can be given a dollar value are given greater weight in decision-making than longer term environmental considerations which are more uncertain and very difficult to quantify in monetary terms
- It does not explicitly state that this clause sets out the Act's purpose and this has to be implied from the clause title

The purpose should be reworded to comply with article 192 of UNCLOS as set out below (changes underlined).

*Clause 10(1)(a) Recognise and provide*

If EDS's submission in relation to "New clause 11A Environmental principles" is accepted, a consequential change is required and is set out below (changes underlined).

*Clause 10(1)(b) Precautionary principle*

The intent of this clause appears to be that the precautionary principle should only be applied in favour of the environment and not in favour of economic development, but the drafting does not make this intention clear. The clause should be reworded as set out below to improve clarity on this crucial point (changes underlined).

**10 Purpose**

(1) 'The purpose of the Act seeks is to ~~achieve a balance between the protect and preserve ion of the environment and economic development~~ in relation to activities in the exclusive economic zone and on the continental shelf by —

(a) requiring decision-makers to recognise and provide for the matters in section 11A and take the matters in section 12 into account the matters in section 12 in making decisions under sections 27, 30, and 61; and

(b) requiring them to take a cautious approach in favour of the protection of the environment in decision-making if information available is uncertain or inadequate; and

(c) requiring the adverse effects of activities on the environment to be avoided, remedied, or mitigated.

(2) In addition to the matters in subsection (1), this Act—

(a) recognises that—

(i) some activities that are undertaken in the exclusive economic zone or on the continental shelf may have effects on the environment and on existing interests that are not addressed under other legislation; and

(ii) some activities are regulated under legislation in a way that incidentally avoids, remedies, or mitigates the adverse effects of those activities on the environment; and

(b) regulates the activities described in paragraph (a)(i) and their effects on the environment and existing interests.

**Clause 11 International obligations**

EDS supports the need to interpret the legislation in accordance with New Zealand's international obligations. However, this clause only refers to New Zealand's obligations under UNCLOS. New Zealand has other important international obligations applying to the EEZ and continental shelf under the Convention on Biological Diversity. This convention should also be referenced in this clause. The clause should be reworded as follows:

'This Act must be interpreted, and all persons performing functions and duties or exercising powers under it must act, consistently with New Zealand's international obligations under the Convention and the Convention on Biological Diversity.'

## **New clause 11A Environmental principles**

One of the key purposes of passing this legislation is to ensure that New Zealand has adequate environmental protection within the EEZ and extended continental shelf and to fill the current gap in this area. EDS is very supportive of that intention. EDS is therefore surprised to see that the Bill contains a set of information principles but lacks a set of environmental principles. EDS considers that including a set of environmental principles is critical if the legislation is to achieve its purpose and provide adequate guidance to decision makers. An appropriate set of environmental principles is set out below as a new clause 11A.

Second, EDS is concerned that if the environmental principles are simply included as additional matters to be taken into account, new clause 11A and clause 12 will present a “shopping list” of matters with no guidance to decision-makers about the relative weight to be given to each matter. This can be contrasted with the position under the Resource Management Act 1991 (RMA) in which sections 5, 6, 7 and 8 can be seen as forming a hierarchy of importance, with the RMA’s purpose being paramount and the terms “take into account” (s8), “have particular regard to” (s7) and recognise and provide for” (s6) placing progressively greater obligation on the decision maker to consider and protect those matters to the extent relevant.<sup>1</sup>

The High Court has said of the phrases “recognise and provide” and “take into account”:<sup>2</sup>

There is a deliberate legislative contrast between s5 "recognise and provide for" and s6 "take into account". When Parliament intended that actual provision be made for a factor, Parliament said so. One does not "provide for" a factor by considering and then discarding it. In that light, the obligation "to take into account" in s6 was not intended to be higher than an obligation to consider the factor concerned in the course of making a decision—to weigh it up along with other factors—with the ability to give it, considerable, moderate, little, or no weight at all as in the end in all the circumstances seemed appropriate.

Consistent with the new purpose we have proposed for the Bill, which ensures the protection and preservation of the marine environment as an environmental bottom line, EDS proposes the environmental principles are matters that should be “recognised and provided” for. This amendment would place an obligation on decision makers to prioritise matters in clause 11A above the matters in clause 12 and would reduce conflicts arising between the matters in the decision-making process.

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 sub clauses (g) and (h) of clause 12 could be deleted as EDS has incorporated the elements of these sub clauses into new clause 11A.

### **Clause 11A Environmental principles**

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

- (a) The maintenance of the integrity of marine ecosystems (including ecosystem complexity, structure, function, productivity, dynamism, natural viability and boundaries)

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<sup>1</sup> *Unison Networks Ltd v Hastings District Council* W011/09.

<sup>2</sup> *Bleakley v Environmental Risk Management Authority* [2001] 3 NZLR 213 at [72] (note this is considering the use of the phrase in the context of the Hazardous Substances and New Organisms Act 1996).

- (b) The maintenance of biological diversity, including the physical features and biogenic structures that support biological diversity
- (c) The maintenance of diverse and heterogeneous marine habitats and connectivity between different habitats and populations
- (d) The protection and preservation of unique, rare or fragile populations, communities, habitats, ecosystems and geomorphological features from adverse environmental effects
- (e) The protection and preservation of threatened species, keystone species and the habitats of these species from adverse environmental effects
- (f) The avoidance where possible, and otherwise remediation or mitigation of the adverse effects of activities
- (g) Management of the cumulative effects of all activities on the receiving environment

**Clause 12 Matters to be taken into account to achieve purpose**

Clause 12(b) refers to the ‘economic well-being of New Zealand’. It needs to be made clear that this refers to economic well-being in the long term, that is economic sustainability, rather than in the short term. Otherwise this clause could promote decisions which favour short-term economic gains at the expense of the environment, but will ultimately result in longer-term economic costs and detriment to national well-being due to environmental degradation and reputational damage. The clause should be reworded as follows:

‘the economic ~~well-being~~ sustainability of New Zealand’

Clause 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’ (Article 194(5)). This is an environmental bottom line which New Zealand needs to put into place to fulfil its international obligations. The clause should be reworded as follows:

‘the ~~need to~~ protection and preserve rare or fragile and vulnerable ecosystems and the habitats of depleted, threatened or endangered species’

Clause 12 (g) should be reworded in a similar manner to indicate that the protection of biological diversity and healthy functioning and resilience of marine ecosystems is an environmental bottom line, not something that can be traded off in favour of short-term economic gain.

‘the ~~need to~~ protection of the biological diversity and maintain the integrity, resilience and healthy functioning of marine species, ecosystems, and processes’

One of the key matters which decision-makers will need to consider is the risks of undertaking an activity in the EEZ and continental shelf. The deep water and offshore environment means that there are high risks associated with many activities. This has been highlighted by the Gulf of Mexico 2010

oil spill and the recent grounding of the *Rena* on the Astrolabe Reef in the Bay of Plenty. Clause 12 should contain an additional matter to be taken into account which addresses this issue, as follows:

'the risks and consequences of activities causing adverse environmental effects through accidents and other unplanned events'

### **Clause 13 Information principles**

Clause 13(1)(b) requires decision-makers to base decisions on the best available information. Similar wording was used in section 10 of the Fisheries Act 1996 and has been the basis on which numerous judicial review proceedings have been brought by the fishing industry against decisions made by the Minister of Fisheries. Many of the Minister's decisions have been overturned by the High Court based on this technical challenge. It would be unfortunate if such a litigious minefield was replicated in this legislation. EDS therefore strongly recommends that this clause be deleted as shown below as well as clause 13(4) which refers to this clause.

Clause 13(3) refers to the application of an adaptive management approach. However, the wording of this clause is rather clumsy and unclear. So the intent is made clearer, the clause should be reworded. Proposed changes to address these issues are set out below:

In achieving the purpose of this Act, a person performing functions and duties or exercising powers under it that affect the environment must—

(a) make full use of the information and other resources available to it and of its powers to obtain information and expert advice and commission research; and

~~(b) base decisions on the best available information; and~~

(c) take into account any uncertainty or inadequacy in the information available.

(2) If, in relation to the making of a decision under this Act that affects the environment, the information available is uncertain or inadequate, the person must favour caution and environmental protection.

(3) 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, the person must first consider whether taking an adaptive management approach should be applied ~~would allow the activity to be undertaken.~~

### *Part 1 Subpart 4 – Functions, duties, and powers*

### **Clause 21 Functions of Environmental Protection Authority**

This clause should make provision for other functions to be set out in regulations made under the Act to allow flexibility as the new management framework is developed. It should also provide the EPA with a broader oversight function for the operation of the new regime which may require fine-tuning as it is brought into operation.

(ea) to monitor and report on the effect and implementation of this Act

(f) to perform any other function specified in this Act or regulations made under it

#### **Clause 24 Restriction on Environmental Protection Authority's power to delegate**

Decisions on marine consents need to be made by people who have a good understanding of the marine environment, environmental impact assessment methodology and decision-making processes for environmental-type consents.

EDS is concerned that the current board members of the EPA do not have the knowledge and skills required to make robust decisions on applications in the EEZ and continental shelf and to chair a public hearing, involving cross examination (provision for cross examination is sought by EDS below).

Currently this clause provides the EPA Board **may** appoint a committee to exercise its decision-making role on applications for marine consents. There is no **requirement** in the Bill that decisions on marine consents be delegated to a **suitably qualified** committee.

This is at odds with the requirements in the RMA for Board of Inquiry appointments. Section 149J of the RMA requires the Minister for the Environment to appoint one member as the chairperson, who must be a current, former, or retired Environment Judge or a retired High Court Judge. Section 149K RMA requires the Minister to consider the need for the board to have available to it, from its members, knowledge, skill, and experience relating to the RMA, the matter or type of matter that the board will be considering, tikanga Māori and the local community.

EDS considers a new requirement should be introduced in the Act requiring decisions on marine consents to be delegated to a suitably qualified committee. This committee should be required to include a chairperson, who is a current, former, or retired Environment Judge or a retired High Court Judge. Other members should be selected for their understanding of the marine environment, environmental impact assessment methodology, tikanga Māori and best practice management of activities in the EEZ and continental shelf.

#### *Part 2 Subpart 1 – Regulations*

#### **Clause 27 Regulations prescribing standards, methods, or requirements**

Clause 27(1)(c) makes provision for regulations for 'assessing the state of the environment' but not monitoring which is an important precursor to such an assessment. The clause could be amended to address this issue as follows:

Monitoring and assessing the state of the environment of the exclusive economic zone and the continental shelf

#### **Clause 30 Regulations**

This clause covers regulations more generally. EDS considers that there should be an explicit reference to the possibility of a regulation providing for a marine policy statement. As more activities take place within the EEZ and continental shelf there is likely to be a growing need for a strategic policy framework to be developed to guide consenting decisions. Providing for this possibility could be achieved through the addition of the following:



(ca) providing for the development of a marine policy statement

This would need to be accompanied by an additional definition in Clause 4 (interpretation) to define the term 'marine policy statement'.

*Part 1 subpart 2 – Marine consents*

**Clause 39 Application for marine consent**

This clause requires the applicant to include an impact assessment as well as fully describing the proposal. However it does not require the applicant to provide information on the proposed implementation of the consent. This is of concern, because it is the processes around the implementation of the consent which are likely to have the greatest impact on whether or not risks are adequately managed. Managing the risk of an accident which impacts on the environment is likely to be one of the major issues in consenting offshore activities.

Applicants for a marine consent should be required to provide details of their environmental management system and plans for implementation and be able to demonstrate how they will be implementing these systems.

In addition, applicants should be required to provide details of reputation and previous performance including any previous environmental litigation, financial status, resourcing and capability in order to demonstrate that they are capable of carrying out the proposed activities safely and in a way that minimises harm to the environment.

This issue could be addressed by providing that applicants, in addition to providing an impact assessment, must also provide an environmental management operational plan. Additional clauses could provide a definition of the plan and set out the requirements for its content. This would require the following amendment to clause 39(2):

An application must-

- (a) Be made in the prescribed form; and
- (b) fully describe the proposal; and
- (c) fully describe the past record and capabilities of the applicant to safely undertake the proposal; and
- (d) Include an impact assessment prepared in accordance with section 40; and
- (e) include an environmental management plan in accordance with section 40A

**Clause 53 Hearings to be public and without unnecessary formality**

Clause 53(3)(c) provides that the EPA must 'not permit any person other than a representative of the EPA to question a party or witness'. Cross-examination by the parties has therefore been excluded. It is important that cross-examination is permitted so that the evidence provided by the applicant or submitters is adequately tested. Applications for activities within the EEZ and continental shelf are likely to raise very technical and complex issues, including assessments of risk, which need to be fully examined through cross-examination to ensure that the decision is made on robust and credible information. The clause should be reworded as follows:

- (3) In determining an appropriate and fair procedure for a hearing, the EPA must—
- (a) avoid unnecessary formality; and
  - (b) recognise tikanga Māori where appropriate, and receive evidence written or spoken in Māori, and the Maori Language Act 1987 applies accordingly; and
  - (c) ~~not permit any party person other than a representative of the EPA to question a party or witness~~ providing evidence for another party.

#### **Clause 60 Matters to be considered in deciding extent of adverse effect on existing interests**

In addressing effects on existing interests, this clause requires the EPA to have regard to “the area” the activity would have in common with the existing interest. However, an existing interest such as fishing may rely on the healthy functioning of the marine environment and on marine habitats which are geographically separated from the area actually fished. This clause needs to recognise that conflict is not necessarily just spatial but can relate to the quality of the environment. It could be reworded to include the following addition clause to address this issue:

(aa) the reliance of the existing interest on the quality of the environment which may be affected by the activity

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

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.’

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
- Currently, 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 also no common metric which can be reliably applied. 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.

The provision would also create legal uncertainty in the interpretation of the legislation when it is applied, as it conflicts with the wording of the purpose and principles in subpart 2, and could lead to complex and time-consuming litigation.

These provisions should be rewritten as follows:

~~(1) Before the Environmental Protection Authority decides whether to grant or refuse an application for marine consent under subsection (2), the EPA must consider the extent to which imposing conditions under section 62 might avoid, remedy, or mitigate the adverse effects of the activity for which consent is sought.~~

~~(2) After complying with subsection (1) and sections 59 and 60, the EPA may—~~

~~(a) grant an application for marine consent, in whole or in part, and issue a consent if the activity's contribution to New Zealand's economic development outweighs the activity's adverse effects on the environment; or~~

~~(b) refuse the application if the adverse effects of the activity on the environment outweigh the activity's contribution to New Zealand's economic development.~~

(1) ) After complying with sections 59 and 60 the EPA —

(a) may grant or refuse the application; and

(b) if it grants the application, may impose conditions under section 62.

(3) The EPA may ~~also~~ refuse an application for a consent if it considers that it does not have adequate information to determine the application.

(4) Before refusing an application under subsection (3), the EPA must—

(a) have regard to whether the applicant gave the EPA any further information or reports in response to a request by the EPA; and

(b) consider whether taking an adaptive management approach would be appropriate ~~allow the activity to be undertaken.~~

~~(5) If the EPA grants the application, it may issue the consent subject to conditions under section 62.~~

## 62 Conditions of marine consents

Clause 62 sets out the conditions that can be imposed on marine consents. In addition to what is already provided for in sub-clause 62(2), it needs to enable the EPA to impose conditions that address:

- Baseline monitoring before the activity commences so that any effects can be properly identified
- Implementation of the consent to ensure that the risks of an accident that could result in an adverse effect on the environment are minimised
- The ability of the EPA to appoint an independent observer and to recover the costs from the applicant

These issues can be addressed by making the following changes to the wording of clause 62(2)

The conditions that the EPA may impose include, but are not limited to, conditions requiring the consent holder to—

(a) provide a bond for the performance of any 1 or more conditions of the consent:

(b) obtain and maintain public liability insurance of a specified value sufficient to cover the likely costs of any accident or incident that requires a clean-up:

(ba) Undertake baseline monitoring prior to commencing the activity:

(c) monitor, and report on, the exercise of the marine consent and the effects of the activity it authorises:

(ca) monitor, and report on, operational procedures to minimise the risk of an unplanned event occurring which could result in an adverse effect on the environment:

(d) ~~appoint~~ make provision for an observer appointed by the EPA to monitor the activity authorised by the consent and its effects on the environment:

(e) make records related to the activity authorised by the consent available for audit.

Clause 62(4) provides that regulations can expressly limit the conditions that may be attached to a consent. This constraint on the EPA's decision making power to impose conditions undermines its role as an independent organisation operating at arms' length from the Minister. This clause should be deleted.

## Clause 65 Observers

This clause provides for the consent holder to appoint an observer with the approval of the EPA. The provision for the consent holder to directly appoint the observer could result in the independence of the observer being compromised. EDS's preference is for the observer to be directly appointed by the EPA which could then recover the cost from the consent holder. Changes to the wording of the clause to achieve this are shown below:

A condition imposed under section 62(2)(d) that requires the EPA holder of a consent to appoint an observer must specify in detail the observer's duties in relation to the activity.

~~(2) The consent holder may appoint a person to be an observer only if the person is approved by the EPA for that purpose.~~

(3) The EPA must only appoint ~~approve~~ a person to be an observer in relation to a consent if the person has the appropriate training, skill, and experience to perform the duties.

#### **Clause 80 Decision on review of duration of consent**

Clause 80(2) which deals with extending the duration of the consent is wording in a loose way and needs to be tightened up as follows:

(2) The EPA may extend the duration of a consent on a review under section 74 only if the monitoring of the effects shows that the effects are minor or ~~may will be~~ adequately avoided, remedied, or mitigated to ensure no significant adverse effects on the environment by imposing conditions.

#### **Clause 88 Application for consent for cross-boundary activity**

This clause addresses cross-boundary activities. It provides that an applicant may make a joint application but doesn't require this to happen. EDS considers that the default position should be that a joint application is required. This is to ensure that all the environmental impacts of the activity are considered at the same time. The boundary between the territorial sea and the EEZ is arbitrary in environmental terms and bears no relationship to the boundaries of marine ecological systems. It is a fluid environment which is fully interconnected. Impacts on both sides of the jurisdictional division therefore need to be considered together. Once a joint application is lodged, clause 92 makes provision for each part to be heard separately if specific circumstances arise warranting this.

This issue can be addressed by making the following amendments to the clause:

A person who intends to undertake a cross-boundary activity must ~~may~~

~~(a)~~ prepare a joint application for consent that complies with the requirements of—

(i) this Act and any regulations in relation to the part of the activity that relates to the exclusive economic zone or the continental shelf; and

(ii) the Resource Management Act 1991, and any regulations, national environmental standards, or regional or district plans made under that Act, in relation to the part of the activity that relates to New Zealand territory; or

~~(b) apply for a marine consent and a resource consent for a cross-boundary activity separately, whether concurrently or at different times.~~

#### **Clause 96 Separate decisions on marine consent and resource consent applications**

This clause provides for separate decisions on joint applications. This makes sense given that the decisions will need to be made under different legislation. However, it will be important that the

conditions which are imposed on the activity under the two separate decisions are compatible so that they can be implemented in practice. An additional subclause would address this issue as follows:

The Environmental Protection Authority must decide the application for a marine consent that is part of a joint application for consent.

(2) Sections 59 to 69 apply to the application for a marine consent.

(3) The relevant consent authority must decide the application for a resource consent that is part of a joint application.

(4) Sections 104 to 116 of the Resource Management Act 1991 apply to the application for resource consent.

(5) When imposing conditions on a consent which is part of a joint application, the EPA and relevant consent authority should, to the extent possible, ensure that the conditions imposed are compatible with each other.

#### **Clause 97 Application for consent for nationally significant cross-boundary activity referred to board of inquiry**

This clause provides for the EPA to delegate its functions to a board of inquiry hearing a nationally significant application. This ability to delegate functions should also apply to the case when part of a joint application is heard by the Environment Court.

#### *Part 3 Subpart 1 Objections and appeals*

#### **Clause 107 Representation at proceedings**

This clause sets out the persons which may become party to proceedings before the High Court and includes the Attorney-General and the consent authority for cross-boundary activities. There also needs to be provision for a public interest group to become party to the proceedings. This provides an important check and balance, as the Attorney-General does not often participate in these kinds of proceedings to protect the public interest. The amended wording to provide for this is shown below:

(1) The following persons may be a party to any proceedings before the High Court under this Act:

(a) the Attorney-General, representing a relevant aspect of the public interest:

(b) the relevant consent authority in relation to proceedings affecting a cross-boundary activity to which subpart 3 of Part 2 applies:

(c) a person who has an interest in the proceedings that is greater than the interest that the general public has.

#### *Part 3 Subpart 2 - Enforcement*

#### **Clause 114 Application for enforcement order**

This clause provides for the EPA or an enforcement officer to apply to the Environment Court for an enforcement order. It is essential that other parties are also able to apply for an enforcement order if there is a breach of the legislation of the conditions of a consent. This is because:

- The EPA may not have the resources to seek an enforcement order.
- The EPA may give enforcement lower priority to other activities and therefore not make resources available to undertake enforcement in specific situations.
- The EPA may become over-influenced by consent holders, such as happened in the Gulf of Mexico, and therefore not undertake its enforcement responsibilities rigorously.

Enabling other parties to seek enforcement orders provides an important 'check and balance' of the performance of the EPA and or consent holders. This is essential in the situation where parties are undertaking potentially highly risky activities in deep offshore water, where a breach of conditions could have catastrophic consequences.

There is an open provision in the RMA for any party to seek an enforcement order, and in the over 20 years of the Act's operation there has not been any problem with excessive numbers or applications, or those which are frivolous or vexatious.

The wording of the clause should be amended as follows:

(1) Any person may at any time ~~The Environmental Protection Authority or an enforcement officer may~~ apply to the Environment Court for an enforcement order.

(2) The application for an enforcement order must be in the prescribed form and specify the relief sought.

(3) Part 11 of the Resource Management Act 1991 applies as if the application were made under Part 12 of that Act.

### **Application for declarations**

The Bill does not provide for application to the Environment Court for declarations. This provision in the RMA provides a very useful tool to clarify the law and its application, and is far more cost effective than requiring parties to go to the High Court on a point of law. EDS strongly suggests that provision is made for any party to seek a declaration in relation to the legal interpretation of the legislation or a marine consent.

### **Clause 125 Penalties**

This clause sets out penalties for infringements of the legislation with a maximum fine provided of \$300,000 for a natural person and \$600,000 for a company. There is no provision for a prison term. Given the value of the activities likely to take place within the EEZ and continental shelf such as offshore oil and gas extraction and minerals mining, and potential consequences of accidents happen, these maximum values are far too low and unlikely to serve as a real deterrent. In addition, the possibility of a prison term is likely to serve as a more effective deterrent than a fine which can be easily paid. EDS would strongly suggest that the maximum fines be at least doubled and that a prison term also be provided for.

## **Conclusion**

EDS welcomes the initiative to put in place legislation to manage the environmental effects of activities within the exclusive economic zone and continental shelf. However, the Bill as currently worded is defective. It fails to provide a robust regime which will ensure that the environmental values of this area are protected in the long-term public interest. It also fails to meet New Zealand's international obligations. EDS urges the Local Government and Environment Committee to implement the amendments set out above.

Yours sincerely



**Raewyn Peart**  
**Policy Director**

Environmental Defence Society  
P O Box 95 152  
Swanson  
Auckland 0653  
Phone: 09 8156082  
Mobile: 021613379  
Email: [raewyn@eds.org.nz](mailto:raewyn@eds.org.nz)  
Website: [www.eds.org.nz](http://www.eds.org.nz)