17 May 2013

Mr Joshua McLennan-Deans
Senior Analyst, Marine and Environmental Governance
Ministry for the Environment – Manatu Mo Te Taiao
23 Kate Sheppard Place, PO Box 10362, Wellington 6143

Re: Exclusive Economic Zone and Continental Shelf (Environmental Effects—Permitted Activities) Regulations 2013

Dear Joshua,

Thank you for the opportunity to comment on the Exclusive Economic Zone and Continental Shelf (Environmental Effects—Permitted Activities) Regulations 2013. Greenpeace's comments on the above proposed regulations follow.

As we noted in our submissions on the 'Managing Our Oceans' discussion on these proposed regulations last June, the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act it is contrary to New Zealand's international obligations to protect the marine environment under the United Nations Convention on the Law of the Sea, contrary to the precautionary principle which has been accepted by the International Court of Justice and International Tribunal for the Law of the Sea as customary international law, and contrary to international best practice. The proposed regulations would implement these reckless and unlawful amendments, but, in addition, may also be *ultra vires*.

We will not repeat observations made in that earlier submission, to which reference should be made. We highlighted the risks of deep-water drilling, seismic surveying, operational impacts from oil drilling and the Inadequacy of the Exclusive Economic Zone and Continental Shelf Act 2012 to regulate and protect the environment.

We noted that New Zealand has an obligation under Article 192 of the Law of the Sea Convention 1982 to protect and preserve the marine environment, and under article 194(2) to take all measures necessary to ensure that activities are so conducted so that pollution arising from incidents or activities does not spread beyond the areas where New Zealand exercises sovereign rights in accordance with the Convention.

Article 194 requires New Zealand to deal with all sources of pollution of the marine environment, including by measures designed to minimize to the fullest possible extent pollution from installations and devices used in exploration or exploitation of the natural resources of the sea-bed and subsoil. Measures must be taken 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 206 of the Convention requires New Zealand to carry out an environmental impact assessment, when New Zealand has reasonable grounds for believing that planned activities under their jurisdiction or control may cause substantial pollution of or significant and harmful changes to the marine environment. The assessments must be published, or provided to competent international organizations, which should then make them available to all States (Article 205).

We stress this, since the draft regulations show in clear form how the Act, and now these draft regulations, will fail to protect the marine environment, and will fail to enable New Zealand to comply with its international obligations.
Specifically, the Bill would fail this in a number of ways:

1. By failing to ensure that EIAs are carried out where necessary and made public and that appropriate consultations with the public occur.
2. By failing to control potentially harmful activities in the marine environment, and
3. By failing to control activities which may cause pollution and damage to the marine environment, including seismic testing.

1. No EIAs required

GREENPEACE
Greenpeace Aotearoa New Zealand Inc PB 92507 Wellesley Street Auckland 1141 **www.greenpeace.org.nz**
0800 22 33 44 **tel** 09 630 6317 **fax** 09 630 7121 **email** info@greenpeace.org.nz

The ‘initial environmental assessment’ required in clause 4 is nowhere near adequate. It is in no way an environmental impact assessment. It does not even purport to be an environmental impact assessment, but an initial environmental assessment. There is no public consultation, no element of independence, so it will be conducted only by the operator, and there is no review. Nor are there any methods of controlling any impacts which are identified.

2. No control of potentially harmful activities

Merely requiring all reasonable measures are taken to ‘avoid, mitigate, or remedy’ adverse effects of the activity on any sensitive environment encountered are in no way sufficient to protect the marine environment or to carry out New Zealand’s obligations.

1. The requirement is only to ‘avoid, mitigate or remedy’ adverse effects. It does not require operator to prevent adverse effects. The operator can choose simply to mitigate them, for instance. That means that damage may be caused to vulnerable marine ecosystems, ecologically or biologically sensitive areas (see below), or to the marine environment, and there is not only no obligation for the operator to prevent them, but no way for the New Zealand government to prevent them.

2. There is no requirement addressed to (1) vulnerable marine ecosystems (VMEs), which are required by the United Nation Food and Agriculture Organization (FAO) to be protected, or to (2) ecologically or biologically sensitive areas (EBSAs), some of which have been identified by the Convention on Biological Diversity (CBD). ‘Sensitive environments’ is a new and different definition, and as such this will both introduce confusion and result in failure to protect areas, since much work has been carried out internationally on VMEs and EBSAs.

3. There is no requirement addressed to the marine environment as such. The obligations are limited to ‘sensitive environments’. So fish populations, or marine mammals, may be damaged, and there is no way of controlling effects, nor is there any obligation even to avoid, remedy or mitigate effects.

4. There is no requirement of consultation, even with Iwi. The obligation is only to notify Iwi etc.

5. There are no controls over seabed mining activities. This is particularly reckless when deep seabed mining exploration is only starting, so even the technology is developing or even still not developed and the effects unknown.

6. There are no controls over marine structures. This is even when the proposed regulation includes drilling rigs and any seabed mining structures.

7. The regulations are in our submission *ultra vires.*

3. No control of activities which may cause pollution and damage to the marine environment, including seismic testing.

The requirement in Clause 7 to comply with the Department of Conservation’s 2012 Code of Conduct for Minimising Acoustic Disturbance to Marine mammals from Seismic Survey Operations does not amount to control of the activities. It is an abdication of responsibility. The Code Reference Document[1] itself notes that “There are currently many areas of uncertainty related to the potential impacts of acoustic sources on the marine environment”.

The precautionary approach, to which New Zealand has repeatedly signed up in numerous international instruments, and which has been embraced by the International Court of Justice and the International Tribunal for the Law of the Sea, requires New Zealand not to use scientific uncertainty as a reason to postpone preventative measures. That is exactly what New Zealand has done here. This can result in damage not only to marine mammals, including whales, but also to fish populations.

---

[1] http://www.doc.govt.nz/Documents/conservation/native-animals/marine-mammals/seismic-survey-code-of-conduct-reference-document.pdf

GREENPEACE
Greenpeace Aotearoa New Zealand Inc PB 92507 Wellesley Street Auckland 1141 **www.greenpeace.org.nz**
0800 22 33 44 **tel** 09 630 6317 **fax** 09 630 7121 **email** info@greenpeace.org.nz

All cetaceans - whales and dolphins -are highly sensitive to sound and use sound for communication, echolocation and navigation. Whales and dolphins have been found dead after military sonar testing and industry sonar use. Noise from oil and gas exploration seismic surveys and geophysical surveys can be detected hundreds of kilometres from the source. There is also research showing impacts on fish. The CBD noted in a synthesis report[2] last year that "Fish utilize sound for navigation and selection of habitat, mating, predator avoidance and prey detection and communication. Impeding the ability of fish to hear biologically relevant sounds might interfere with these critical functions.

Although the study of invertebrate sound detection is still rather limited, based on the information available it is becoming clear that many marine invertebrates are sensitive to sounds and related stimuli". The report concluded that: "The uncontrolled introduction of increasing noise is likely to add significant further stress to already-stressed oceanic biota. Protecting marine life from this growing threat will require more effective control of the activities producing sound which depends on a combination of greater understanding of the impacts and also increased awareness of the issue by decision makers both nationally and regionally to implement adequate regulatory and management measures." In no way do the proposed regulations implement adequate regulatory or management measures.

Seismic testing should in no way be a permitted activity. It should be subject to prior hearings, specific conditions, and ongoing control as well as active monitoring.

4. No consultation, even with Iwi

Clause 2 of Schedule 1 only requires notification of iwi and other groups: there is no requirement of consultation. Far less is there a requirement of consultation with the public, or other stakeholders, such as environmental organizations, recreational groups or the fishing industry.

5. No controls over mining activities

Prospecting and exploration for seabed mining is also a permitted activity under the proposed regulations. This is highly irresponsible and potentially dangerous. Seabed mining is a very new and emerging activity. Making seabed mining prospecting and exploration a permitted activity, when not only are the effects not well understood, but the technology is still rapidly evolving, is exceptionally reckless. Operators may drill or scrape the seabed, seamounts, hydrothermal vents or cause sedimentation and silting, or cause other serious effects, in the name of seabed mining prospecting and exploration. This simply must not be permitted and must be closely controlled and managed.

6. No controls over marine structures

Clause 5 allows maintenance or repair of a permitted marine structure. This is any structure erected on or attached to the seabed during, or for the purpose of carried out, a permitted activity. Simply requiring operators to comply with the pre-activity and post-activity provisions for both oil exploration structures, such as drilling rigs, or seabed structure, when nobody knows even what they may be, is reckless. They should not be permitted activities.

7. Regulations Ultra Vires

Section 28 of the Act provides that:

"The regulations must not provide for an activity to be a permitted activity if, in the Minister's opinion,—

(a) the activity has or is likely to have adverse effects on the environment or an existing interest that are significant in the circumstances; and

(b) it is more appropriate for the adverse effects of the activity to be considered in relation to an application for a marine consent."

[2] CBD, Scientific Synthesis on the Impacts of Underwater Noise on Marine and Coastal Biodiversity and Habitats (12 March 2012).

GREENPEACE
Greenpeace Aotearoa New Zealand Inc PB 92507 Wellesley Street Auckland 1141 www.greenpeace.org.nz
0800 22 33 44 tel 09 630 6317 fax 09 630 7121 email info@greenpeace.org.nz

It is clear that activities such as seismic testing are likely to have adverse effects on the environment that are significant in the circumstance. It is also clear that it is more appropriate for the adverse effects to be considered in relation to an application for a marine consent. The Minister cannot, in our submission, reasonably hold an opinion otherwise.

Section 33 of the Act contains a list of matters which the Minister may take into account. These include:

“ (a) any effects on the environment or existing interests of allowing an activity with or without a marine consent, including—
(i) cumulative effects; and
(ii) effects that may occur in New Zealand or in the waters above or beyond the continental shelf beyond the outer limits of the exclusive economic zone; and

(b) the effects on the environment or existing interests of other activities undertaken in the exclusive economic zone or in or on the continental shelf, including—
(i) the effects of activities that are not regulated under this Act; and
(ii) effects that may occur in New Zealand or in the waters above or beyond the continental shelf beyond the outer limits of the exclusive economic zone; and

(c) the effects on human health that may arise from effects on the environment; and
(d) the importance of protecting the biological diversity and integrity of marine species, ecosystems, and processes; and
(e) the importance of protecting rare and vulnerable ecosystems and the habitats of threatened species; and
(f) New Zealand's international obligations; and
(g) the economic benefit to New Zealand of an activity; and
(h) the efficient use and development of natural resources; and
(i) the nature and effect of other marine management regimes; and
(j) best practice in relation to an industry or activity; and
(k) in relation to whether an activity is classified as permitted or discretionary, the desirability of allowing the public to be heard in relation to the activity or type of activity; and
(l) any other relevant matter.”

Clearly once any reasonable Minister considers these matters properly, she or he could not reasonably come to the conclusion that oil prospecting and exploration should be a permitted activity.

In addition, under section 34, in relation to the making of a decision under this Act, the information available is uncertain or inadequate the Minister must favour caution and environmental protection. It is clearly the case that information is uncertain or inadequate in matters such as seismic testing.

Conclusion

These regulations should be withdrawn. These activities should be discretionary.

Greenpeace wishes to be heard in relation to these submissions.

Yours sincerely,

Nathan Argent
Chief Policy Advisor
Greenpeace New Zealand Inc

GREENPEACE
Greenpeace Aotearoa New Zealand Inc PB 92507 Wellesley Street Auckland 1141
0800 22 33 44 tel 09 630 6317 fax 09 630 7121 email info@greenpeace.org.nz www.greenpeace.org.nz