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Ministry for the Environment
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Submission on Activity Classifications Under The EEZ Act: A Discussion Document On The Regulation On Exploratory Drilling, Discharge Of Harmful Substances And dumping Of Waste In The Exclusive Economic Zone And Continental Shelf

1.0 INTRODUCTION

The Environment and Conservation Organisations of NZ (ECO) is the national alliance of 55 groups with a concern for the environment. We were established in 1972. Our reach within New Zealand is substantial. Oceans Policy and its cut-down derivatives have been a central concern for many years, and has had much attention from our members and working groups and Exec committee and has been discussed at successive AGMs.

This submission has been prepared by members of ECO Executive and is in line with ECO Policy that was developed in consultation with ECO member bodies and endorsed by our AGM.

While ECO welcome the opportunity to make a submission on the Activity Classification Proposals we are concerned that it appears that both the Ministry and the Minister have closed minds on these issues.

ECO refers the Ministry to our previous submission (May 2013) on the draft regulations and our concerns over the approach and implementation of those proposals.

ECO is concerned that the introduction of Non-notified Discretionary Classification to the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 occurred without the opportunity for public submissions or a Select Committee review process. ECO considers that the Ministry is in breach of its obligations under the Environment Act. The Ministry has failed in these provisions to provide “mechanisms for promoting effective public participation in environmental planning” and the requirements of section 17 of the Environment Act.

2.0 Summary of Submission

Below we make a summary of changes to the proposal:

Table 1: Summary of the Submissions on the discussion document	
Issues	Proposals
For oil and gas exploratory drilling, the costs to applicants of the current <i>discretionary</i> classification are small when considered against the scale of the activity and the potential impacts on the environment and existing interests. However, a <i>permitted</i> activity classification provides insufficient and totally inadequate regulatory oversight.	Exploratory drilling for oil and gas is to be classified as <i>discretionary</i> under the EEZ Act. ECO considers that for climate reasons this should be gazetted as a prohibited activity.
The Marine Legislation Bill requires the definition of <i>harmful substances</i> to be set in regulations made under the EEZ Act.	Define harmful substance as: (a) a substance which is ecotoxic to aquatic organisms and considered hazardous for the purposes of the Hazardous Substances (Minimum Degrees of Hazard) Regulations 2001, or (b) oil, or (c) garbage, or (d) discharged sediments and/ or tailings from mineral operations. This proposal builds on the current definition set out in the MTA and is expanded to capture sediments and/ or tailings.
The regulation of garbage discharges from offshore installations is being transferred from the MTA to the EEZ Act, and the Minister must recommend the appropriate classification for these activities.	To be <i>permitted</i> with conditions, reflecting the current MTA approach and international obligations arising from MARPOL Annex V. ECO consider there should be a duty on all parties to take all reasonable steps to avoid garbage discharges below the threshold. Discharges above thresholds allowed in MARPOL will be <i>prohibited</i> .
The regulation of offshore processing drainage discharges and displacement water discharges is being transferred from the MTA to the EEZ Act, and the Minister must recommend the appropriate classification for these activities.	To be <i>permitted</i> up to certain thresholds and to be classified as <i>non-notified discretionary</i> above those thresholds.
The regulation of discharges of oily waste from machinery space on offshore installations is being transferred from the MTA to the EEZ Act, and the Minister must recommend the appropriate classification for these activities.	To be <i>permitted</i> with conditions that reflect MARPOL requirements and the current MTA approach. Discharges above thresholds allowed in MARPOL to be <i>prohibited</i> .
The regulation of burials at sea is being transferred from the MTA to the EEZ Act, and the Minister must recommend the appropriate classification for these activities.	To be <i>permitted</i> with conditions that meet the requirements of the London Protocol by requiring certificate of compliance.

Table 1: Summary of the Submissions on the discussion document	
Issues	Proposals
The regulation of discharges of drilling fluids from oil and gas drilling is being transferred from the MTA to the EEZ Act, and the ability to regulate the discharge of sediments and/ or tailings from mineral operations is proposed to be introduced to the Act. The Minister must recommend the appropriate classification for these activities.	To be classified in accordance with the classification of the broader operation of which the discharge is part. The discharges of sediments or tailings should be either discretionary or prohibited activities.
The regulation of production water discharges is being transferred from the MTA to the EEZ Act, and the Minister must recommend the appropriate classification for these activities.	To be <i>discretionary</i> . This classification reflects the potentially large scale of the discharge and provides the opportunity for <i>appropriate</i> management.
The regulation of dumping activities is being transferred from the MTA to the EEZ Act, and the Minister must recommend the appropriate classification for these activities.	Dumping of wastes other than as provided for in the Annexes of the London Protocol or if inconsistent with any Resolutions adopted by Contracting Parties to be <i>prohibited</i> . The dumping of structures or parts of structures during decommissioning of oil and gas production structures is proposed to be <i>discretionary or prohibited</i> . The dumping of other wastes allowed by the London Protocol to be classified as <i>discretionary</i>

Note: MTA = Maritime Transport Act 1994; MARPOL = International Convention for the Prevention of Pollution from Ships 1973, as modified by the Protocol of 1978.

3.0 Restatement of ECO's policy objections

As ECO has already indicated in its previous submission, it is adamant that the current Regulations and the Draft to give effect to the Act strikes the wrong balance between economic imperatives and environmental protection and preservation. Specifically, ECO restates that the EE&CS Act is already geared in a manner that focused on promoting marine mining including oil and gas mining and other such activities in the EEZ. The EE&CS Act does so despite the fact that this approach:

- Ignores the obvious risks associated with such activities;
- perpetuates New Zealand's dependence on fossil fuels; and
- is unsustainable, exposes the marine environment and New Zealand's economy to significant risks, in particular because of the climate impacts of fossil fuels and the cost associated with addressing such impacts.

The policy position behind that the Regulations and this ddraft take an already permissive Act and further augments its permissive approach to activities which have been established as environmentally risky in nature. ECO considers that combined the current regulations are inconsistent with the Act and international obligations.

The more salient policy decisions that ECO opposes to date include the following:

- ECO objects to making of Exploration drilling a permitted use and notes that previous proposals (based on the weak NIWA risk assessment recommendations) recommended that prospecting only should be made a permitted use.
- ECO considers a number of those activities which are classed as permitted by the Regulations (including seismic testing) is damaging to a range of marine creatures beyond marine mammals, and ECO have already supplied the Ministry with the paper which reports that seismic surveying causes significant harm to cephalopods which are deemed to be an ecological keystone species in the marine environment.

Overall the Draft Regulations are extraordinarily lax, cannot be allowed to endure, and will be the subject of sustained campaigns by ECO to remedy the above mentioned failings.

We are disappointed that the Ministry makes no proposals for closed areas, and does not suggest anything should be prohibited, even though the NIWA Risk Assessment is clear that some activities are extremely damaging, such as phosphorite nodule mining.

4.0 Section 34 and the precautionary principle

34 Information principles

- (1) When developing regulations under [section 27](#), the Minister must—
 - (a) make full use of the information and other resources available to him or her; 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, the information available is uncertain or inadequate, the Minister must favour caution and environmental protection.
- (3) If favouring caution and environmental protection means that an activity is likely to be prohibited, the Minister must first consider whether providing for an adaptive management approach would allow the activity to be classified as discretionary.
- (4) In this section, *best available information* means the best information that, in the particular circumstances, is available without unreasonable cost, effort, or time.

Section 34 of the EE&CS Act provides that when developing regulations under section 27, the Minister must:

- make full use of the information and other resources available; and
- base decisions on the best available information (meaning the best information that, in the particular circumstances, is available without unreasonable cost, effort, or time); and
- take into account any uncertainty or inadequacy in the information available.

This section also provides that if, in relation to the making of a decision under this Act (such as how regulations under section 27 should be drafted), the information available is uncertain or inadequate, and the Minister ***must favour caution and environmental protection***.

As is noted above, where the information available is uncertain or inadequate, the Minister ***must favour caution and environmental protection***. The legislature, in enacting this

provision sought to import the precautionary principle. The primary function of the Principle is to guide environmental decision making about planned human activities.

The precautionary principle, part of customary international law, provides that decision makers (such as regulators), when making decisions about an Activity, are to act with care and foresight (in other words take precautionary steps), to protect the environment when faced with scientific uncertainty as to the environmental damage that the Activity may cause. In the present case it is readily accepted that in setting the Draft Regulations the Minister is faced with significant uncertainty.

4.2 Permissive approach is not acceptable

ECO is of the view that the permissive approach taken by the Draft Regulations is the result of a wider Government strategy to maximise the income stream from future oil and gas royalties by making it easier and less costly to exploit oil and gas in New Zealand's marine environment. Such an approach is inappropriate, as it fails to give effect to the EE&CS Act's purpose as it places too much emphasis on economic considerations.

5.0 Scale of Activity and sensitivity of sites and public interest

ECO believes that the salient unknown variables associated with non-notified Activities that are likely to increase or decrease the environmental impact of a given non-notified Activity includes:

- the size/scale of an Activity;
- the fact certain Activities (such as exploratory drilling) may involve different scales and impacts on the seafloor and may at times be conducted/occur in highly sensitive marine environments;
- the indeterminate amount/levels of disturbance and interference with, the seafloor, subsoil and the surrounding ecosystems associated with a given Activity.
- the unlimited and indeterminate number of Activities that may be conducted in any given area (i.e. Activities may be spread out over a large area or concentrated in a single area), and in turn the varying level of environmental pressure that a single marine area may be subject to;
- the fact they may be conducted in any number of EEZ and continental shelf locations which:
 - may vary significantly in terms of the local ecosystems and the ability of such ecosystems to withstand and recover from disruption; and
 - may include sensitive areas (the locations of which are mostly unknown), or rare, threatened or endangered species or vulnerable marine ecosystems.

6.0 Prohibited Activities

ECO is concerned that apart from the international requirements for prohibited activities under MARPOL and the London Convention the Ministry still has not identified prohibited activities or areas (eg sensitive areas (the locations of which are mostly unknown), or rare, threatened or endangered species or vulnerable marine ecosystems) where activities are prohibited.

ECO looks forward to the Ministry delivering on its obligations under the EEZ&CS (Environmental Effects) Act and the Environment Act to identify prohibited activities and areas where activities should be prohibited.

7.0 Request

ECO would welcome the opportunity to discuss this submission with the Ministry. Please contact ECO at eco@eco.org.nz tel 04 385-7545 and copy in ecowatch@paradise.net.nz and for any arrangements about this submission.

Yours sincerely,

Barry Weeber
Co-Chairperson
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