

Submission

To the

Local Government and Environment Select Committee

On the

Exclusive Economic Zone and Continental Shelf (Environmental Effects) Bill

Introduction

1. Straterra Inc was formed in 2008 to be a collective voice for the New Zealand resource sector. Its membership represents 84% by value of New Zealand minerals production (excluding oil & gas, and geothermal), as well as exploration, research, service, and support.
2. The resource sector makes a significant contribution to the New Zealand economy¹. Oil, gas, coal, gold, aggregates and other minerals contributed \$2.15 billion to GDP in 2008, compared to the wine industry (\$0.45bn), and tourism (\$6.66bn). Resource exports in 2009 earned \$3.6bn (8.2% of total goods exports) while dairy in that year was \$10.0bn, and overseas tourism, \$9.3bn. In 2009 there were 6800 people employed directly in mining, and an extra 8000, indirectly, flowing from the economic activity of the 6800. The median wage for a mining employee was \$57,320 in 2008, compared to the New Zealand median of \$33,530.
3. New Zealand's Exclusive Economic Zone and Continental Shelf – the EEZ – presents major opportunities for the New Zealand economy and the resource sector: ironsands, rock phosphate, base and precious metal deposits in seabed massive sulphides (SMS), oil & gas, metal nodules and crusts, and methane hydrates². While current mining is restricted to oil & gas, there is significant potential in the other areas mentioned.

¹ NZIER (2010). Diamond in the rough. Report appended to Straterra's submission to the Ministry of Economic Development on the discussion paper "Maximising our mineral potential"
http://straterra.co.nz/uploads/files/straterra_s4_submission_may_2010.pdf

² NZ's offshore mineral resources – opportunities and challenges. Wood, R and Wright, I. (2008). Proceedings of AusIMM NZ Branch Annual Conference, September 2008. 617-624.

4. Mining in the EEZ is regulated chiefly under the Continental Shelf Act 1964, and the Maritime Transport Act 1994. This is an incomplete legislative framework, which the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Bill aims to fill³.
5. Straterra welcomes the opportunity to submit on the Bill. We do so from the perspective that resource management decisions must strive for an appropriate balance between economic, social and environmental objectives, and be based on sound information. As well, the New Zealand resource sector may legitimately expect to find clarity, transparency, and certainty or, failing that, predictability, in legislation and regulations. This is necessary for upholding the rule of law, and promoting New Zealand's attractiveness for investment.
6. Straterra wishes to be heard by the Select Committee on our submission.

Executive Summary

7. Straterra supports the intent of the EEZ Bill (**clause 10**), which aims to provide for "balance" between economic and environmental interests within New Zealand's wider marine jurisdiction, reflecting the United Nations Convention on the Law of the Sea (1982), which states in the Preamble⁴: "Recognizing the desirability of establishing through this Convention, with due regard for the sovereignty of all States, a legal order for the seas and oceans which will facilitate international communication, and will promote the peaceful uses of the seas and oceans, *the equitable and efficient utilization of their resources*, the conservation of their living resources, and the study, protection and preservation of the marine environment" (Straterra's italics).
8. The Bill provides for the classification of activities – everywhere, or in particular areas - as "permitted" (as of right, subject to rules), "discretionary" (subject to marine consent with conditions), and "prohibited" (cannot be carried out). The consenting authority is the Environmental Protection Authority (EPA), and a process and criteria are provided for considering, submitting on, and deciding on applications for marine consents, including conditions for managing environmental effects.
9. From Straterra's perspective, the EEZ Bill should enable environmentally-responsible development in New Zealand's wider marine jurisdiction. In the case of mining of seabed resources, the footprint relative to seafloor habitats would be very small, as a rule. Ideally, a mining company would work with the EPA during project development, from prospecting, to

³ Explanatory note to the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Bill

⁴ UNCLOS (1982) Preamble http://www.un.org/depts/los/convention_agreements/texts/unclos/preamble.htm

exploration, to mining. At every stage, more information on economic viability, and on environmental effects and how they would be managed, would become available, as the level of investment by the company progressively increases. In that scenario, it is likely, even inevitable, that methods for mining and environmental mitigation would be adjusted or modified as work proceeds. For the mining company to manage risks adequately, a smooth, efficient, and cost-effective regulatory process is vital.

10. On that basis, we believe the Bill could work reasonably well, as written. Nonetheless, Straterra is concerned that the Bill, in its interpretation, could lead to a significant skewing of the balance sought. Our concerns are chiefly the following.
11. The purpose of the Bill (**clause 10**) is appropriate, however, inadequately supported by the wording of this clause, or of **clause 12** on matters to be taken into account to achieve purpose. **Clause 61 (2)** aside, the Bill could be read in a way that frustrates the achievement of “balance”. An amendment to **clause 12** is proposed.
12. The prohibited activity category (**clauses 13, 29 and 38**) is accepted, provided it is restricted (in regulation) to a very short and logical list, e.g. uranium mining, dumping radioactive waste, seafloor disturbance where there are submarine cables or pipelines, to ensure that all reasonable development proposals receive adequate consideration. An amendment to **clause 29 (1) (a)** is proposed.
13. The provisions for both “caution” and “adaptive management” are fundamental to enabling reasonable development proposals, in light of the information gathering challenge in the EEZ, cf. on land, and are supported with amendments to ensure the proper operation of the Bill.
14. **Clause 27** on the setting of regulations could lead to a rigid framework, at a time of rapid evolution in marine mining technology. Some activities could entail technologies that are untried in the marine environment, and which will inevitably be modified or improved in light of experience. This dictates flexibility when setting regulations, to provide adequately for adaptive management under **clauses 61 and 62**, and to avoid locking developers into methods that can be improved as more information and/or technologies become available. An amendment to **clause 27** is proposed.
15. We assume the intent of **clause 28 (1)** is to identify areas having particular characteristics, within which activity classifications could change. For example, activities that are discretionary in the EEZ overall might become prohibited in areas where submarine cables or pipelines have been laid. That is a rationale in favour of **clause 28 (1) (b)** identifying areas “for specific uses”. On the

other hand, **clause 28 (1) (a)** identifying areas for their “biophysical characteristics” inappropriately supplants or replaces the Marine Reserves Bill. **Clauses 28 (1) (d)** and **(e)** are unnecessary because they cover matters addressed in **clause 40** on impact assessments, i.e., effects on other persons, and cumulative effects.

16. That leaves **clause 28 (1) (c)** providing for areas to be “managed in co-ordination with other marine management regimes”. That is logical if **clauses 28 (1) (a), (d)** and **(e)** are deleted.
17. Permitted activities ought to cover the type of activity where the environmental effects are less than “significant in the circumstances”, and which can be carried out as of right subject to regulations or guidelines. Logically, this classification would include seismic surveys, scientific research, and many if not all prospecting and exploration activities. An amendment to **clause 29 (1) (b)** is proposed, noting that **clause 29 (4)** always provides for the Minister to require a marine consent application if the effects are deemed likely to be “significant in the circumstances”.
18. If an activity is not classified in regulation, it is deemed to be a discretionary activity (**clause 37 (1) (c)**). This is inequitable because an applicant may seek to carry out an activity having effects that are less than significant in the circumstances, and still face a full marine consent hearing process. An unclassified activity should be treated as permitted, to put the onus on the regulator to classify. The safeguard for society is **clause 29 (4)**.
19. **Clause 34** is fraught - the Minister could potentially prohibit prospecting, exploration and mining activities in Benthic Protection Areas, with no consideration of specific development proposals. That would be inequitable to the sector, and run counter to the Bill’s purpose. **Clause 34** should be deleted, with the safeguard for society being **clause 20 (a)** requiring compliance with other marine legislation, **clause 28 (1) (c)**, **clause 28 (2)** under which an area of the EEZ can be closed to activities, and **clause 61 (1) (b)** under which a marine consent application can be declined, if necessary to achieve the Bill’s purpose.
20. Existing-use rights (**clauses 16-18**), and transitional arrangements (**clauses 150-151**) for moving existing activities into the new legislation are unsatisfactory, in light of the reality of prospecting, exploration and mining. For example, the holder of a prospecting licence under the Continental Shelf Act 1964 would reasonably expect to be able to change or extend the duration of that licence under that Act, or convert to a mining licence under that Act. This is important for attracting, managing and retaining investment capital, and for upholding the rule of law. This Bill would unreasonably extinguish those rights or expectations. As well, more time – but not unlimited time - will be need to be provided to allow for existing-use rights, and subsequent

rights (i.e. from prospecting to exploration, and from exploration to mining), on the same rationale. Amendments to these clauses are proposed.

21. Given the lack of a right of appeal on merit to the Environment Court, the option should be available, at the EPA's discretion, for applicants and submitters to cross-examine during hearings, rather than have that faculty restricted to the EPA (**clause 53**). That would provide better provision for the facts to be tested in relation to marine consent applications.
22. There is a risk of elevated costs to businesses arising from marine consent processes, which could affect the raising and management of investment capital. In this respect, the EPA bears a responsibility to manage carefully public participation in its decision-making processes.
23. **Clause 6** on the meaning of "effect" draws a distinction between those commonly understood to be effects, and events with low probability of occurrence and a high impact if they do occur (e.g. oil spills, shipwrecks). Here, New Zealand has international obligations, e.g. the International Convention for the Prevention of Pollution from Ships 1973 (MARPOL), reflected in **clause 11**. The policy approach should be spelled out clearly to avoid inappropriate application of "caution and environmental protection" when making decisions.

Discussion and recommendations

PROCESS

24. The Exclusive Economic Zone and Continental Shelf (Environmental Effects) Bill was read a first time in Parliament in September 2011, and referred to the Local Government and Environment Select Committee (LGE). Submissions were invited, to LGE by 20 October 2011, and after that date to the Clerk of the House, on behalf of LGE, pending the formation of the new Parliament. Submissions are due to close on 27 January 2012.

OVERVIEW OF THE BILL

25. The EEZ Bill provides a regime for consenting the appropriate use and development of the Exclusive Economic Zone and Continental Shelf (EEZ), including seabed mining, but excluding some other economic activities, which are covered under other legislation. It also provides for environmental protection where use and development are not appropriate. The operative term is "balance".
26. The framework is a streamlined version of the Resource Management Act 1991 (noting some important differences). The EEZ Bill is not to duplicate other legislation, e.g. Maritime Transport

Act 1994, Fisheries Act 1996, Marine Reserves Bill. Therefore, it fills a gap in legislation in the EEZ, which the Continental Shelf Act 1964 and other marine legislation only partially fill. For instance, there is no formal requirement currently to provide an environmental impact assessment as part of an application for prospecting, exploration or mining in the EEZ, nor is there any authority capable of receiving one. Nor is there any reasonable way for a business to work with a regulator on adaptive management of environmental effects. This Bill addresses both issues, among others.

27. Activities are to be classified in regulations into three types – “permitted”, “discretionary”, and “prohibited” – and that drives decision-making. A permitted activity can be carried out subject to rules or guidelines. A discretionary activity requires consent, subject to conditions, informed by assessments of potential effects, and proposals for addressing them. A prohibited activity is prohibited.
28. The Bill also provides for a permitted or discretionary activity to be prohibited in a specified area, set aside, for example, for a submarine cable or pipeline.
29. The Environmental Protection Authority (EPA) is the consenting and compliance authority. It does not make regulations; the Minister for the Environment is responsible for that, via a public process.
30. The resource sector will have an interest in processes for marine consent applications. They resemble those under the RMA, but with important differences. All marine consent applications are notified, anyone can make a submission, and anyone can seek to be heard on a submission. Against that, the EPA can strike out frivolous or vexatious submissions. All of this is probably appropriate.

General recommendations:

- a) Note that the EEZ Bill is generally **sound draft legislation** - it is a consenting regime for addressing the environmental effects of many (but not all) economic activities in the EEZ; it fills gaps in existing legislation (viz. Explanatory note, General policy statement); it is complementary to the Marine Reserves Bill; and it is consistent with the intent of UNCLOS (cf. clause 11);
- b) Note that the provisions for **public participation** in marine consent processes provide for more public scrutiny of proposed activities in the New Zealand EEZ, compared to other marine jurisdictions around the world, which is a relevant consideration for other Recs.;

- c) Note that marine consent processes could impose significant **costs** on businesses, which could disincentivise investment if inadequately managed by the regulator, frustrating the achievement of the Bill’s purpose. This consideration puts an onus on the EPA to manage public participation in a responsible way, e.g., via clauses 53 and 58;
- d) Note that the **footprint of prospecting, exploration and mining activities** in the EEZ would be relatively small, with little cause for concern over competing demands for use of space, or cumulative effects;
- e) Note the **reality of mining**, which is that as a firm moves from prospecting, to exploration, to mining, the cost of proving a proposal increases, with no certainty of income until mining is approved and shown to be successful. This poses a challenge when seeking investment capital. To attract that investment, it is important to ensure an efficient transition from one activity to another, within this Bill, and transition from existing legislation to new legislation;

PURPOSE OF THE BILL

- 31. This Bill is to strike a “balance” (**clause 10**) between different interests in the EEZ, which are chiefly economic and the environment. Unlike the RMA, the Bill provides no hierarchy of factors to take into account to achieve purpose; rather, a list of matters to take into account when making decisions (**clause 12**). As an overall philosophy, decision-making is based on a weighing of the benefits of development compared to adverse effects on the environment (**clauses 61 (2) (a) and (b)**). That is consistent with UNCLOS.
- 32. On considering the matters to be taken into account under **clause 12**, however, the list is largely tilted towards environmental concerns, which is appropriate were it not for **clause 12 (b)** on the “economic wellbeing of New Zealand”, which is vague and unclear. Wellbeing could mean almost anything, given that it is not defined in clause 4. **Clause 12 (c)** on “efficient use and development of natural resources” is appropriate (cf. section 7 (b) of the RMA).

Recommendation on the purpose of the Bill:

- f) Amend the **purpose** of the Bill (clause 10), to provide appropriate recognition of economic development vis-à-vis other interests, by replacing clause 12 (b) with the text “*economic prosperity of New Zealand*”, to underpin the achievement of “balance”, noting that “economic wellbeing” is a vague and subjective term;

INFORMATION PRINCIPLES

33. **Clause 13** is central to the working of the Bill, and each clause of the Bill would be read in conjunction with it – **clause 13** is, therefore, supported in principle. It provides for activities to be “prohibited” if there is inadequate information, in order to “favour caution and environmental protection” (**clause 13 (2)**). It also provides for “adaptive management”, or learning by doing (defined in **clause 4**), to address the information challenge inherent to the EEZ, and avoid having to classify some activities in regulation as prohibited when a marine consent with conditions would be preferred (**clause 13 (3)**). A wording change is needed for clarity.
34. The term “caution” is a marked and important advance on “precautionary approach/principle”, which has been interpreted in diverse and contradictory ways over time, in New Zealand and overseas⁵. The matter has been the subject of earlier debate in New Zealand on EEZ legislation⁶. “Caution” is consistent with the purpose of the Bill, especially in light of **clause 13 (2)** which provides the formulation “the person must favour caution and environmental protection”. Read together, that clause, and **clause 13 (3)** to do with adaptive management, provide for the Bill’s purpose to be achieved. One limb cannot do without the other.

Recommendations on information principles:

- g) Support the use of the term “**caution**” in clauses 13 (2) and (3), to circumvent long-standing confusion and controversy, internationally and in New Zealand, surrounding the use, or misuse, of the terms “precautionary principle” and “precautionary approach”, and in light of the provisions in the Bill for “adaptive management”;
- h) Amend clause 13 (3) on “**adaptive management**”, to say: “If favouring caution and environmental protection means that an activity is likely to be *classified in regulation as a prohibited activity under section 29 (1) (a)*, or a marine consent is likely to be refused *under section 61 (3)*, the person must first consider whether taking an adaptive management approach would allow the activity to be undertaken *consistent with economic viability*”. This wording clarifies the meaning of this clause, while still providing for adaptive management under clause 61 (4) (b), clause 61 (5), clause 62, and clause 74;
- i) Support the retention of both clause 13 (2) and clause 13 (3) as essential to the achievement of the Bill’s purpose (**balance**);

⁵ For example, the discussion on the precautionary principle on Wikipedia http://en.wikipedia.org/wiki/Precautionary_principle

⁶ Ministry for the Environment <http://www.mfe.govt.nz/issues/oceans/previous-work/index.html>

PROHIBITED ACTIVITIES

35. A mineral prospecting, exploration or mining activity in a particular area could be classified in regulation (**clauses 27, 28 and 29**) as “prohibited” (**clause 38**). Under that clause, approval could not be sought or gained, and the activity could not be carried out. For some types of activity at places, that may be appropriate, and for many types of activity, it would not.
36. In this respect, **clause 13** is helpful, even essential. Here, an activity that would otherwise be classified as prohibited because of lack of information could be eligible for consideration under a marine consent process via “adaptive management” (provided for in **clause 61 (4) (b)**).
37. Prohibited activities would logically entail activities such as dumping radioactive waste, storage of toxic waste (cf. sections 258 and 260 of the Maritime Transport Act 1994); and activities that would interfere with submarine cables and pipelines. That should form a criterion for the making of regulations to ensure that all reasonable proposals are eligible for consideration.

Recommendation on prohibited activities:

- j) Support the classification, “**prohibited activity**” (clause 13, clause 29, clause 38), subject to it covering a very short list of relevant activities in regulation. Amend clause 29 (1) (a) to read: “prohibit an activity, *including relevant activities in submarine cable or pipeline zones, uranium mining, dumping of radioactive waste, relevant activities in marine reserves, or other activities of a similar nature or having similar effects*”. This will ensure that all reasonable development proposals are adequately considered;

ADAPTIVE MANAGEMENT

38. As stated, adaptive management provides an avenue for assessing the environmental effects of proposed development that might otherwise be challenging to assess upfront, and for enabling projects that otherwise might, when favouring “caution and environmental protection”, be declined.
39. On the other hand, adaptive management poses risks for companies seeking to raise and retain investment capital. It can be difficult to raise funds, even for an early-stage adaptive management trial, if the outcome of the consenting process is uncertain.
40. For this reason, it is crucial to provide for adaptive management in the way the Bill is written (**clause 61 (4) (b)**). This provision provides for adaptive management as a consent condition under **clause 62**. The consent holder can then modify their approach as needed, as development

proceeds, and in consultation with the EPA. This is a logical, constructive and equitable approach that provides a safeguard for investors. The safeguard for the regulator (and society) is **clause 74**, which provides for review of the conditions on a marine consent.

41. One further step is required, however, for adaptive management to work effectively. Standards, methods and requirements prescribed in regulation under **clause 27** must be written to avoid the developer being locked into practices that could, on experience, prove less than optimal – knowledge and technology will likely result in rapid changes in best-practice over the life of a permit, and the developer must be able to exercise adaptive management. In general, mining companies would be more than happy to work with the EPA on proactive environmental management. They – and the EPA - must be enabled to do that.

Recommendations on adaptive management:

- k) Support clause 61 (4) (b) as providing the appropriate avenue for considering **adaptive management** under conditions of a marine consent (clause 62), which may be reviewed if deemed necessary (clause 74), all fundamental to achieving the purpose of the Bill;
- l) Add to clause 27 on **regulations prescribing standards, methods, or requirements** the following text: *“(3) Subsections (1) and (2) are subject to subsection (4); (4) All regulations under section 27 must be made in such a way as to provide for adaptive management under clause 61 (4) (b).”* This will avoid mining companies with adaptive management written into marine consent conditions being locked into rigid methods or requirements, and finding themselves prevented from complying with their conditions;

EXISTING-USE RIGHTS AND TRANSITION PROVISIONS

42. **Clauses 16, 18, 150** and **151** demand careful attention from the perspective of the resource sector. For example, a firm currently prospecting for ironsands in the EEZ will have raised investment capital to finance a non-productive activity, with a degree of expectation of future earnings. But there are many stages to traverse before the income begins to flow. The prospector would move to the exploration stage, which entails more spending on (and investment in), e.g. proving the economic viability of ore extraction at target sites, and assessing environmental effects and determining how they could be managed. All going well, that firm would move to the mining stage (provided more investment capital comes to hand). If the rules change mid-stream, the strategy for raising, managing and retaining investment capital could potentially fall over. In the worst-case scenario, the firm could go bankrupt.

43. There is a balance to be struck between unfair treatment of existing prospecting and exploration companies, and bringing these companies into the new legislative regime. That is surely the intent of these clauses. A few simple amendments would facilitate that aim. A key outcome would be to allow firms to continue under the status quo ante, when changes to a licence are made, or if the duration of a licence is extended, which are common occurrences. For instance, unseasonably bad weather could delay a prospecting programme through no fault of the firm or the regulator. To be clear: it is important for companies to meet new environmental standards for their operations, however, care must be taken to avoid companies being landed, unfairly, with stranded assets.
44. It is understood the status quo ante cannot be preserved forever, for a firm with existing-use rights. In light of experience, five years would be ideal for the transition, however, it may be acceptable under this Bill to provide a period of three years from the entry into force of the new legislation.

Recommendations on existing activities and transition provisions:

- m) Amend clause 16 providing for **certain existing mining activities to continue**, which provides for existing activities such as prospecting for iron sands, rock phosphate, and seabed massive sulphides to continue, by amending clause 16 (2) (a) to say: “any change in the activity if the change was authorised by a change in the permit, licence, or privilege made *within three years after the entry into force of this Act*”, and clause 16 (3) to say: “This activity may continue even if it contravenes this Act and regulations for the term of the permit, licence or privilege specified in the permit, licence or privilege, *and for a period not exceeding three years from the entry into force of this Act* by which the permit, licence or privilege is extended”. The amendments are necessary to uphold the rule of law, to provide fair treatment of businesses, and in light of Rec. (e);
- n) Amend clause 18 providing for **certain prohibited activities to continue** in the same vein as Rec. (l), to provide for a period of three years from entry into force of the legislation, in clause 18 (2) (b), and in the lead-in words to clause 18 (3), being necessary to uphold the rule of law, to provide fair treatment of businesses, and in light of Rec. (e);
- o) Amend clause 150 (2) (a) on **existing activities that become discretionary** to specify a period of three years, instead of 6 months, to provide sufficient time for businesses to adapt to the new legislative regime, to uphold the rule of law, to provide fair treatment of businesses, and for consistency with Rec. (m);

- p) Amend clause 151 (2) on **existing activities that become prohibited**, by replacing the phrase “a prescribed period” with “*a period not exceeding three years from the entry into force of this Act*”, to uphold the rule of law, to provide fair treatment of businesses, and for consistency with Rec. (n);

REGULATIONS

45. Submitters on this Bill are unlikely to be able to view the shape of regulations (under **clauses 27 and 29**) before submissions are made, and it is in regulations the detail will be contained. The Bill provides the overall framework, and that is fine, as far as it goes. But the operation of the Bill will depend on the regulations, and if these are unknown, submitters will be placed at a disadvantage in the public policy process. This issue can be managed by providing criteria to guide the classification of activities, as discussed below.
46. There are no criteria in the Bill for classifying activities as permitted, or prohibited. This is a serious flaw, considering that the treatment of each type of activity under the Bill is very different, and that inappropriate classification could have major implications for businesses proposing to carry out an activity.
47. As discussed in paras. 34-36, prohibited activities should comprise a very short list of activities that are unacceptable.
48. Permitted activities should cover activities where the effects are “no more than minor” (cf. wording in section 95D of the RMA), or less than “significant in the circumstances” in the wording of this Bill. That is a value judgment, and would logically include activities such as acoustic disturbance as part of seismic surveys, scientific research, and the taking of samples from the seafloor, or under the seafloor, as part of prospecting and exploration. The Bill provides a safeguard in **clause 29 (4)**, which provides for the Minister to require a marine consent if the activity is likely to have “adverse effects ... that are significant in the circumstances”. That is supported.

Recommendations on regulations:

- q) Support the **classification of activities** (clause 27, clause 29) into “permitted”, “discretionary”, and “prohibited” - subject to Rec. (j) and Rec. (t) – to streamline the operation of the Bill, and promote cost-effectiveness of the regulatory regime (Rec. (c));

- r) Amend clause 29 (1) (b) on **regulations classifying activities** to read: “allow an activity without a marine consent or describe the activity as permitted, *including seismic surveys, scientific research, and prospecting and exploration activities, in all cases, where the effects are less than significant in the circumstances.*” This is necessary to avoid activities of the sort that would be non-notified or permitted on land being subject to marine consent processes, and for balance with clause 29 (4) (Rec. (s));
- s) Support clause 29 (4) in relation to **permitted activities** as necessary to the operation of clause 29 as a whole, and to achieve the purpose of the Bill;
- t) Amend clause 36 (1) on **permitted activities** to say: “An activity is a permitted activity if it is described in regulation as a permitted activity, *or if regulations do not classify the activity as permitted, discretionary or prohibited*”, and delete clause 37 (1) (c). This places an onus on the regulator to classify activities in regulation, and to avoid unfairly penalising businesses for delays in making regulations. Society’s interests are safeguarded under clause 29 (4) (refer to Rec. (s));

MARINE PROTECTION

- 49. Ideally, this Bill would provide a case-by-case approach to assessing proposals for activities in the EEZ, and generally it does, with the exception of prohibited activities, already discussed. But **clause 28** provides for regulations that could close areas of the EEZ to any or all activities – it is a spatial planning clause, on our reading.
- 50. That said, the overall intent of **clause 28** is unclear. In many of the sub-clauses, no explanation is provided on why an area would need to be identified and provided for; the reader is left to guess. We surmise that **clause 28** would operate logically in conjunction with **clause 29**, that some areas need to be closed to some types of activity that would otherwise be permitted or discretionary. If so, the wording should be amended to make this objective clear.
- 51. There are a number of other difficulties with **clause 28**.
- 52. **Clause 28 (1) (a)** is inappropriate. The wording “Regulations made under section 27 may identify and provide for areas ... that – are important or especially vulnerable because of their biophysical characteristics” could be read as replacing or supplanting the entire Marine Reserves Bill. The protection of areas as marine reserves is an important matter, and needs to be treated seriously, just as on land, where there are entire statutes devoted to protection, e.g. National Parks Act 1980, Conservation Act 1987. **Clause 28 (1) (a)** should be deleted, as unnecessary, and as poor law-making practice.

53. That is not to say there should be no protection of areas of the EEZ under this Bill. The case of areas where submarine cables and pipelines are laid has been mentioned. For this reason, we believe **clause 28 (1) (b)** should be retained.
54. **Clauses 28 (1) (d)** and **(e)** sit awkwardly with **clause 28** as a whole. Setting aside the question of what “competition or conflict” is intended to mean (**clause 28 (1) (d)**), that matter, and the matter of “cumulative adverse effects”, are addressed under **clause 40** on impact assessments. To be specific, **clause 40 (1) (c)** requires a consideration of the effects of a proposed activity on existing interests, and on cumulative effects; and **clause 40 (1) (d)** requires the applicant to identify persons whose existing interests are likely to be adversely affected. **Clauses 28 (1) (d)** and **(e)** should simply be deleted as unnecessary.
55. **Clause 34** provides for the prohibition of activities in marine protected areas created under other legislation, say, under a new Marine Reserves Act, or Benthic Protection Areas under the Fisheries Act⁷. The implications of the BPAs for prospecting, exploration and mining under this Bill are potentially far reaching and include: inequitable treatment of the resource sector; conferring few or no benefits to society; and adverse effects on New Zealand’s economic growth potential. BPAs containing resource potential include the Chatham Rise, and the Kermadecs.
56. To elaborate, the BPAs were set up in 2007 to protect seafloor biodiversity from bottom trawling. This was a commercial fisheries industry proposal in response to international and domestic pressure, developed for public consultation by the then fisheries ministry, with the Department of Conservation. In the event, the BPAs were placed in such a way that 77% of the bottom trawling that used to be carried out in these areas occurred in three of the 17 BPAs. At the same time, their placement does not reflect priorities for biodiversity conservation in the EEZ, in the view of environmental NGOs⁸. The inference is that commercial fishing is not greatly affected, while biodiversity is possibly inadequately protected from bottom trawling.
57. At issue under this Bill is that prospecting, exploration and mining could be prevented in the BPAs under **clause 34**, and this is inequitable for at least two reasons. The potential impacts on the seafloor of resource sector activities within BPAs could become overstated when making decisions under **clause 34**. It is also possible that the BPAs are in the wrong places in terms of biodiversity conservation, and, therefore, that prohibiting resource sector activities within them

⁷ Information on Benthic Protection Areas <http://www.fish.govt.nz/en-nz/Environmental/Seabed+Protection+and+Research/Benthic+Protection+Areas.htm>

⁸ Pers comm. Bob Zuur of WWF New Zealand, December 2011

would adversely affect the resource sector, as well as New Zealand's economic growth potential, while providing relatively few benefits for biodiversity. Balance would not be achieved.

58. Our concern relates, perhaps, more to the BPAs as configured, than to **clause 34**. Certainly, the BPAs were developed without consideration of the broader and very important range of interests for which this Bill seeks to find "balance". Nonetheless, the issue remains. Ideally, the BPA system would be reviewed, e.g., under the Marine Reserves Bill, but that is beyond the scope of this legislative process. In terms of this Bill, **clause 34** should be deleted as unnecessary. The safeguards for society are: **clause 20 (a)**, which requires compliance with all other applicable legislation; **clause 28 (1) (c)** which requires co-ordination with other marine management regimes; **clause 28 (2)** which provides for the closure of areas of the EEZ; and a marine consent application can always be declined under **clause 61 (2) (b)**, if that is the best decision in the interests of achieving balance.

Recommendations on marine protection:

- u) Clarify the intent of clause 28 on **classifying areas** by amending the lead-in words to this clause to say: "Regulations made under section 27 may identify *for the purposes of section 29*, and provide for areas of the exclusive economic zone or the continental shelf that", to explain that the classification for an activity may vary from one area to another (viz. Rec. (j));
- v) Delete clause 28 (1) (a) to do with protection of areas for their **biophysical characteristics**, to avoid inappropriate duplication with the Marine Reserves Bill, currently before the Select Committee, noting that the safeguard for society is clause 20;
- w) Retain clause 28 (1) (b) on **specific uses**, which is necessary to achieve the intent of clause 28 (refer to Rec. (u));
- x) Retain clause 28 (1) (c) on **co-ordination with other marine management regimes** for consistency with clause 20;
- y) Delete clauses 28 (1) (d) and (e) on **competition or conflict**, and **cumulative adverse environmental effects**, because these matters are addressed under clause 40;
- z) Support clause 20 on **relationship with other legal requirements**, as essential to the operation of clause 28, and to the Bill generally;

- aa) Delete clause 34 on **prohibitions and restrictions under other marine management regimes** as undesirable and unnecessary in light of clause 20, and clause 28 (1) (c), with the safeguard for society provided by clause 61 (1) (b), and by clause 28 (2);

DISCRETIONARY ACTIVITIES AND THE EPA

59. The marine consent application process (Subpart 2 of Part 2 of the Bill) is a condensed version of resource consent processes under the RMA, which places an onus on the EPA to make good decisions, for several reasons.
60. Decisions cannot be appealed on merit to the Environment Court, only on points of law to the High Court (**clause 103**). All applications must be notified, providing for public submissions and hearings (**clause 46**). The EPA can seek independent advice (**clause 45**). No cross-examination of submitters is permitted by anyone other than a representative of the EPA (**clause 53**). We believe that to ensure an appropriate process, the cross-examination provision should be broadened to ensure that the facts presented in hearings are adequately tested.
61. While the public notification provision (**clause 46**) of all applications for discretionary activities could be a blunt instrument, and impose unnecessary costs in processing relatively minor applications, that risk could be reduced by taking a broad view of what should be “permitted”. **Clause 29 (4)** would always be available to move a permitted activity into the discretionary category, if warranted in a specific instance.

Recommendations on discretionary activities and the EPA:

- bb) Support, in general, the proposed provisions for the operation of the **EPA**, as logical and coherent, noting the issue of costs raised in Rec. (c);
- cc) Support the **duty of persons** provision (clause 19), as consistent with the purpose of the Bill;
- dd) Support clause 40 on the requirement for an **impact assessment** in relation to marine consent applications, as essential to achieving the purpose of the Bill;
- ee) Amend clause 42 to prevent repeated delays in EPA processes, in relation to **incomplete applications** for marine consents, by using similar wording to section 88C of the Resource Management Act 1991;

ff) Amend clause 53 on **hearings to be public and without unnecessary formality** by amending 53 (3) (c) to say: “*provide for others than a representative of the EPA to question a party or witness, at the discretion of the EPA*”. This would add rigour to the marine consent application process, and provide more opportunity for the facts to be tested in relation to that process, in light of the absence of appeal rights to a court on merit. The EPA’s exercise of discretion is consistent with its powers under with clauses 58 (4) and (5);

gg) Support clause 61 (2) (a) and (b) as essential to achieving the purpose of the Bill, and for consistency with UNCLOS (clause 11) by requiring the decision-maker to **weigh economic and environmental interests**;

hh) Support clause 146, which **protects information** that is commercially sensitive to businesses;

APPLICATIONS FOR CONSENTS STRADDLING THE MARINE AND COASTAL AREA/EEZ

62. The RMA applies in the marine and coastal area, and this Bill, in the EEZ. Options are provided in the Bill for addressing the respective consent applications (Subpart 3 of Part 2): jointly and separately, either at the wish of the applicant, or the discretion of the EPA, and that can include referring nationally-significant proposals to a board of inquiry (**clauses 97 and 98**).

63. At issue is that cross-boundary applications risk being onerous, inevitably so, even if good processes are followed. Potentially, a consent for one application could be granted, and the other declined, affecting the integrity of the project. Granted, this would be less of a risk with nationally-significant proposals, and it may be surmised that many if not all cross-boundary applications would fall into that category.

64. It is not clear to Straterra how the Bill could be improved in this respect. It is acknowledged that an effort has been made to consider the impact of Subpart 3, Part 2, on development proposals. We can do no more than propose that further thought be given to the matter.

Recommendation on applications for consent straddling the mca/EEZ

ii) Rationalise processes for **cross-boundary applications** - under this legislation, and the Resource Management Act 1991 - to reduce the regulatory and financial burden on businesses as far as practicable (viz. Rec. (c));

MEANING OF EFFECT

65. **Clause 6** provides a distinction between what would normally be considered effects, and matters that are better managed under a risk management framework, e.g. low probability/high impact events such as oil spills and shipwrecks, currently addressed under other legislation, e.g. the Maritime Transport Act 1994. The wording in **clause 6** is taken from section 3 of the RMA, and is supported, with an amendment to ensure that this clause operates as intended.

Recommendations on meaning of effect

- jj) Support clause 6, on the **meaning of effect**, which draws a distinction between effects, as commonly understood, and events such as oil spills (low probability, high impact) that are better addressed under a risk management regime (refer to Rec. (jj)). The intent should be reinforced with an addition to clause 6: *“(3) To avoid doubt, effects covered under subsection (1) (f) shall be managed, as provided for under the Maritime Transport Act 1994, and consistent with New Zealand’s obligations under the International Convention for the Prevention of Pollution from Ships (MARPOL)”*, or similar wording;
- kk) Support the transfer of Maritime Transport Act 1994 **waste management** provisions into the Bill (for consistency with clause 6), via a Supplementary Order Paper or by other means, noting that a transfer of responsibilities and/or resources from Maritime New Zealand into the EPA will require careful management.

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