

13 February 2012

Nicky Wagner  
Chairperson  
Local Government and Environment Committee  
Parliament Buildings  
Wellington

Dear Chairperson,

**Exclusive Economic Zone and Continental Shelf (Environmental Effects) Bill**

Thank you for hearing the Sustainable Future Institute's oral submission on February 9, 2012. I have been reflecting on the questions that were asked by the committee during the hearing and thought it might be beneficial to expand on the points I addressed, these are explored briefly below.

**Question 1: Why would it be beneficial to base the proposed legislation on the HSNO Act, rather than the RMA?**

The HSNO legislation is a farsighted piece of law in that it is ahead of its time, and it is based on international best practice in risk management. It is still considered to be legislation which is globally advanced as it weighs costs, risks and benefits, and demands that decisions are not simply notified but must 'state the criteria in the Act and in the methodology relied upon by the Authority in reaching its decision' (see Clause 36 of the HSNO (Methodology) Order 1998).

The Institute believes the scale of the ocean and the fact that it has not been managed in the past, and has no mechanisms, such as territorial authorities to co-manage resources makes this Bill unique. Further, the science underlying oceans and new organisms (e.g. genetically modified) is still relatively new and contains a lot of what risk managers call the 'unknown unknowns' (in contrast to the 'known unknowns'). This is not the situation with land management, as we are generally dealing in 'known knowns', where the effects are well-known and the decision comes down to what communities and local authorities want and need.

Lastly, the above-legislation and HSNO need to operate within international framework, treaties and conventions, such as the UN Convention of the Law of the Sea and the UN Convention of Biodiversity. The latter convention was signed by 150 government leaders at the 1992 Rio Earth Summit. It was conceived as a practical tool for translating the principles of Agenda 21 and is dedicated to promoting sustainable development.

Over the next twenty years the ocean will be a major game changer, we will either learn to manage it well to sustain both its delicate ecosystems and the needs of the world's ever growing population, or we will destroy a resource that will be difficult to regenerate. Legislation, in particular the management of costs, risks and benefits and ensuring those benefits are gained (and where appropriate shared) will be a vital tool for protecting the health of our oceans. Ensuring New Zealand becomes a global leader in ocean management will require inspirational leadership and stronger international engagement and alignment.

**Question 2: Why a broad definition of effects is necessary, in particular why ‘past effects’ should be included?**

The HSNO Act contains a very broad definition of effects, so that all and every effect can be taken into account. Further it acknowledges that some effects are related to past events, for example climate change. In this case the effects that started years ago, when cause and effect were not apparent, can be taken into account today under the HSNO legislation. We believe a broad definition of effects should be adopted under the above-mentioned Bill and that the process should be separated into four stages:

1. The identification of all effects (discovering what effects exist);
2. The assessment of each effect (judging each effect in terms of probability, magnitude and timeframe);
3. The weighing of all effects together (including all costs, benefits and risks – including the management of risk); and
4. The presenting of the decision (including writing up the decision in such a way that it shows how the decision was reached, based on what evidence, with what level uncertainty over what effects, over what time frame and listing any controls that are necessary to manage risks).

**Question 3: Based on your experience with the HSNO legislation, what are the lessons learnt from the regulations?**

The Institute has concerns about the regulations being created after the above-mentioned Bill becomes law and therefore in isolation. Based on our experience with the regulations set up under the HSNO Act, regulations have not been given the standing one would have expected.

The HSNO (Methodology) Order 1998 sets out the methodology used by the Authority for making decisions under the HSNO Act. It has been under review since 2002, and from our understanding still remains with the Minister. Twice, since 2002, the Minister has invited submissions from the public on the regulations; both times summaries were prepared and published, however in both instances the review remained with the Ministers office. This makes the methodology unstable as it could be changed at any time.

From the Institute’s experience, the decision-making methodology should be designed with the Bill and incorporated within the Act; it is too important to be developed in isolation. Embedding risk management principles, criteria and methodology early and clearly in the legislation process, so that decisions, outputs and outcomes deliver what is best for this country, is the goal of effective risk management. The Institute believes the methodology underlying decisions under the above-mentioned Bill should contain the following components, along the lines of the key groups of clauses in the HSNO (Methodology) Order 1998:

- Information Used by the Authority (Clauses 8-11 of the HSNO (Methodology) Order 1998)
- Evaluation of risks, costs and benefits (Clauses 12-14)
- Submissions (Clauses 15-16)
- Experts (Clauses 17-19)
- Information provided by other bodies (Clause 20)
- Decision-making (Clauses 21-28)
- Uncertainty (Clauses 29-32)

- Approach to Risk (Clause 33)
- Aggregation and comparison of risks, costs and benefits (Clause 34)
- Application of controls (Clause 35)
- Presentation of decisions (Clause 36).

We believe the most important of these is Clause 36, in that decisions must state the criteria and therefore the evidence that was relied upon by the Authority. The Institute can provide a more detailed list of key components if this would be helpful.

### **Maritime Governance Instruments (Attached Table 1)**

As mentioned to the Committee, the Institute prepared a table with a view to understanding the existing governance structures of New Zealand's Maritime Zones (see attached). It was through preparing this table that I proposed the title be changed to the Ocean Territory Protection Act. Furthermore, if the government aims to meet the OECD recommendations – to finalise and implement oceans policy and pursue further expansion of marine reserves – we believe the Bill needs more work in order to ensure these objectives are met.

As a result of completing the table over the last few days, we also identified three additional concerns regarding the content within the current Bill (see also Table 1, vii(b)):

1. **Section 13: Cautious approach** should be replaced by precautionary approach. The Bill refers to 'cautious approach' without defining what that means. International best practice uses the term precautionary approach. The addition of pre- in front of cautionary is important as it is about being cautious in advance of an event, rather than in response to an event.  
The concept of a precautionary approach forms part of Principle 15 of the 1992 Rio Declaration, which states that 'where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation'. The precautionary principle is also contained in Article 191 of the Treaty on the Functioning of the European Union (EU). The EU states that the precautionary principle shall be informed by three specific principles: the fullest possible scientific evaluation and the determination, as far as possible, of the degree of scientific uncertainty; a risk evaluation and an evaluation of the potential consequences of inaction; and the participation of all interested parties in the study of precautionary measures once the results of the scientific evaluation and/or the risk evaluation are available.  
A precautionary approach is already part of the *New Zealand Coastal Policy Statement 2010: Policy 3: Precautionary approach* – 'Adopt a precautionary approach towards proposed activities whose effects on the coastal environment are uncertain, unknown, or little understood, but potentially significantly adverse'.
2. **Sections 25 and 68: Consent decisions** should (i) explain on what evidence and (ii) on what criteria the decision was made. Further, consent decisions must be required to (iii) stipulate the length of the consent, (iv) specify when the Authority must be informed of any specific milestones or events (e.g. unintended but significant consequences), and (v) controls that are applicable.
3. **Section 125: Penalties** should be significantly increased. Penalties should act as a disincentive for malice or risky behaviour.

Below we also identify five key issues not addressed (see also Table 1, vii(c)):

1. **Ocean policy** should be integrated into the Bill, with clarity concerning responsibility for implementing strategy and enforcing regulations. We could not find the terms plan, strategy, or national policy statement in the Bill.
2. **Sustainable development approach** should be included. A *sustainable development approach* is mentioned in the Local Government Act 2002, *sustainable yields* in the Fisheries Act 1983, and *sustainable management of natural and physical resources* in the RMA 1991. We believe this should be included in the above-mentioned Bill.
3. **Carbon Capture** to be integrated into the Bill. It is not clear within the Bill where Carbon Capture activities are covered, although these activities are mentioned in the Explanatory note to this Bill.
4. **Marine Farming** to be integrated into the Bill. It is not clear within the Bill where Marine Farming activities are covered and how they are connected with the Fisheries Act 1983, although these activities are mentioned in the Explanatory note to this Bill.
5. **Marine Reserves Bill** to be aligned and progressed with the Bill. I noted at the committee there was talk of the Marine Reserves legislation addressing OECD recommendations. Following up on this point after the committee, I noted that the National Party is committed to extending the Marine Reserves legislation into the EEZ (see *Environment and Climate change Policy 2011*) and that the Marine Reserves Bill has been before the committee since 2002. The Institute would like to see this progress and we are interested to know (i) whether both Bills are being reviewed in unison and (ii) the current process for the Marine Reserves Bill to become law. We would appreciate an update on this and whether further submissions will be called.

Thank you again for hearing the Institute's submission. As requested we will also send hard copies of Report 9: *Science Embraced: Government-funded science under the microscope* early next week. If you have any further queries, please do not hesitate to contact the Institute.

Yours faithfully,



Wendy McGuinness  
Chief Executive

**Table 1: Maritime Governance Instruments: Current Status and the proposed Exclusive Economic Zone and Continental Shelf (Environmental Effects) Bill**Note: OECD (2007) Recommendation to New Zealand: 'finalise and implement ocean policy and pursue the further expansions of marine reserves.'<sup>1</sup>

Legislation, Treaties and Conventions	Domain	New Zealand Land Territory	New Zealand Ocean Territory <sup>2</sup>			International Territorial Waters <sup>3, 4</sup>	
			Inland Waters	Territorial Sea	Continental Shelf of New Zealand <sup>5</sup>		
<b>Maritime Zones<sup>6</sup></b>		Area 1: Inland Waters <sup>7</sup>	Area 2: Territorial Sea <sup>8</sup>	Area 3: Contiguous Zone <sup>9</sup>	Area 4: Exclusive Economic Zone <sup>10</sup>	Area 5: Non-Exclusive Economic Zone <sup>11</sup>	Area 6: High Seas <sup>12</sup>
		Landward of the Baseline	Baseline-12 nautical miles	12-24 nautical miles	12-200 nautical miles	12-350 nautical miles	Beyond the Continental Shelf
i.	UN Convention on the Law of the Sea (UNCLOS) <sup>13</sup>				<u>Article 87</u> All nations have the freedoms of navigation and over flight and of the laying of submarine cables and pipelines, and other internationally lawful uses	<u>Article 77</u> The coastal state exercises the right of exploration and to exploit the natural resources of its continental shelf	<u>Article 118</u> Cooperation of states in the conservation and management of living resources  <u>Article 119 and 120</u> Conservation of the living resources (including Marine Mammals) of the high seas
ii.	Fisheries Act 1983 <i>New Zealand Fisheries Waters</i> <sup>14</sup>	Fishing Mgt	Fishing Mgt	Fishing Mgt	Fishing Mgt		
iii.	Resource Management Act 1991 <i>Coastal marine area</i> <sup>15</sup>	Resource Mgt	Resource Mgt				
iv.	Marine Reserves Act 1971 <i>Potential reserve area</i> <sup>16</sup>	Resource Mgt	Resource Mgt				
v.	Maritime Transport Act 1994 <i>New Zealand Waters</i> <sup>17</sup>	Shipping Mgt	Shipping Mgt				

Legislation, Treaties and Conventions	Domain	New Zealand Land Territory	New Zealand Ocean Territory <sup>2</sup>			International Territorial Waters <sup>3, 4</sup>
			Inland Waters	Territorial Sea	Continental Shelf of New Zealand <sup>5</sup>	
vi. New Zealand Nuclear Free Zone, Disarmament, and Arms Control Act 1987 <i>Nuclear Free Zone</i> <sup>18</sup>		Nuclear Free Mgt	Nuclear Free Mgt			
vii. Proposed Exclusive Economic Zone and Continental Shelf (Environmental Effects) Bill  a. Description of domain			(as per Area 4)	Natural Resources Defined: <sup>19</sup> includes seabed, subsoil, water, air, minerals, and energy, and all forms of organisms (whether native to New Zealand or introduced)	Natural Resources Defined: means the mineral and other non-living resources of the seabed and subsoil and sedentary species <sup>20</sup>	
b. Key concerns within the current Bill				<p>Note:</p> <p>1. Section 13 Cautious approach: should be replaced by precautionary approach</p> <p>2. Section 25 and 68 Consent decisions: should describe the content of decisions in particular on what evidence and on what criteria the decision has been made. Further it must stipulate time frames, milestones and controls that are applicable</p> <p>3. Section 125 Penalties: should be significantly increased. The Bill currently provides for a maximum penalty of \$300,000 per person or \$600,000 other than a natural person</p>		
c. Key issues not addressed within the current Bill				<p>1. Ocean policy to be integrated into the Bill</p> <p>2. Sustainable development approach to be integrated into the Bill</p> <p>3. Carbon Capture to be integrated into the Bill</p> <p>4. Marine farming to be integrated into the Bill</p> <p>5. Marine Reserves Bill to be aligned and progressed with this Bill</p>		

1. Organisation for Economic Cooperation and Development (OECD) (2007). *Environmental Performance Reviews: New Zealand*, Chapter 1: Conclusions and Recommendations, 3. International Co-operation, p. 10. Retrieved January 25, 2012 from [http://www.oecd.org/document/10/0,2340,en\\_2649\\_34307\\_37915274\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/10/0,2340,en_2649_34307_37915274_1_1_1_1,00.html)
2. To enable this domain to be able to be defined clearly, the Institute has created the term *New Zealand Ocean Territory* to refer to all waters from the baseline to an external territorial boundary. In particular we note that *NZ Fisheries Waters* and *New Zealand Waters* have very different meanings – see other footnotes below.
3. United Nations Convention on the Law of the Sea (UNCLOS) (1982). General Obligation, Article 192: ‘States have the obligation to protect and preserve the marine environment.’
4. United Nations Convention on the Law of the Sea (UNCLOS) (1982). Part XII, *Protection and Preservation of the Marine Environment*, Section 1. General Provisions, Article 192, General obligation. Retrieved January 25, 2012 from [http://www.un.org/depts/los/convention\\_agreements/convention\\_overview\\_convention.htm](http://www.un.org/depts/los/convention_agreements/convention_overview_convention.htm)
5. Definition of *continental shelf*, in the *Continental Shelf Act 1964*, means the seabed and subsoil of those submarine areas that extend beyond the territorial limits of New Zealand, throughout the natural prolongation of the land territory of New Zealand, to the seaward-side boundaries.  

The *Explanatory Note* to the Bill states: *The continental shelf is the seabed and subsoil of New Zealand’s submerged landmass from the territorial limits of New Zealand and in some places extending beyond the EEZ. New Zealand has exclusive sovereign rights for the purpose of exploring the continental shelf and managing, conserving, and exploiting its natural resources. These resources are limited to those found on or under the seabed.* This seems to imply the EEZ is different from the continental shelf, but our research would indicate that generally they are treated internationally as the EEZ and is simply part of the continental shelf. The Bill would benefit from making this clear and in line with international practice.

In the UNCLOS Article 76, the continental shelf of a coastal State comprises the submerged prolongation of the land territory of the coastal State - the seabed and subsoil of the submarine areas that extend beyond its territorial sea to the outer edge of the continental margin, or to a distance of 200 nautical miles where the outer edge of the continental margin does not extend up to that distance. The continental margin consists of the seabed and subsoil of the shelf, the slope and the rise. It does not include the deep ocean floor with its oceanic ridges or the subsoil thereof. See <http://www.lin.govt.nz/hydro/naval-info/maritime-boundaries/definitions>
6. See <http://www.lin.govt.nz/hydro/naval-info/maritime-boundaries/definitions>
7. Definition of *internal waters*, in the *Territorial Sea, Contiguous Zone, and Exclusive Economic Zone Act 1977*, includes any areas of the sea that are on the landward side of the baseline of the territorial sea of New Zealand. See also endnote 5.
8. Definition of *territorial sea*, in the *RMA Act 1991*, means the territorial sea of New Zealand as defined by section 3 of the *Territorial Sea, Contiguous Zone, and Exclusive Economic Zone Act 1977*. Section 3 states the territorial sea of New Zealand comprises those areas of the sea having, as their inner limits, the baseline described in sections 5 and 6 and 6A and, as their outer limits, a line measured seaward from that baseline, every point of which line is distant 12 nautical miles from the nearest point of the baseline.
9. Definition of *Contiguous Zone, Territorial Sea, Contiguous Zone, and Exclusive Economic Zone Act 1977*, comprises those areas of the sea having, as their inner limits, the marker, and, as their outer limits, a line measured seaward from the marker, every point of which line is distant 12 nautical miles from the nearest point of the marker. The Act defines the term ‘marker’ to mean ‘the line that, pursuant to section 3 of this Act, marks the outer limits of the territorial sea of New Zealand.’
10. Definition of the *exclusive economic zone of New Zealand*, included in the *Territorial Sea, Contiguous Zone, and Exclusive Economic Zone Act 1977*, comprises those areas of the sea, seabed, and subsoil that are beyond and adjacent to the territorial sea of New Zealand, having as their outer limits a line measured seaward from the baseline described in sections 5 and 6 and 6A, every point of which line is distant 200 nautical miles from the nearest point of the baseline.
11. This would benefit from a legal definition, currently the law infers that it means the part of the continental shelf that is not the EEZ. This would presumably include any holes in the EEZ within the Continental Shelf, such as between Bounty and Campbell Islands, and west of the Catham Islands.
12. Definition of *high seas* in the *UN Convention on the High Seas 1958*, states the term “high seas” means all parts of the sea that are not included in the territorial sea or in the internal waters of a State.  

See [http://untreaty.un.org/ilc/texts/instruments/english/conventions/8\\_1\\_1958\\_high\\_seas.pdf](http://untreaty.un.org/ilc/texts/instruments/english/conventions/8_1_1958_high_seas.pdf)
13. On 19 July 1996, New Zealand ratified the United Nations Convention on the Law of the Sea (UNCLOS). Under UNCLOS there are a number of maritime zones defined generally by their distance from the land, but more precisely, as their distance from the Territorial Sea Baseline (TSB). See <http://www.lin.govt.nz/hydro/naval-info/maritime-boundaries/definitions>
14. Definition of *New Zealand fisheries waters*, in the *Fisheries Act 1983*, means—(a) all waters in the exclusive economic zone of New Zealand; (b) all waters of the territorial sea of New Zealand; (c) all internal waters of New Zealand; (d) all other fresh or estuarine waters where fish indigenous to or acclimatised in New Zealand are found.
15. Definition of *coastal marine area*, under the *Resource Management Act 1991*, means the foreshore, seabed, and coastal water, and the air space above the water—(a) of which the seaward boundary is the outer limits of the territorial sea; (b) of which the landward boundary is the line of mean high water springs, except that where that line crosses a river, the landward boundary at that point shall be whichever is the lesser of— (i) 1 kilometre upstream from the mouth of the river; or (ii) the point upstream that is calculated by multiplying the width of the river mouth by 5.
16. Definition of *area*, covered under the *Marine Reserves Act 1971*, means any part of — (a) The seabed vertically below an area of the surface of — (i) The territorial sea of New Zealand; or (ii) The internal waters of New Zealand as defined by section 4 of the *Territorial Sea and Exclusive Economic Zone Act 1977*; or (b) The foreshore of the coast of New Zealand; — and includes any water at any material time upon or vertically above it.
17. Definition of *New Zealand waters*, under the *Maritime Transport Act 1994*, means— (a) the territorial sea of New Zealand; and (b) the internal waters of New Zealand; and (c) all rivers and other inland waters of New Zealand.
18. Definition of *Nuclear Free Zone*, under the *New Zealand Nuclear Free Zone, Disarmament, and Arms Control Act 1987* comprises: (a) all of the land, territory, and inland waters within the territorial limits of New Zealand; and (b) the internal waters of New Zealand; and (c) the territorial sea of New Zealand; and (d) the airspace above the areas specified in paragraphs (a) to (c).
19. Definition of *natural resources*, in the proposed Bill, means: (a) in relation to the exclusive economic zone, includes seabed, subsoil, water, air, minerals, and energy, and all forms of organisms (whether native to New Zealand or introduced); and (b) in relation to the continental shelf, means the mineral and other non-living resources of the seabed and subsoil and sedentary species.
20. UNCLOS Article 77 defines *sedentary species* as organisms which, at the harvestable stage, either are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or the subsoil.

NB: Special thanks to Stuart Caie from the New Zealand Hydrographic Authority for reviewing this table.