

Submission

Regulations proposed under the Exclusive Economic Zone and
Continental Shelf (Environmental Effects) Bill

29 June 2012

Ministry for the Environment
PO Box 10362
Wellington 6143

To the Minister for the Environment,

Please find attached the McGuinness Institute's submission on the discussion document on the regulations proposed under the Exclusive Economic Zone and Continental Shelf (Environmental Impacts) Bill currently before Parliament.

Kind regards,



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About the McGuinness Institute

The McGuinness Institute, formerly the Sustainable Future Institute, was founded in 2004 and is a non-partisan think tank working towards a sustainable future, contributing strategic foresight through evidence-based research and policy analysis.

Experience

In preparing this submission we draw on three of the McGuinness Institute's projects, *Project 2058*, *Project Genetic Modification* and *Project One Integrated Report*.

Project 2058 is the Institute's flagship project. It includes a research programme that aims to explore New Zealand's long-term future with a view to putting forward a National Sustainable Development Strategy (NSDS) for New Zealand. One of the areas of interest that we have identified is the country's environmental health and management.

Project Genetic Modification closely monitors developments in genetic modification and related policy both in New Zealand and internationally, for our upcoming report *The Future of Genetic Modification in New Zealand*. Publication of this report is on hold until ERMA completes its review of the HSNO (Methodology) Order 1998, which commenced in 2002. A revision of this very important methodology has been under review for ten years – a point not to be lost when considering delegating significant powers to regulations rather than embedding them in the legislation.

Project One Integrated Report advocates the use of one integrated annual report, by both organisations and countries, as a critical mechanism for improving global governance of resources, human health and well-being. Integrated Reports encourage conversation with all stakeholders about their expectations of a company's commitments and the performance metrics that ensure sustainability in economic, environmental, social and cultural terms.

These three Projects are concerned with risk management and long-term strategic thinking for the benefit of New Zealanders. The Institute sees the effective use and management of New Zealand's resources as an integral part of our sustainable future.

Introduction

The McGuinness Institute is particularly focused on creating policy analysis and research for the long-term interests of New Zealand. Over the coming decades the effective management of our oceans will be an increasingly important aspect of New Zealand's economic, environmental and social well-being. Sound management and sustainable practices are vital in order to support both the Exclusive Economic Zone's (EEZ) delicate ecosystems and the ever expanding demand on resources from a growing global population. Managing our oceans well is vital and the measures we put in place to achieve this should be aspirational if we hope to truly preserve this precious resource.

The Institute has submitted in writing and also in person to the Local Government and Environment Select Committee on the Bill currently before Parliament. We support this Bill and applaud measures to enact a legislative framework to manage and regulate the EEZ and the continental shelf, however, the Institute also has a number of concerns with the current proposals, and these are outlined below.

In particular, we are concerned that the Bill does not go far enough in reflecting our international commitments to the United Nations Convention on the Law of the Sea (UNCLOS), and ensuring that our environment is adequately protected. We believe that the EEZ requires a robust and stringent approach from legislators, and accordingly that the use of regulations should be kept to a minimum. We acknowledge that the current proposal focuses heavily on regulation; however, we still feel it important to stress the need for a solid policy framework. Our previous submission on the Bill also noted the need to provide more information to the public and clarity over the decision making processes, and this issue remains of concern to the Institute through the current discussion document.

This submission outlines our specific concerns regarding the decision-making process in the proposed regulatory framework and the weighing of environmental matters. This submission recommends that a methodology similar to that in the Hazardous Substances and New Organisms Act (HSNO) 1996 could provide an alternative framework for developing a more effective decision-making process.

Concerns

(i) The decision-making framework of the proposed regulations

In our submission on the EEZ Bill, we strongly recommended that the use of regulations as a tool should be kept to a minimum. We believe that the significance of ocean management means that the governance of the EEZ should not be left to subsequent regulations. Given that the EEZ Bill sits alongside the regulatory framework, our principal concern in this submission is that the decision-making framework for the EEZ regulations does not provide an adequately robust framework for assessing the permissibility of activities carried out in the EEZ.

The basic principles underlying the risk management processes should be embedded in the purpose and principles of the legislation. Because so much of the Bill is left to regulation, and it is therefore difficult to predict exactly how effective it will be in practice, it is critical that the purpose of the regulation is clear. This is of particular concern as the regulatory decision-

making powers have the potential to include matters of significance. This means they go beyond the purely technical, and thus are outside the ambit of what regulations are intended for.

The framework does not provide for a thorough assessment and analysis of the associated risks, costs and benefits. The EEZ regulations will need to appreciate, understand and assess the significant risks associated with the sustainable management of our oceans. The impact will concern environmental, social and cultural risks, alongside the economic ones. The regulations should analyse the costs of pollution, damage to our marine ecosystems, and wider concerns such as damage to New Zealand's international reputation and the corresponding loss of tourism revenue.

Furthermore, the regulations should specify what the benefits are that individual parties and New Zealand as a whole stand to gain, and how those will be achieved. Benefits must also be assessed over longer time frames to ensure that decisions are being made with future generations in mind. Non-economic benefits also need to be sufficiently accounted for and properly valued against economic benefits that may only be relevant to a small number of interests.

(ii) The weighting of environmental matters

In the words of Dr Jan Wright, Parliamentary Commissioner for the Environment - 'we can pursue economic development, but we must protect the environment. The former – economic development – is optional. The latter – environmental protection – is not' (PCE, 2011: 5).

We submit that both the Bill and the regulatory framework in their current state do not adequately prioritise sound and sustainable environment management. In doing so, they fail to meet our international obligations under UNCLOS. In particular, the weighing of economic development against environmental protection suggests that some discretionary activities could be permitted under the scheme even where they are significantly harmful to the environment so long as they provide for economic development. We are concerned that the policy framework does not uphold minimum environmental standards. Unless mechanisms are inbuilt into the regulations to protect the environment, the results will be short-term gains at the expense of longer-term costs to both the environment and the economy.

The Institute is also concerned that under the current policy structure, some activities will be automatically permitted 'with appropriate terms and conditions' where New Zealand has international obligations to permit them, without considering the environmental impact of those activities. This seems to counter the fact that one of our most important international obligations is to UNCLOS, and that under the *General Obligation*:

'States have the obligation to protect and preserve the marine environment.'
(UN, 1982: Article 192)

There is also uncertainty as to what constitutes 'appropriate terms and conditions' for permitted activities as these are likely to vary between types and specific instances of permitted activities. Furthermore, we wish to raise concerns about the fact that certain activities have been pre-emptively declared permitted, particularly prospecting for oil and gas, and prospecting for seabed mining. Given that the environmental effects of these activities are unlikely to be considered 'minor' or able to be 'avoided, remedied or mitigated', we contend that the policy framework is flawed in this regard.

The proposed assessment criterion bypasses a number of critical questions that should be asked of any activity being conducted in New Zealand's EEZ and therefore cannot provide public assurance that the regulatory decision-making processes reliably account for all factors relevant to the effective management of our oceans. This is particularly important as the proposed regulatory framework allows some discretion for decision-makers to determine what level of adverse effects on the environment would be appropriate for an activity to be permitted.

Recommendation

We submit that a better framework for regulatory decision-making would be one based on the Hazardous Substances and New Organisms Act (HSNO) 1996. The HSNO Act is a farsighted piece of legislation, which provides international best practice in risk management areas.

The HSNO Act provides an integrated, co-ordinated approach to the management of hazardous substances (ECan, [n.d.]). The Act is administered by the Ministry for the Environment and implemented by the Environmental Risk Management Authority (ERMA) and enforced by various agencies. The legislation provides a detailed regulatory framework and guidelines for public notification (HSNO, s53, s74(a), s74(b)). We recommend that the EEZ regulatory framework should be similar to those provided under the HSNO Act.

Strengths of adopting the HSNO legislation regulatory framework

1. The regulations established under section 74(a) and section 74(b) provide a detailed list of thresholds and classifications for each intrinsic hazardous property, forming a matrix comprising of the types and degrees of hazards to be considered concurrently. A third set of regulations provides for a range of controls with wider considerations in order to minimise adverse effects (EPA, 2012).
2. Section 9 of the HSNO Act requires that the EPA uses a methodology that includes an assessment of monetary and non-monetary costs, as well as the benefits. This takes into consideration factors such as the intrinsic value of an eco-system, sustainability of all native and valued introduced flora and fauna, and future generations (EPA, 2011). We submit that this is one way that would adequately assess and analyse the risks, costs and benefits to parties and to all New Zealanders.

The co-ordinated approach and use of clear, detailed methodology provides for a stringent decision-making process that lends itself to consistency and transparency. The Institute believes that the decision-making methodology embedded in the HSNO legislation provides an excellent example of how the proposed regulatory framework could be developed to reflect international best practice and provide the most effective possible management and decision-making framework for preserving our oceans.

References

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