3 September 2013

To: Regulations Review Committee

Complaint about Exclusive Economic Zone and Continental Shelf (Environmental Effects—Permitted Activities) Regulations 2013

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We wish to appear before the Committee to speak to our complaint. We would like the following to appear in support:

Nathan Argent – chief policy adviser (Greenpeace NZ)
Duncan Currie – legal adviser
Claire Browning – conservation advocate (Forest & Bird)

Greenpeace New Zealand, Inc. ('Greenpeace') was founded in 1974 and has over 60,000 financial supporters. Globally, Greenpeace International is an independent global campaigning organisation that acts to change attitudes and behaviour, to protect and conserve the environment and to promote peace. It comprises 28 independent national/regional offices in over 40 countries across Europe, the Americas, Africa, Asia and the Pacific, as well as a co-ordinating body, Stichting Greenpeace Council. The organisation has a global membership of 4 million supporters.

Forest & Bird is New Zealand's oldest and largest conservation charity, established in 1923. Independent and community-based, our mission is to be a voice for nature - on land, in fresh water, and at sea - on behalf of our 77,000 members and supporters, and 50 branches.

Executive summary

1. Our complaint is based on Standing Order 315(2) grounds, that the Exclusive Economic Zone and Continental Shelf (Environmental Effects—Permitted Activities) Regulations 2013:
   1.1. are not in accordance with the general objects and intentions of the statute under which it is made; and
   1.2. appear to make some unusual or unexpected use of the powers conferred by the statute under which it is made.

2. We invite the committee to recommend to Parliament that the regulations should be disallowed, for being ultra vires their empowering Act, the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012.

Background to the regulations

3. The Exclusive Economic Zone and Continental Shelf (Environmental Effects—Permitted Activities) Regulations 2013 (the "EEZ Regulations") specify permitted activities, as follows:
   3.1. marine scientific research
   3.2. maintenance, repair, removal, alteration and extension of permitted structures
   3.3. submarine cables (as required by international law)
   3.4. seismic surveys
   3.5. all prospecting
   3.6. exploration, except drilling for petroleum.

4. These activities, being permitted, may proceed 'as of right', subject to the conditions set out in the regulations.

5. The conditions vary, per permitted activity. There are pre-activity notification requirements in some cases; and in the case of marine scientific research, prospecting and exploration, operators must have undertaken an initial environmental assessment and done a contingency plan.

6. For seismic surveys, the sole requirement is that it comply with the *2012 Code of Conduct for Minimising Acoustic Disturbance to Marine Mammals from Seismic Survey Operations* - which itself imports the necessary conditions, including a requirement for independent observation.

7. In all cases except seismic surveys, a post-activity report must be completed, including information about any sensitive environments that were encountered, and details of measures taken to avoid, remedy or mitigate adverse effects upon them.

Grounds of complaint

8. The principal ground of complaint is that
   a) The regulations are not in accordance with the general objects and intentions of the statute under which it is made;

9. Furthermore, in failing to comply with their primary law, the regulations
   b) Appear to make some unusual or unexpected use of the powers conferred by the statute under which it is made;

EEZ Act: general objects and intentions

10. The general objects and intentions of the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 ("the Act") can be seen in subpart 2: Purpose and Principles.

10 Purpose

(1) The purpose of this Act is to promote the sustainable management of the natural resources of the exclusive economic zone and the continental shelf.

(2) In this Act, sustainable management means managing the use, development, and protection of natural resources in a way, or at a rate, that enables people to provide for their economic well-being while—

(a) sustaining the potential of natural resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and

(b) safeguarding the life-supporting capacity of the environment; and

(c) avoiding, remedying, or mitigating any adverse effects of activities on the environment.

(3) In order to achieve the purpose, decision-makers must—

(a) take into account decision-making criteria specified in relation to particular decisions; and

(b) apply the information principles to the development of regulations and the consideration of applications for marine consent.

11 International obligations

This Act continues or enables the implementation of New Zealand's obligations under various international conventions relating to the marine environment, including—

(a) the United Nations Convention on the Law of the Sea 1982:

(b) the Convention on Biological Diversity 1992.

11. Other relevant clauses of the Act include section 33 – matters to be considered for regulations, and section 34 – information principles, both separately addressed below.

International law

12. It will be seen that in section 11 the Act specifically is stated to continue or enable the implementation of New Zealand's obligations under various international conventions relating to the marine environment, including the United Nations Convention on the Law of the Sea 1982 (UNCLOS) and the Convention on Biological Diversity 1992 (CBD).

13. In our submission, the EEZ regulations that are the subject of this complaint breach a number of provisions of international law:

    13.1. **Article 192 of UNCLOS:** New Zealand has an obligation under Article 192 of UNCLOS to protect and preserve the marine environment. This is an overriding obligation, from which New Zealand's jurisdiction to exploit resources in the EEZ comes. By making these activities permitted activities, the New Zealand government will lose the ability to take necessary measures to protect and preserve the marine environment.

    13.2. The International Tribunal for the Law of the Sea (ITLOS) in its 2010 Advisory Opinion[1] described the article 192 obligation as a 'general obligation' and went further, stating[2] there is a general obligation of due diligence (in that case of States sponsoring deep seabed mining applications, but also more generally applicable, as is seen from a case which New Zealand itself brought to ITLOS, *the Southern Bluefin Tuna* cases).[3]

    13.3. The 'due diligence' obligation is an obligation to deploy adequate means, to exercise best possible efforts, to do the utmost, to obtain the result.[4] *It is an obligation of conduct; not result*.[5] This is crucial: New Zealand must take the appropriate regulatory measures.

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[1] ITLOS Case No. 17, Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area. 1 February 2011. ("Advisory Opinion"). At https://www.itlos.org/index.php?id=109.

[2] Advisory Opinion, Para 130. ITLOS stated that:
"The link between an obligation of due diligence and the precautionary approach is implicit in the Tribunal's Order of 27 August 1999 in the Southern Bluefin Tuna Cases (New Zealand v. Japan; Australia v. Japan). This emerges from the declaration of the Tribunal that the parties "should in the circumstances act with prudence and caution to ensure that conservation measures are taken … ..(ITLOS Reports 1999, p.274, at paragraph 77), and is confirmed by the further statements that "there is scientific uncertainty regarding measures to be taken to conserve the stock of southern bluefin tuna" (paragraph 79) and that "although the Tribunal cannot conclusively assess the scientific evidence presented by the parties, it finds that measures should be taken as a matter of urgency" (paragraph 80)."

[3] Tribunal's Order of 27 August 1999 in the Southern Bluefin Tuna Cases (New Zealand v. Japan; Australia v. Japan).

[4] Advisory Opinion, para 110.

[5] "This emerges clearly from the Judgment of the ICJ (World Court) in the *Pulp Mills on the River Uruguay:* "An obligation to adopt regulatory or administrative measures and to enforce them is an obligation of conduct. Both parties are therefore called upon, under article 36 [of the Statute of the River Uruguay], to exercise due diligence in acting through the [Uruguay River] Commission for the necessary measures to preserve the ecological balance of the

13.4. New Zealand must take "all measures consistent" with the Convention "that are necessary to prevent, reduce and control pollution of the marine environment from any source" (article 194.1).

13.5. Article 194(3)(c) requires New Zealand to deal with all sources of pollution of the marine environment, including by measures designed to minimize to the fullest possible extent pollution from installations and devices used in exploration or exploitation of the natural resources of the sea-bed and subsoil - in particular measures for preventing accidents and dealing with emergencies, ensuring the safety of operations at sea, and regulating the design, construction, equipment, operation and manning of such installations or devices.[6]

13.6. Under the Convention, 'pollution' includes energy, such as sound waves from seismic testing: article 1(4).[7]

13.7. The Regulation, as a measure, is clearly not designed to achieve this: control over what happens has been relinquished to operators, by virtue of having made the activities permitted, as of right.

13.8. Article 194(5) requires that measures must be taken to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life.[8]

13.9. There is nothing in the regulations that will even ensure that rare or fragile ecosystems, or the habitat of depleted, threatened or endangered species, are identified, let alone adequately protected.

13.10. Article 206 of the Convention requires New Zealand to carry out an environmental impact assessment, when New Zealand has reasonable grounds for believing that planned activities under its jurisdiction or control may cause substantial pollution of or

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river" (paragraph 187 of the Judgment)." - I.C.J., *Case Concerning Pulp Mills on the River Uruguay* (Argentina v. Uruguay), I.C.J. Reports 2010, p. 14 (28 April 2010). Para 164. At http://www.icj-cij.org/docket/index.php?p1=3&p2=1&k=88&case=135&code=au&p3=4. ("*Pulp Mills Case"),* Para. 111.

[6] UNCLOS article 194.3.

[7] UNCLOS article 1(4) "pollution of the marine environment" means the introduction by man, directly or indirectly, of substances or energy into the marine environment, including estuaries, which results or is likely to result in such deleterious effects as harm to living resources and marine life, hazards to human health, hindrance to marine activities, including fishing and other legitimate uses of the sea, impairment of quality for use of sea water and reduction of amenities;

[8] UNCLOS article 194.5.

significant and harmful changes to the marine environment. The assessments must be published, or provided to competent international organizations, which should then make them available to all States (article 205).

13.11. By contrast, the regulations only require an 'Initial Environmental Assessment' – a desktop survey, done by the operator, that is not independently reviewed. This clearly is not the environmental impact assessment required by article 206. Seismic surveying can, without question, cause significant and harmful changes to the marine environment. The effects are discussed below. It should therefore be subject to environmental impact assessment procedures: to establish, for instance, marine life that is in, or may enter, the particular area in which the seismic surveying is intended to be conducted.

Protect and preserve the marine environment (art 192)

14. Contrary to what UNCLOS and sections 10 and 11 of the empowering Act require, there is no requirement in the EEZ regulations addressed to the marine environment as such. The obligations are limited to 'sensitive environments' defined in Schedule 6.

15. In addition to the UNCLOS 'protect and preserve' requirement, imported by section 11 of the Act, section 10 of the EEZ Act defines 'sustainable management' as:
"managing the use, development, and protection of natural resources in a way, or at a rate, that enables people to provide for their economic well-being while—
(a) sustaining the potential of natural resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and
(b) safeguarding the life-supporting capacity of the environment; and
(c) avoiding, remedying, or mitigating any adverse effects of activities on the environment."

16. In doing so, the concern of the Act is clearly not restricted to 'sensitive environments', as defined in the regulation, but to 'the environment', which is defined in section 4 to mean
"*the natural environment, including ecosystems and their constituent parts and all natural resources, of—*
(a) New Zealand:
(b) the exclusive economic zone:
(c) the continental shelf:
(d) the waters beyond the exclusive economic zone and above and beyond the continental shelf."

17. The obligation to protect and preserve the marine environment extends to species and ecosystems within that environment. Adverse effects likely to arise from the regulations, to fish populations, marine mammals, seabirds and other significant species are discussed below, in relation to seismic testing in particular - but effects are not limited to seismic testing. They may also arise, for instance, by silting or dredging.

18. Officials are proceeding under the belief that effects of the permitted activities on the marine environment will be no more than minor, or can be managed to achieve minor or less effects.

Even if the nature of prospecting, exploration and seismic activity *were* invariably such that it could be managed to achieve minor or less than minor effects, the 'management' part is missing in the draft regulations as proposed, and we address this in some further detail below. Certainly for seismic surveying, we do not accept that this is the case: a growing body of evidence suggests that its effects on marine mammals and other species are profound.

19. We further note that the regulations have taken what might be described as an activity focus rather than an environment focus. There is a requirement to ensure that no more material is removed from the seabed or subsoil "than is reasonably necessary to undertake the activity". The emphasis is on what is necessary to undertake the activity, not what is necessary to protect and preserve the marine environment, as UNCLOS requires.

Protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life (art 194(5)).

20. The regulations require certain steps to be taken by operators seeking to carry out a permitted activity, in relation to 'sensitive environments' as defined in Schedule 6 to the regulations.

21. 'Sensitive environments' is a new and different definition from those internationally accepted, and as such this will both introduce confusion and result in failure to protect areas. International concern particularly relates to vulnerable marine ecosystems (VMEs), which are required by the United Nation Food and Agriculture Organization (FAO) to be protected; and to ecologically or biologically sensitive areas (EBSAs), some of which have been identified by the Convention on Biological Diversity (CBD). Much work has been carried out internationally on VMEs and EBSAs.

22. Cabinet papers reveal that seismic surveying activity is excluded entirely from the need to consider sensitive environments.[9]

23. Regardless of the appropriateness of the 'sensitive environment' definition, the EEZ regulations are not capable of protecting such environments. These limitations are conceded by officials, in briefings provided to their Minister, and Cabinet papers relating to the regulations, obtained under the OIA. The regime that has been set in place is described, in a briefing dated 12 October 2012 as a "high trust self-reporting model".

24. In particular, our concerns here relate to the absence of observers, and consequent inability of the EPA, which administers the oversight function, to perform anything in the way of effective oversight and enforcement.

25. The 'initial environmental assessment' which is required under these regulations is no more than a preliminary desktop study. It must "describe in general terms the environment *likely to be*

[9] Paper to the Cabinet Legislation Committee "Exclusive Economic Zone and Continental Shelf (Environmental Effects – Permitted Activities) Regulations" dated 10 June 2013 refers: "agree that seismic surveying is not required to comply with requirements relating to sensitive environments" (recommendation 6).

encountered when the activity is being undertaken; and *identify and describe any sensitive environments that are likely to exist* ....". It is undertaken by the operators themselves.

26. Having identified such likelihood, there is a requirement on operators to then develop a contingency plan, working through a framework supplied in Schedule 2 to the regulations – they must seek to 'avoid, remedy or mitigate'. Again, there is no independent oversight or analysis of the quality of this work; it is reliant entirely on operators' word, and good faith. Worse, the examples given in the regulations do not require avoidance at all: merely mitigation.[10] That means that damage may be caused to vulnerable marine ecosystems, ecologically or biologically sensitive areas, or to the marine environment, and there is not only no obligation for the operator to prevent them, but no way for the New Zealand government to prevent them.

27. Nor will compliance with the contingency plan be monitored, since the decision has been taken by the Minister that observers should not be required.

28. Papers to the Minister reveal that "the EPA raised concern that the permitted activity proposals would not provide it with the powers to effectively influence how the activities are carried out."[11] In a briefing from November 2012:[12]

"The EPA, as the regulator, is not able to undertake an assessment of the effects of the proposed activity, for example, whether the activity should proceed in the intended location. The EPA is also not able to assess the standard of information it is provided, for example, whether the operator's plan to avoid, remedy or mitigate their likely effects is adequate. The EPA is limited to assessing the completeness of information, that is, once all information required by the regulations has been provided, the operator may proceed."

29. This was reiterated in a further briefing in April 2013 (emphasis added):[13]

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[10] Examples of kinds of measures that could be taken to avoid, mitigate, or remedy adverse effects of an activity include (clause 5)—

(a) carrying out the activity in another place:

(b) reducing contact with the seabed:

(c) carrying out alternative lower-impact activities:

(d) changing the method(s) of operation to lower the impact of the activity on the environment.

[11] Briefing to Hon Amy Adams Minister for the Environment, undated (November 2012) 12-B-01921, at para 151.

[12] Ibid.

[13] Briefing to Hon Amy Adams, Minister for the Environment, 3 April 2013 13-B-00358.

*"However, the Environmental Protection Authority (EPA) has indicated that **while existing monitoring, reporting and enforcement tools are sufficient to ensure operators comply with requirements to supply information, they are not sufficient to monitor the accuracy of reports about onboard activity**. The ability to place observers onboard would therefore be useful ..."*

The same paper goes on to note:

"Whilst not absolutely necessary for effective monitoring, requiring operators to place observers onboard a vessel while a permitted activity is taking place provides a high level of assurance that operators are complying with the regulations. The EEZ permitted activities regulations place a degree of trust on operators to submit information to the EPA about what they proposed to do and then to carry out their activity in accordance with their plans, adapting those plans if a sensitive environment is encountered."

30. We submit that this "high trust self-reporting" model is manifestly inadequate: it fails in providing for New Zealand to continue or enable the implementation of our obligations, in terms of section 11. It means that damage may be caused to vulnerable marine ecosystems, ecologically or biologically sensitive areas, or to the marine environment, and there is no way for the New Zealand government to prevent them – or even, to know that the damage has occurred, allowing enforcement action to be taken. The incentive in fact is on operators, to be less than scrupulous with the truth and – again as acknowledged in the papers – to minimise their compliance costs, knowing that the likelihood of being discovered to be in breach of their requirements is very small.

31. In having taken the decision to proceed with this framework, regardless of clear advice about its limitations, the regulation breach a further principle, the precautionary principle, clearly set out among the objects and intentions of the Act – and itself, an important and well known principle at international law.

The precautionary approach

32. Section 34 of the Act sets out information principles, to be followed in developing regulations:

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.*

33. The EEZ and continental shelf is an environment in which, in relation to regulation, little is known and the level of uncertainty is consequently very high. What is known tends to indicate that there are grounds for considerable caution. Again, this is acknowledged by officials in Ministerial advice:

    "Not much is known about New Zealand's EEZ and CS. Only 24 percent has been mapped and only 15 percent to a standard necessary to distinguish likely seafloor habitats, most of which require further sampling to confirm. However, as well as containing critical fish species and many other organisms, we do know that it is home to many iconic marine mammals, including orca, sperm whales and seabirds, as well as areas of high, sometimes unique biodiversity on and around seamounts, deepwater coral reefs, hydrothermal vents and other features." [14]

    "Although informed by consultation that has included expert scientific input, regulations development has been constrained by a lack of information ..." [15]

34. The Minister must – not may, but must – favour caution and environmental protection where information available is uncertain or inadequate. Furthermore section 34 of the EEZ Act specifically requires that the Minister favour caution when there is uncertainty.

35. The **precautionary approach**, to which New Zealand has repeatedly signed up in numerous international instruments, has been embraced by the International Court of Justice and the International Tribunal for the Law of the Sea.[16]

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[14] Paper, Cabinet Economic Growth and Infrastructure Committee, "Permitted Activities Proposals for Exclusive Economic Zone Environmental Effects Regulations", para 12.

[15] Ibid, at para 7.

[16] ITLOS also observed in its Advisory Opinion (Advisory Opinion, para. 135) that the precautionary approach has been incorporated into a growing number of international treaties and other instruments, many of which reflect the formulation of Principle 15 of the Rio Declaration. "In the view of the Chamber, this has initiated a trend towards making this approach part of customary international law. This trend is clearly reinforced by the inclusion of the precautionary approach in the Regulations and in the "standard clause" contained in Annex 4, section 5. 1, of the Sulphides Regulations. So does the following statement in paragraph 164 of the ICJ Judgment in Pulp Mills on the River Uruguay that "a precautionary approach may be relevant in the interpretation and application of the provisions of the Statute" (i.e., the environmental bilateral treaty whose interpretation was the main bone of contention between the parties). This statement may be read in light of article 31, paragraph 3(c), of the Vienna Convention, according to which the interpretation of a treaty should take into account not only the context but "any relevant rules of international law applicable in the relations between the parties"."

Noted by the ICJ in the Pulp Mills and Gabčíkovo-Nagymaros (I.C.J., Gabčíkovo-Nagymaros Project (Hungary/Slovakia). The Court recognized that both Parties agree on the need to take environmental concerns seriously and to take the required precautionary measures, Para 113. The Court also observed that "The Court is mindful that, in the field of environmental protection, vigilance and prevention are required on account of

36. While purporting to have taken a cautious or precautionary approach,[17] the regulations in fact do not: in the face of the acknowledged considerable uncertainty, operators are to be allowed to operate without oversight. In failing to comply with such an approach, this constitutes a further breach of established international law requirements - and thus section 11 of the Act, as well as 34.

Seismic surveys

37. In relation to seismic surveys, in particular, the breach of the precautionary principle is particularly marked.

38. With respect to seismic surveys, there is considerable uncertainty and inadequacy in information available. The requirement in clause 7 of the regulations to comply with the *Department of Conservation's 2012 Code of Conduct for Minimizing Acoustic Disturbance to Marine mammals from Seismic Survey Operations* is not adequate to address them. The Code Reference Document itself notes that: "*There are currently many areas of uncertainty related to the potential impacts of acoustic sources on the marine environment*".

39. It is, however, clear that seismic surveying can result in damage not only to marine mammals, including whales, but also to fish populations. All cetaceans - whales and dolphins - are highly sensitive to sound and use sound for communication, echolocation and navigation. Whales and dolphins have been found dead after military sonar testing and industry sonar use. Noise from oil and gas exploration seismic surveys and geophysical surveys can be detected hundreds of kilometers from the source. New Zealand's Maui and Hector dolphins are of grave concern considering their significantly low population numbers and that they face a very real possibility of extinction.

40. New Zealand has obligations under Article 206 of UNCLOS to take measures to protect and preserve the habitat of threatened and endangered species. Considering the areas that will be open for bidding within New Zealand's waters, seismic surveying will be taking place within the Maui and hector dolphin habitats – and in fact, already has been.

41. In April this year a letter was sent to the Prime Minister from the Society of Marine Mammalogy urging the Government to immediately stop the seismic surveying in the Maui dolphin habitat. The Society of Marine Mammalogy is the world's largest professional group dedicated to the

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the often irreversible character of damage to the environment and of the limitations inherent in the very mechanism of reparation of this type of damage.

[17] Briefing to Hon Amy Adams Minister for the Environment, undated 12-B-01921 at para 33:
"Although I am required to take into account countervailing factors like the economic benefit to New Zealand of an activity, both the purpose of the Act and section 34(2) require me to err on the side of protecting the environment in the face of uncertain information. This is the approach I have adopted, particularly in regard to sensitive environments."

study of marine mammals, with membership of over 2,000 scientists from 60 different countries. The letter specifically stated: *"We are very concerned that seismic testing is being allowed in the protected area not only because of the risk of direct harm to dolphin hearing but also because potential displacement from this habitat by Maui's dolphins could result in increased by catch in unprotected areas. Allowing this seismic testing thus appears inconsistent with the New Zealand Government's stated goal of enabling this subspecies to recover. We urge you to reconsider the decision to allow this seismic testing in and near the protected area in light of the high risk to the Maui's dolphin."*

42. There is also research showing acoustic impacts on fish. The CBD noted in a synthesis report last year that: "*fish utilize sound for navigation and selection of habitat, mating, predator avoidance and prey detection and communication. Impeding the ability of fish to hear biologically relevant sounds might interfere with these critical functions. Although the study of invertebrate sound detection is still rather limited, based on the information available it is becoming clear that many marine invertebrates are sensitive to sounds and related stimuli*". The report concluded that: "*The uncontrolled introduction of increasing noise is likely to add significant further stress to already-stressed oceanic biota. Protecting marine life from this growing threat will require more effective control of the activities producing sound which depends on a combination of greater understanding of the impacts and also increased awareness of the issue by decision makers both nationally and regionally to implement adequate regulatory and management measures*."

43. Cephalopods, and diving birds such as penguins and shearwaters are believed also to be affected. This is an activity that presents life-threatening effects to significant marine species, and threatened species: it has adverse effects on the environment that are significant.

44. The **precautionary approach** requires New Zealand not to use scientific uncertainty to postpone measures. That is exactly what New Zealand has done here. Considering the uncertainty related to impacts of seismic surveying the precautionary approach must be applied. However seismic surveying is a permitted activity and no impact assessment is required.

45. In this regard alone, the Regulations, beyond question, fail in the necessary requirement to favour caution and environmental protection – or to comply with international law.

Section 33 – matters to be considered for regulations

46. Section 33 of the Act lists matters to be considered for regulations. Brief comments in relation to its relevant parts are made below.

33 Matters to be considered for regulations

(1) This section and section 34 apply when the Minister is developing regulations for the purposes of section 27.

(2) ...

(3) The Minister must take into account—

(a) Any effects on the environment or existing interests of allowing an activity with or without a marine consent, including—

(i) Cumulative effects; and
(ii) Effects that may occur in New Zealand or in the waters above or beyond the continental shelf beyond the outer limits of the exclusive economic zone; and

47. How can the Minister consider cumulative effects of activities as broad as minerals exploration and marine structures when they are permitted activities, no environmental impact assessment is required and no hearing are held? Indeed, how will the Minister know what the effects are – in the water column, or on or the continental shelf – again, without an environmental impact assessment, or adequate monitoring? The only monitoring required by the EPA is in clause 9: "must monitor permitted activities to determine whether the activities are being undertaken in accordance with conditions imposed by these regulations". In other words, the monitoring is highly restricted, or even circular: it relates solely to the necessary information having been provided, with no check on the accuracy of that information. Silting, dredging, explosives activities or other activity may well occur without the EPA or anyone else knowing about it.

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

48. If other activities (such as fishing) are impacting the same areas as minerals exploitation or seismic testing, the EPA is unlikely to even know, due to the inadequate monitoring, and there are no ways for it to control it, since it is a permitted activity.

(c) The effects on human health that may arise from effects on the environment; and
(d) The importance of protecting the biological diversity and integrity of marine species, ecosystems, and processes; and

49. This concern is not restricted to 'sensitive environments', but applies to all species, ecosystems and processes.

(e) The importance of protecting rare and vulnerable ecosystems and the habitats of threatened species; and

50. This has been addressed above. The regulations fail to protect habitats of threatened species, as opposed to types of environment deemed sensitive.

(f) New Zealand's international obligations; and

51. This has been addressed above.

(g) The economic benefit to New Zealand of an activity; and
(h) The efficient use and development of natural resources; and
(i) The nature and effect of other marine management regimes; and

(j) Best practice in relation to an industry or activity; and
(k) In relation to whether an activity is classified as permitted or discretionary, the desirability of allowing the public to be heard in relation to the activity or type of activity; and

52. As the result of the Regulation making these activities permitted, the public has no ability to be heard.

Recommendations

53. This Committee should recommend that the Regulation be disallowed under the Regulations (Disallowance) Act 1989.

54. We would like take this opportunity to thank the Committee for its consideration and look forward to meeting the Committee on the matter of the issues outlined above.

Yours sincerely,

Nathan Argent
Greenpeace NZ

Claire Browning
Forest & Bird