



Forest & Bird

TE REO O TE TAIAO | *Giving Nature a Voice*

Submission on Developing a Regulatory Framework for Offshore Renewable Energy

Second Discussion Document AUGUST 2023

2 November 2023

To: Ministry of Business, Innovation and Employment
Email: offshorerenewables@mbie.govt.nz
From: Royal Forest and Bird Protection Society of New Zealand Inc. (Forest & Bird)
Contact:

Thank you for the opportunity to submit feedback on this second round of consultation regarding offshore renewable energy development in Aotearoa New Zealand.

Forest & Bird submitted on MBIE's first round of consultation and went to great length to explain the need for certainty for all users of marine space, regarding the development of offshore renewable energy. The Regulatory Impact Statement¹ released with this second round of consultation acknowledges that certainty is a key consideration, but only for driving developer investment in offshore renewables.

Certainty needs to come for all users, including biodiversity, from a government-led and spatially-planned approach to the development of offshore renewable energy. This would afford the opportunity to assess and weigh all potential competing uses of maritime spaces, and significantly, assess the cumulative impacts of offshore renewable projects as well as prioritise biodiversity protection, in line with our global and domestic legal obligations.

¹ Regulatory Impact Statement: Offshore renewable energy, in principle decisions for regulating feasibility activities <https://www.mbie.govt.nz/dmsdocument/27261-regulatory-impact-statement-offshore-renewable-energy-in-principle-decisions-for-regulating-feasibility-activities-proactiverelase-pdf>

SUBMISSION

1. Forest & Bird acknowledges the regulatory uncertainty upon us with a change of government. Regardless, the message from the incoming government has been clear, it wants to fast-track infrastructure consenting processes and create Major Infrastructure Priorities.² We suggest that, as written, MBIE's proposed regulatory framework will not satisfy the direction of the incoming government.
2. Creating certainty from government-led and spatially-planned development of offshore renewable energy is essential if we want a considered approach to an industry that could have devastating consequences for our marine environment if not done right. Such an approach would cause delay in the short-term, but certainty and efficient permitting processes in the long-term. Furthermore, it would ensure we meet our international obligations under treaties such as the Convention on the Conservation of Migratory Species of Wild Animals.³
3. MBIE does not appear to have incorporated feedback from other government departments and cross-agency groups on this very point. The Ministry for Primary Industries, Ministry for the Environment and Department of Conservation all favour a government-led approach.⁴ Furthermore, in a memo from the Oceans Secretariat to MBIE, it states:

“The recent *Our Marine Environment* report confirmed that oceans are under increasing pressure from the impacts of climate change, and therefore a cautious approach is needed for any proposed development in the marine environment.”⁵

4. As Forest & Bird stated in its original submission, the starting point for managing feasibility activities for offshore renewable energy development in the marine environment should be to safeguard marine biodiversity. Pushing ahead with legislation in 2024 to enable the issuance of permits in a marine biodiversity hotspot, needs a much more nuanced and cross agency approach before legislation can be drafted. Even the USA, which has tight goals for delivering offshore renewables, in a press statement says:

“We are committed to incorporating the best available science into our decision making processes as we continue to advance the Biden-Harris administration's goal of deploying 30 gigawatts of offshore wind energy by 2030. By taking an all-of-government approach, we can leverage the expertise and resources of our federal partners to ensure responsible development of offshore wind energy.”⁶

² Page 9. National Party, Infrastructure for the Future, policy document:

https://assets.nationbuilder.com/nationalparty/pages/17956/attachments/original/1686090956/Infrastructure_for_the_Future.pdf?1686090956

³ <https://www.cms.int/en/legalinstrument/cms>

⁴ Page 6. Regulatory Impact Statement: Offshore renewable energy, in principle decisions for regulating feasibility activities <https://www.mbie.govt.nz/dmsdocument/27261-regulatory-impact-statement-offshore-renewable-energy-in-principle-decisions-for-regulating-feasibility-activities-proactiverelase-pdf>

⁵ Oceans Secretariat Memo. Dated 4 November 2022. To Offshore Renewable Energy and Hydrogen team, MBIE. Released to Forest & Bird under the Official Information Act.

⁶ <https://www.noaa.gov/news-release/noaa-and-boem-announce-joint-strategy-for-fisheries-surveys>

The Biden-Harris Administration’s clean energy goals include responsibly advancing offshore wind energy production while *protecting biodiversity and promoting ocean co-use*.⁷ This is the approach needed in Aotearoa.

5. We note in Chapter 2 that the government is working on a New Zealand Energy Strategy, due to be released in late 2024.

“The Strategy will take a whole of energy system perspective and seek to balance our objectives of decarbonising the energy system at pace, maintaining security and reliability, improving affordability, and supporting growth and productivity.”⁸

It is not clear whether the Strategy is considering the relative need for offshore renewables compared to other sources of energy. In addition, it’s not clear whether offshore renewables are being considered in relation to other industries using the ocean e.g. fisheries.

6. We acknowledge that Chapter 8 in the consultation lays out how the environmental effects will be addressed but this is inadequate from a ‘whole of ocean’ perspective. We see this already in areas like Wellington Harbour where the cumulative effects of individually considered consents in the coastal marine area have not been adequately considered and now we have a dire situation for kororā (little blue penguins) around the harbour⁹. MBIE needs to step back and consider an alternative, whole-of-government approach to regulation that addresses effects on a basin level, not project by project, to ensure disastrous outcomes are prevented from poor decision making based on lack of scientific information and inadequate regulation. One of the key lessons to learn from resource management on land is the need to address cumulative effects up front and holistically because they are almost impossible to deal with on a case-by-case approach because of the difficulty of assessing when thresholds have been crossed.
7. Significantly, regulation of relevance to offshore renewables is totally undeveloped in Aotearoa. Aotearoa does not currently have national standards or guidelines for underwater noise, for example.¹⁰ Offshore windfarms, building turbines as tall as the Sky Tower in the ocean¹¹, could create the biggest marine noise pollution ever experienced in New Zealand during their construction and we see no evidence of MBIE even considering this. In addition, offshore renewables will create infrastructure in the ocean that we simply don’t understand the implication of for wildlife in Aotearoa, such as electromagnetic radiation from cabling.¹² It is important to recognise and provide for the roles of electromagnetic fields and sound for both navigation and prey location by marine wildlife. This needs investigating.

⁷ Ibid.

⁸ Page 13. Consultation documentation.

⁹ Construction activities are occurring in the CMA around the harbour, displacing and killing many birds e.g.

<https://www.thepost.co.nz/a/nz-news/350066540/penguin-deaths-stop-work-312m-shared-path>

¹⁰ <https://www.cawthron.org.nz/our-news/noise-ocean-marine-mammals/>

¹¹ <https://www.stuff.co.nz/business/132835091/colossal-wind-turbines-with-110-metre-long-blades-planned-taranaki-coast>

¹² https://link.springer.com/chapter/10.1007/978-94-017-8002-5_6

8. Perhaps underpinning Forest & Bird's biggest concerns about offshore renewable energy more broadly and the developer led approach favoured by MBIE is the complete absence of data pertaining to the majority of species that use our marine environment. Basic information is absent or poor for a large proportion of our marine life, and of those we do know about, a high proportion are threatened with extinction, as shown in the State of Environment reporting jointly carried out between Statistics New Zealand and the Ministry for the Environment.¹³ Developers are only incentivised to investigate effects where they want to build the infrastructure, project by project. This is not only inefficient and likely to be slowed by the availability of experts, consent by consent, but also potentially problematic because the data is owned by the developers and does not enable a transparent, government-led approach to addressing cumulative effects across projects across the ocean nor does not prioritise species of concern.
9. Further to this, we note that much of the science presented at symposiums like the recent Ara Ake Offshore Renewable Energy Forum in New Plymouth refers to Northern Hemisphere situations where the biota is totally different. Even the USA, which is taking a precautionary approach to offshore development, has far fewer species affected than New Zealand. Recent research by Birdlife International has identified three marine flyways that collectively cover our entire EEZ.¹⁴ Almost half the world's cetaceans (whales, porpoises and dolphins) have been reported in our waters.¹⁵ The EEZ may be an attractive prospect for renewable energy but we have so much to lose if a holistic approach isn't taken at the feasibility stage and if we don't invest now in filling some of the critical data gaps regarding our marine biodiversity. Offsetting is not an option in our oceans. Nor is adaptive management. Spatial planning and research upfront are critical if we want renewable energy that doesn't come at the expense of our marine biodiversity.
10. Shortly after MBIE's first consultation closed in April, the government released the report of a Ministerial Inquiry into land use in Te Tairāwhiti and Te Wairoa. The results identified that much of the land use in the region is unsustainable and stated that the

“...unintended consequences of successive government strategies and inadequate local authority intervention [arose] from a failure to recognise the complexity of the regions' well-known geomorphology and people.”¹⁶

The solution was “...to pursue a more nuanced vision of a mosaic of sustainable land uses – both protective and productive – that are more appropriate to their place in the landform.”¹⁷ This would include a new purple zone. Purple zones would identify land that must be returned to permanent forest – preferably native – which would have the advantage of biodiversity co-benefits.
11. The purple zones presented by the Ministerial Inquiry are essentially what Forest & Bird is suggesting needs to apply to our oceans. Had the government acknowledged the nuance of the

¹³ <https://www.stats.govt.nz/indicators/extinction-threat-to-indigenous-species/>

¹⁴ <https://www.seabirdtracking.org/special/marine-flyways/>

¹⁵ <https://www.doc.govt.nz/nature/native-animals/marine-mammals/>

¹⁶ Page 19. Ministerial Inquiry into Land Uses in Tairāwhiti and Wairoa
<https://environment.govt.nz/assets/Outrage-to-Optimism-CORRECTED-17.05.pdf>

¹⁷ Ibid.

landscape before ploughing ahead with plantation forestry policies, then we may not have seen the devastation resulting from Cyclone Gabrielle. This is exactly what is needed now ahead of offshore renewable energy development – acknowledgement of the biodiversity values, the nuance of the ocean and the animals and habitats that occur there, to prevent an entirely avoidable effects if placed in the wrong location.

Responses to questions

Chapter 4: Further detail on feasibility permits

12. What size of offshore renewable energy projects do you think are appropriate for a New Zealand context?

The size of the project is somewhat irrelevant, it's the cumulative impact of many projects over time that is of greatest concern. How is MBIE considering addressing this? The environmental impact of any particular project will be much greater than its footprint. Noise in particular pollutes many kilometres on a logarithmic scale, this will be extreme during construction. Overseas studies show the best mitigation for seabirds is to avoid areas of high overlap. Equally, consideration needs to be given to offshore renewables in an international context. For example, turbines that kill birds in Aotearoa are possibly just one link in a chain of turbines across a migratory path of seabirds along a flyway. The size of the footprint may be less relevant than the location it is built and the noise of construction from sequential development is necessary to consider upfront. This is why spatial planning needs to be based on managing effects and risks rather than developer led and driven by economics.

13. This chapter does not give sufficient information regarding the feasibility permits. Diagram 3 on Page 14 gives a flow chart and mentions feasibility criteria. What are these criteria? This is a critical stage of the process and we have no idea what MBIE will be assessing applications against. The feasibility stage is where due diligence should be undertaken and we have no ability to determine how or whether this will be done based on the information presented.

Chapter 5: Commercial permits

14. Should there be a mechanism for government to be able to compare projects at the commercial stage in certain circumstances? If yes, would the approach outlined in Option 2 be appropriate or would there be other ways to achieve this same effect?

It is very important that MBIE retains the ability to compare applications. Environmental considerations need to be at the forefront of decision making. For example, one developer might have better technology that makes less noise or may have invested more heavily in research to ensure the proposal will have the least impact on marine biodiversity. Factors like this should be considered as part of a process of comparison.

15. Are the proposed criteria appropriate and complete? If not, what are we missing?

The proposed criteria are totally silent on environmental considerations. There needs to be a requirement for every developer to maintain a fund to pay for *independent* assessment of impact. Assuming consents are granted, then ongoing robust monitoring for the duration of the project is essential to help assess unforeseen impacts resulting from the development and guide future criteria for permitting in light of this.

16. *Should there be mechanisms to ensure developers deliver on the commitments of their application over the life of the project? If yes, what should these mechanisms be?*

There should definitely be mechanisms to ensure developers deliver on the commitments of their application over the life of the project. Mechanisms would include sanctions for non-compliance and possible early decommissioning for recidivous non-compliance with bonding to ensure that funds are available to cover decommissioning should it be required.

17. *Is 40 years an appropriate maximum commercial permit duration? If not, what would be an appropriate duration?*

The duration of commercial permits should align with RMA consents, i.e. no more than 35 years with periodic review if problems emerge. This would ensure compatibility with regulation and consenting.

18. *Should a developer that wishes to geographically extend their development be required to lodge new feasibility permit and commercial permit applications? Why or why not?*

If developers want to geographically extend their development, then they should be required to lodge new permit applications with MBIE as well as go through the consenting process again. Geographic extension has significant implications for further noise pollution, encroachment into areas previously outside the environmental impact assessments and as we continually reiterate, cumulative effects of these projects are a serious consideration, these applications all need to be considered in a wider context. Expansion of existing projects is a situation where the risk of crossing thresholds with cumulative effects is increased because of the additional impact may not seem large although the cumulative impact is.

19. *Would the structure of the feasibility and commercial permit process as described enable research and development and demonstration projects to go ahead? If not, why not?*

Research and development and demonstration projects need to all be assessed like a commercial project i.e. usual consenting still applies. No demonstration project should be enabled without all the required ecological assessments.

Chapter 8: Interaction with the environmental consenting processes

20. *For each individual development, should a single consent authority be responsible for environmental consents under the RMA and the EEZ Act? Why or why not?*

It is appropriate to have a single consenting authority responsible for environmental consents under the RMA and the EEZ Act. This would maintain oversight of the big picture. However, before

applications reach this point, MBIE needs to have conducted extensive investigations into limits to effects, in particular noise, to ensure applications are considered within a 'whole of ocean' context.

21. *Do environmental consenting processes adequately consider environmental effects such that it is not necessary to duplicate an assessment of environmental effects in the offshore renewables permitting regime?*

Issuance of feasibility permits needs to be done in the context of greater understanding of some of the biological constraints of the wildlife that lives in and uses the ocean. The environmental consenting processes do consider environmental effects such that it is not necessary to duplicate this in MBIE's permitting regime. However, this is perhaps the wrong question. This assumes that it was ever appropriate to issue a feasibility permit to a developer/project in the first place. It will be very costly for both the developer and eNGOs to enter into consenting processes each time when the basis of the developer's feasibility was flawed environmentally from the outset. We have seen this already with the sand mining application in the Taranaki Bight.¹⁸ There is a very real risk this will just be repeated continuously if MBIE doesn't get the feasibility framework right from the outset. We have stated our case for a better approach in our submission above.

22. *Should the offshore permitting regime assess the capability of a developer to obtain the necessary environmental consents? If not, why not?*

Assessing the capability of a developer to obtain consent does not seem like it should be the role of government. However, if MBIE were to go down that route, then we would suggest the capability includes ensuring the developer is aware of the significant data deficiency of many of the species of concern and working alongside the Department of Conservation to determine the span of research required and the questions that need answering; marine biology, acoustic, hydrological and ecological science capability will need to be a core capability for consent applications.

23. *What is the optimum sequencing between obtaining feasibility permits, commercial permits and relevant environmental consent(s)?*

We would agree with MBIE's preferred Option 1: feasibility permit – relevant environmental consent(s) – commercial permit.

24. *Are there any other matters about the environmental consent regimes that you think need to be considered in the context of the offshore renewable energy permitting regime?*

Forest & Bird wrote a comprehensive submission on proposed amendments to strengthen national direction on renewable electricity generation and electricity transmission. In our submission we noted that the enabling approach taken in the proposed national direction would inevitably worsen the biodiversity crisis. We would strongly oppose any review of the New Zealand Coastal Policy Statement through the lens of perceived challenges for consenting onshore renewable energy projects. Addressing the climate crisis should not come at the expense of the environment that we depend on now more than ever in the face of climate change.

¹⁸ <https://www.theguardian.com/environment/2021/oct/01/new-zealand-supreme-court-blocks-seabed-mining-consent>

25. *How should the factors outlined influence decisions to pursue offshore renewable energy developments in the EEZ or the Territorial Sea? Are there other factors that may drive development in the EEZ versus the Territorial Sea?*

This question addresses the heart of Forest & Bird's concern about offshore renewable energy in our ocean. All marine species may be affected by phases of wind farm development and operation. The point is that we simply don't have any data on the majority of the biota affected. Hence, this whole process needs to be a precautionary one. As stated in the consultation:

“...we know there are potential adverse impacts to marine mammals and seabirds. It is unclear what the extent of these impacts might be, and whether they will be more adverse in the Territorial Sea or the EEZ. The actual impacts will depend on site specific context.”¹⁹

This is right. No expert can tell you whether effects will be more adverse in the territorial sea or the EEZ. It's simply unknown. Furthermore, the ocean is a dynamic place, it's not just about what's there and how many are there but how they use the space.

Furthermore, decision making in the EEZ will need to recognise that the EEZ is international waters to which New Zealand has both exclusive rights and obligations. The consenting process will need to be consistent with international law governing the use and protection of the marine environment in the EEZ.

Chapter 10: Decommissioning

26. *Should developers be required to submit a decommissioning plan, cost estimate and provide a financial security for the cost estimate? If not, why not?*

Yes. Developers should be required to provide a bond, like they do for mining, so that in the event of liquidation, financial strife, failure to get re-consented or the removal of consent for environmental reasons, there is still the funding available to ensure all infrastructure is decommissioned and removed.

¹⁹ Page 44. Consultation document.