Regulatory Impact Statement

Resource Legislation Amendment Bill 2015: EEZ Amendments

Agency Disclosure Statement

This Regulatory Impact Statement (RIS) has been prepared by the Ministry for the Environment (MfE). It provides an analysis of a package of proposed changes to the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 (EEZ Act).

The purpose of the proposed changes is make the regime work more efficiently, and ensure it reflects the purpose of the EEZ Act by making discrete changes. Some agencies, including the Treasury and the Ministry for Business, Innovation and Employment, have suggested that more substantive amendments will be required to effect genuine change in the regime. MfE does not believe it is possible to progress substantive amendments in the available timeframe, with the current level of evidence, or without further consultation.

The EEZ Act has been in force since June 2013 and there have been a limited number of decisions made under the Act, meaning there is uncertainty about the scale and frequency of a number of the problems identified. This information gap has been filled as far as possible from previous work and existing information, within the framework of the policy objectives set out in the RIS. In effect, the analysis of the options is qualitative and subjective.

The analysis is also informed by ongoing conversations with the Environmental Protection Authority, other Government agencies, industry representatives and other stakeholders. There is uncertainty about specific impacts of the proposed changes, and decisions about how options perform against the policy objectives are qualitative and subjective.

Given the constraints, it has not been possible in all areas to consider the full range of alternative options. The RIS is focused on the most viable options in each area that might deliver the policy objectives.

MfE recommends that the current package of proposals be progressed in the short term, and that consideration of a more fundamental review is progressed over a longer timeframe once there is more certainty about the scale and frequency of particular issues.

Proposals for alignment between the Resource Management Act 1991 and the EEZ Act are outlined in the RIS Alignment of the Decision-making Processes for Nationally Significant Proposals and Notified Discretionary Marine Consents.

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Background

1. The Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 (EEZ Act) came into force on 28 June 2013. It is the primary tool for environmental regulation of the exclusive economic zone (EEZ) and continental shelf. The EEZ Act's purpose is to promote the sustainable management of the natural resources of New Zealand's EEZ and continental shelf.
2. The Environmental Protection Authority (EPA) is responsible for considering and making decisions on marine consent applications and enforcing the regime. Since the EEZ Act came into force, the EPA has received four marine consent applications for discretionary activities and two applications for non-notified discretionary activities. The EPA has also made a number of rulings and determinations on transitional activities.
3. The applications for discretionary activities were for:
    - two applications for novel seabed mining activities: Trans-Tasman Resources Ltd (declined June 2014) and Chatham Rock Phosphate Ltd (declined February 2015); and
    - two applications for petroleum activities from existing operators OMV New Zealand (granted December 2014) and Shell Todd Oil Services (granted June 2015).
4. The EEZ Act does not manage fisheries or fishing, which is done under the Fisheries Act 1996.

Status quo and problem definition

5. The Ministry for the Environment (MfE) considers that the EEZ Act's fundamental balance between managing the environmental effects of activities in the EEZ and maximising responsible economic opportunities is positioned correctly.
6. As a new regulatory regime, operation of the EEZ Act is still "bedding in". As such, how various processes are implemented continues to develop. MfE is concerned that early experience with the EEZ Act regime has highlighted some deficiencies in the legislation, which mean that in general:
    - the purpose of the EEZ Act to sustainably manage natural resources is not clearly reflected throughout all provisions; and
    - there are gaps in aspects of the regulatory regime which create uncertainty for government, applicants and stakeholders.
7. The problems identified relate to four discrete areas:
    - Part A: Decommissioning of offshore infrastructure
    - Part B: Transitional provisions – rulings for activities on existing structures
    - Part C: Enforcement – power to seize and time limit for proceedings
    - Part D: National direction on the EEZ Act.
8. MfE considers it appropriate to address these issues through amendments to the EEZ Act.

Objectives

9. The intention of the proposed changes is to maintain the current balance in the EEZ Act between enabling responsible economic activity and providing protection of the environment, in a more efficient and cost effective way. The following broad policy objectives for the EEZ Act regime have been used to assess the proposals in this RIS:

    - the sustainable management purpose[1] of the EEZ Act is clearly reflected throughout the legislation; and
    - processes related to the EEZ Act are efficient and cost-effective, with the cost to government and operators proportionate to the level of environmental effects addressed.

Options and regulatory impact analysis

10. This section sets out the status quo and problem for each part in more detail, and a table setting out the analysis of proposed options against the objectives.

11. Other proposed amendments to the EEZ Act relating to alignment with the Nationally Significant Proposals process under the RMA are outlined in the RIS *Alignment of the Decision-making Processes for Nationally Significant Proposals and Notified Discretionary Marine Consents.*

Part A: Decommissioning of offshore infrastructure

Status quo and problem:

12. There are four petroleum fields involving platforms, rigs and pipelines operating in the EEZ. These fields will need to be decommissioned once they get to the end of their production life. Decommissioning may commence in the next five to ten years depending on the well production.

13. Decommissioning is likely to involve one or more of the following activities:

    - plugging all wells supported by the platform and severing the well casings below the seabed;
    - cleaning and possibly removing all production and pipeline infrastructure supported by the platform;
    - removing the platform;
    - disposing the platform;
    - ensuring that no debris or potential obstructions remain; and
    - ongoing monitoring of any infrastructure that is left behind.

[1] Section 10 of the EEZ Act states:
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.

14. It is important that these activities are undertaken in a sustainable manner.

15. There is little information available to estimate the costs of decommissioning projects in New Zealand. Experience in the United Kingdom illustrates that these projects are unique and by their nature include unknowns that can significantly affect the cost.

16. Based on overseas experience, the costs and timeframes for decommissioning a structure could typically be anywhere from $20 million to $500 million (and potentially higher) and take up to 10 years to plan and implement depending on the structure and the environment in which it is located.[2]

17. There is currently a gap in the EEZ Act relating to decommissioning structures once they reach the end of their productive life. If the operator chooses to abandon the platform, they need to apply for a dumping consent[3]. If an operator chooses to remove the platform, they need to apply for a marine consent as this will involve activities under the EEZ Act.

18. However, the EEZ Act does not require operators to engage with agencies to plan for, or undertake, decommissioning of offshore infrastructure. If it is considered that any offshore infrastructure should be removed for environmental and other considerations (e.g. through the dumping consent process), the government is not able to require the operator to do this as this authority is not provided for under the EEZ Act.

19. This creates uncertainty as to how operators may approach the decommissioning of their offshore infrastructure/fields. Potentially under the status quo, operators could decide to not decommission a field once it reaches end of life and the EPA would not be able to require the operator to apply for a marine consent (but the operator would have to apply for a dumping consent if they abandoned the infrastructure).

20. This is an issue because the purpose of the EEZ Act is to ensure sustainable management in the EEZ and continental shelf of activities such as the ones that an operator would generally undertake in decommissioning an offshore field.

21. Under the status quo if an application for a dumping consent to leave offshore infrastructure in place was declined due to the environmental impacts, the Government could issue a fine to the operator but the next steps are not clear. However, under the legislative regime the Government could not force the operator to remove the infrastructure. As long as none of the activities outlined in section 20 of the EEZ Act were undertaken on the infrastructure, such as a part of the structure falling off into the ocean, no action could be taken by authorities.

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[2] Cost estimates in this analysis are indicative only, based on: Oil and Gas UK, 2012, *The decommissioning of steel piled jackets in the North Sea region.*; Oil and Gas UK, *Decommissioning insight 2014*; Brian Twomey, *Study assesses Asia-pacific offshore decommissioning costs*, Oil and Gas Journal, Mar 15 2010.

[3] These activities are currently regulated by Maritime New Zealand under the Maritime Transport Act 1994, but will be transferred to the Environmental Protection Authority under the EEZ Act on 31 October 2015 when the Exclusive Economic Zone and Continental Shelf (Environmental Effects—Discharge and Dumping) Regulations 2015 come into force.

22. Any fines that can be issued by the Government are, in the schemes of the overall costs of decommissioning, minor and are unlikely to incentivise operators to apply for a marine consent.

23. Theoretically, an operator could also surrender their operation and not apply for a dumping consent or marine consent, but helicopter a worker onto the platform for a few days every couple of months to undertake ‘maintenance’ and couch this as the platform still being under operation.

24. Although these scenarios are unlikely, as we can assume operators will generally act responsibly, these risks cannot currently be mitigated.

25. The EEZ Act is not specific about an operator’s liability for costs associated with decommissioning. Although a decision-maker may require a bond when granting a marine consent, this is not a mandatory requirement. Further, bonds cannot be imposed on existing operators while they operate without a marine consent under transitional provisions. Thirdly, bonds might not be the best financial security option for decommissioning.

26. By comparison, in the UK the Government can require operators to submit a detailed decommissioning programme well ahead of the field’s end of life. The costs associated with decommissioning in the UK must also be met by the operators of the fields or have a financial interest in them. Requiring operators to plan for and/or begin decommissioning within a particular timeframe would reduce the risk of the operator not decommissioning the field or not decommissioning it properly, and/or not paying for the associated costs.

Options

a) Amend the EEZ Act to specify that decision makers under the EEZ Act have the authority to require operators, including existing operators, to apply for consent for activities associated with decommissioning.

b) Amend the EEZ Act to include a specific bonding requirement for the purpose of decommissioning.

c) Develop regulations to specify the requirements for decommissioning, including any requirements for financial security.

d) Provide guidance on decommissioning.

Option analysis – Decommissioning		
Option	**Impacts**	**Net impact and assessment against objectives**
a) Amend the EEZ Act to specify that decision makers under the Act have the authority to require operators, including existing operators, to apply for a marine consent for activities associated with decommissioning.	**Benefits** • Incentivises operators to engage with the EPA about their obligations for decommissioning. • Ensures that for fields coming to the end of life, operators commence the consenting process for decommissioning. • Minimises risks to the Government over how offshore oil and gas infrastructure will be managed at the end of field life. • Makes it clear to operators what is expected by the legislative framework in managing the decommissioning (or abandonment) of offshore infrastructure. **Risks** • Without a detailed decommissioning framework, there will be uncertainty for operators about what is required in order to obtain a marine consent for decommissioning activities (option c, below, would address this).	Better than status quo. Provides certainty that existing and future operators undertaking activities in the EEZ will take decommissioning into account. Including this explicit requirement addresses a current gap in the legislation, and is an efficient "entry point" to ensure that operators engage with any future policy work to develop a regulatory framework for decommissioning activities.
b) Amend the EEZ Act to include a specific bonding requirement for the purpose of decommissioning.	**Benefits** • Provide certainty that at least part of decommissioning costs are provided for. **Risks** • Requiring a bond in the near future (whether a lump sum or an amount paid off over the next 5-10 years) would likely be very contentious with existing operators, as evidenced by the feedback received about the proposed increase (from around $26 million to around $300 million) in financial surety requirements for oil spill response under the Maritime NZ regime. • Decommissioning an offshore structure is a complex process, which is likely to take a number of years to plan and implement. Further work is required to develop policy around the full range of activities involved in decommissioning. For example, a key part of decommissioning will be about how much of a structure has to be removed, which will have a significant impact on the cost of decommissioning and the type of financial surety needed. • The risk of existing operators defaulting is relatively low. Operators have been here a long time and have a lot of social capital invested in NZ, so this could be unnecessary whilst potentially being contentious with operators.	Worse than status quo. A bond is likely to be very contentious with operators. Given the low risk that existing operators will default on their responsibilities, working with industry and other stakeholders to develop considered policy on the activities associated with decommissioning, rather than imposing a bond in the short term, will ensure an efficient, workable regulatory framework is developed.

c) Develop regulations to specify the requirements for decommissioning, including any requirements for financial security.	**Costs** • Cost of developing regulations. **Benefits** • Those operating in the EEZ will have increased certainty about their ongoing obligations. • Government expectations around decommissioning would be clear and transparent. • Developing regulations will allow time to consult with industry and other stakeholders, ensuring an effective and efficient regulatory framework. **Risks and opportunities** • Decommissioning is a broad and complex area, which will require careful consideration during development of the regulations. • Development of a regulatory regime will provide an opportunity for Government agencies to work constructively with operators, iwi and other stakeholders to develop a comprehensive decommissioning regime, including financial surety requirements.	Better than status quo. This gives enough time to consult and ensure there is an effective and workable regulatory regime for decommissioning, which will provide more certainty to decision-makers, industry and other stakeholders.
d) Provide guidance on decommissioning	**Costs** • Cost of developing guidance. **Benefits** • Sets up an expectation on how operators will approach decommissioning. **Risks and opportunities** • Best practice on decommissioning is still emerging and guidance will need to be updated often • Small risk that operators may not comply with the guidance.	Slightly better than status quo. Although this option would provide some clarity and set up and expectation for operators on what is expected for decommissioning activities, operators will not be required to comply with the guidance. In addition, this does not fill the regulatory gap for existing operators.

Conclusion

27. The regulatory gap in the EEZ Act regime for decommissioning of structures needs to be closed to provide greater certainty to operators requirements.

28. MfE considers that the best approach to achieve this is by amending the EEZ Act to require operators to apply for a marine consent (option a) and then developing regulations that sets out the regulatory framework for decommissioning (option c). This approach will provide certainty that existing and future operators in the EEZ take decommissioning into account, and incentivises them to engage with the policy work to develop regulations. MfE will engage with all stakeholders through the regulation making process.

29. The proposed options will ensure that the EEZ Act regime is able to take account of the effects of structures from establishment to decommissioning, and provide certainty to operators about their obligations (including that liability for decommissioning sits with operators) in meeting the purpose of the Act.

Part B: Transitional provisions – rulings for activities on existing structures

Status quo and problem

30. Section 162 of the EEZ Act generally allows an operator to continue with existing activities that would otherwise require a marine consent as a result of the Act coming into force.

31. However, under section 162(2) of the EEZ Act, activities described in section 162(3), such as minor alterations to existing structures, can only occur if the EPA provides a ruling that the adverse effects of the activity on the environment or existing interests are likely to be minor or less than minor.

32. The oil and gas industry, and the EPA have raised concerns about the scope of activities that require a ruling, as there is no concrete definition of what minor or less than minor means in the EEZ Act. They are concerned about the associated burden on both industry and the EPA should the section be interpreted broadly so that any minor alteration to an existing structure would require a ruling, even if the activity has no adverse effect.

33. A broad interpretation would mean that the activities requiring a ruling would include activities that are unlikely to have any adverse effects, such as re-painting handrails or installing cookers and similar equipment in the kitchen of an offshore platform. Such an interpretation would be inconsistent with the objective to ensure the EEZ Act regime is cost effective, with the cost to government and operators proportionate to the level of environmental effects addressed.

34. The EPA has worked with existing operators in the EEZ to establish a rulings process to determine whether the adverse effects of an activity on the environment and existing interests are minor or less than minor, and has worked with these operators to identify categories of activities that require rulings. This work has resulted in a list of the types of activities that industry and the EPA have determined require rulings.

35. As part of establishing the rulings process, the EPA and industry have worked together to determine activities that will not require a ruling before they occur. However, as this determination is not in legislation, there is still uncertainty about which activities need a ruling from the EPA.

36. All four existing operators (AWE, OMV, Origin Energy and STOS[4]), have now sought and obtained rulings from the EPA for activities with minor or less than minor effects (5 rulings in total). The activities have ranged from wire lining activities on rig platforms to seabed equipment installation. Costs recovered for rulings to date have ranged from several thousand dollars to over $25,000.00. The EPA advises these costs are dependent on the complexity of the request and the level of information supplied.

[4] STOS have been granted a marine consent by the EPA to continue offshore activities associated with the Māui natural gas field operating under Petroleum Mining Licence 381012. Once this consent commences STOS will no longer be subject to section 162(3) of the EEZ Act.

37. Clarifying the intent of the legislation will help to reduce any future uncertainty for both the EPA and operators about the implementation of the ruling provisions.

Options

a) Amend the EEZ Act to clarify the intent of the rulings provisions in s162, i.e. that rulings are only required for activities that have an adverse effect on the environment or existing interests.

b) Amend the EEZ Act to remove the requirement for rulings for existing activities that have minor adverse effects, i.e. remove the rulings process from the EEZ Act.

c) Keep the status quo, with the operator and EPA agreement as a guide for what activities do not need a ruling.

Option analysis - Rulings		
Options	**Impacts**	**Net impact and assessment against objectives**
a) Amend the EEZ Act to clarify the intent of the rulings provisions in s162, i.e. that rulings are only required for activities that have an adverse effect on the environment or existing interests.	**Benefits** • Would provide greater certainty to the EPA and existing operators transitioning into the EEZ Act regime, while continuing to ensure adequate consideration of any adverse effects on the environment and existing interests. • Ensures that the process and scrutiny by decision-makers is proportionate to the environmental effects and that activities described in section 162(3) will still be managed by the EPA under the EEZ Act before the operator transitions into the EEZ Act regime. • Activities that have minor or no adverse effects on the environment, such as painting a handrail on an offshore platform, will not require a ruling. • Would formalise the current agreement between operators and the EPA. **Risks and opportunities** • Given the already agreed rulings process, amendment to this section of the EEZ Act would provide only minor material gain, and runs a small risk of increasing rather than reducing uncertainty about implementation as there could still be uncertainty over what an adverse effect is.	Slightly better than status quo. The EPA and existing operators are establishing a clear process for rulings. In addition, the frequency of rulings requested and their costs are relatively low. The rulings process as currently being implemented provides appropriate regulatory oversight of existing operator's activities at a cost that is proportionate to the effects of the activities. Although there would be little material change at an operational level, this option would provide greater certainty to existing operators that rulings are not required for activities that have no adverse effect on the environment.
b) Amend the EEZ Act to remove the requirement for rulings for existing activities that have minor adverse effects, i.e. remove the rulings process from the EEZ Act entirely so that any activities described in section 162(3) can be undertaken without consent from the EPA.	**Benefits** • Would reduce the costs for existing operators associated with their ongoing activities while they are transitioning into the EEZ Act regime. • Would provide operators certainty over how their existing activities, covered under section 162(3) are managed until they transition into the EEZ Act regime. **Risks and opportunities** • Although minor activities, for example painting a handrail, would not require a ruling, it would mean that activities that may have an adverse effect on the environment, for example replacing the lights on a helicopter landing pad (which may impact birds or marine life), would not be able to be managed by the EPA under the EEZ Act until the operator transitions into the EEZ Act regime. • Would not meet the objectives because there would be no regulatory oversight on how activities described in section 162(3) that have minor adverse effects are managed, because there would be no rulings process, until the existing activity/operator transitions into the EEZ Act regime. • Creates a risk that regulatory oversight would be insufficient and would result in the effects of some activities on the environment or existing interests not being adequately avoided, remedied or mitigated.	Worse than status quo. Removing this aspect of regulatory oversight of existing operators until they transition fully into the EEZ Act regime is not in line with the purpose of the Act as it would result in some activities that have adverse effects on the environment not being able to be managed under the EEZ Act regime until the operator transitions into the EEZ regime.

c)	Keep the status quo, with the operator and EPA agreement as a guide for what activities do not need a ruling	**Benefits** • Already agreed rulings process between operators and the EPA on the types of activities that require rulings and activities that do not require a ruling before they occur. • Activities that have minor or no adverse effects on the environment, such as painting a handrail on an offshore platform, will not require a ruling. • Ensures that the process and scrutiny by decision-makers is proportionate to the environmental effects and that activities described in section 162(3) will still be managed by the EPA under the EEZ Act before the operator transitions into the EEZ Act regime. • Ensures adequate consideration of any adverse effects on the environment and existing interests **Risks and opportunities** • Wouldn't provide operators legislative certainty over how their existing activities, covered under section 162(3) are managed until they transition into the EEZ Act regime. This creates a risk that the EPA could decide to not run their operations in accordance with the agreement with operators. However, the likely risk of this occurring is low.	Same as the status quo. The EPA and existing operators are establishing a clear process for rulings. In addition, the frequency of rulings requested and their costs are relatively low. The rulings process as currently being implemented provides appropriate regulatory oversight of existing operator's activities at a cost that is proportionate to the effects of the activities. However, there would still be uncertainty to operators over what activities rulings are required for.

Conclusion

38. If the status quo is maintained the EPA and existing operators will continue the current operational approach for determining which categories of activities require rulings.

39. Although there would be little material change at an operational level, MfE considers that clarifying the intent of the rulings provisions (option a) would provide greater certainty to existing operators that rulings are not required for activities that have no adverse effect on the environment. This will better ensure the provisions are implemented in a way that is proportionate to the scale and effect of the activities, and that the costs and administrative burden associated with the rulings process are proportionate, while ensuring adequate consideration of any adverse effects.

Part C: Enforcement – power to seize and time limit for proceedings

Status quo and problem:

40. Some enforcement provisions of the EEZ Act are constraining the EPA's ability to effectively manage enforcement of the regime. Two specific issues have been identified:

    - There is some uncertainty about whether the EPA's enforcement officers have the power to seize material for evidentiary purposes as part of investigations under section 141 of the EEZ Act. There is an operational risk that evidence gained through exercising the power to seize could be challenged as the seizure was ultra vires.
    - Section 137 of the EEZ Act sets a time limitation of six months for proceeding against offences from the date on which the offence first became known to the enforcement officer. Due to the nature of offshore industries, the EPA is concerned that six months will often not be enough time to complete the enforcement process.

Power to seize

41. Section 141 of the EEZ Act (relating to power of entry for inspection) does not specifically provide the EPA the power to seize property related to suspected non-compliance. The intention was to provide this power through clause 6 (of section 141) by applying the provisions of Part 4 of the Search and Surveillance Act 2012, which give the power for seizure. However, in practice the application of Part 4 of the Search and Surveillance Act 2012 is unclear. Specifically, the extent of an enforcement officer's powers may include seizure depending on whether a broad or narrow interpretation of section 141(6) of the EEZ Act is adopted.

42. The risks associated with adopting the broad interpretation are that evidence may be obtained for use in a proceeding which is later declared inadmissible or that proceedings are brought against the EPA for breaching section 21 of the Bill of Rights Act 1990. The risk of not adopting the broad interpretation is that non-compliance may not be determined due to evidence not being seized, undermining one of the purposes of the EPA and potentially leading to detrimental effects on the environment.

Time limit for proceedings

43. The limitation period for proceeding in respect of an offence against the EEZ Act ends six months after the date on which the breach giving rise to the offence first became known, or should have become known, to the enforcement officer. Detection of non-compliance in offshore industries is challenging due to the isolation of the activity and difficulties in identifying whether effects have occurred. Because of this, six months is often not enough time to undertake the process.

Options

a. Amend section 141 of the EEZ Act to clarify that the EPA does have the power to seize material for evidentiary purposes as part of investigations in line with provisions of Part 4 of the Search and Surveillance Act 2012

b. Extend the limitation period for proceeding against offences from the current six months to twelve months after the offence first became known to the enforcement officer

Option analysis – Power to seize and time limit for proceedings		
Options	**Impacts**	**Net impact and assessment against objectives**
Amend section 141 of the EEZ Act to clarify that the EPA does have power to seize material for evidentiary purposes as part of investigations in line with provisions of Part 4 of the Search and Surveillance Act 2012	**Benefits** • Clarifies the alignment between the EEZ Act and Part 4 of the Search and Surveillance Act 2012. • Creates certainty for both EPA and operators, by removing the risk that evidence obtained for use in proceeding is later declared to have been unlawfully obtained.	Better than status quo. Clarifying this power under the EEZ Act will ensure that the compliance regime operates effectively.
Extend the limitation period (in section 137) for proceeding against offences from the current six months to twelve months after the offence first became known to the enforcement officer	**Benefits** • Would provide an appropriate timeframe for EPA to undertake enforcement activities for offshore industries. • In practice, six months has been a very tight turnaround for the EPA to proceed against offences after enforcement officers have found out about the offences. • Twelve months would give enforcement officers a practical length of time to proceed against offences but is still a realistic period of time to connect an operator with an offence. • Incentivises the EPA to prioritise and efficiency conduct investigations of offenses, reducing the uncertainty about liability for companies and making efficient use of resources. • Aligns with the natural justice principles of not allowing investigations to drag out for long periods of time and not	Better than status quo. This will enable the EPA to consider and progress compliance activities, ensuring that compliance activity is both efficient and effective. Ensures investigations cannot drag out for long periods of time and that individuals or companies cannot be prosecuted too long after an offence has taken place.

	prosecuting individuals or companies too long after the offence has taken place. • A straightforward approach to increase the effectiveness of the enforcement regime. **Risks and opportunities** • Having a one year limitation period may constrain the EPA's ability to prosecute an individual or company. Arguably the decision on whether you should prosecute should relate to having the appropriate level of evidence, rather than the timeframe in which the offence was first known about. • There may be situations where 15 months after the offence became known, the EPA has enough evidence/information to properly prosecute, but would be limited from doing so by the limitation period. • This may lead the EPA to prosecuting individuals and companies with limited information, solely because otherwise they will reach the limitation period. However, the size of this risk is unknown.	
Remove the limitation period for proceeding against offences	**Benefits** • Would enable the EPA to undertake enforcement activities any time after an offence becomes known. • Would enable the EPA to prosecute once they have acquired the desired level of evidence/information, rather than being motivated by a limitation period. **Risks and opportunities** • Limited incentive for the EPA to prioritise and efficiency conduct investigations of offenses, thus potentially increasing the uncertainty about liability for companies. • Doesn't provide a timeframe for the EPA to undertake enforcement activities. If an enforcement activity is undertaken a long time after the offence took place, or is first known about, it may make it difficult to connect the offender with the offence.	Worse than status quo. This option would enable to the EPA to proceed against offences at any time after they become known, allowing a longer time to gather the appropriate evidence. However, it would create a large legal risk of the EPA not being able to difficult to connect the offender with the offence if it happened a significant period of time before the action was taken, and could conflict with natural justice.

	• Allowing investigations to drag out for long periods of time and enabling individuals or companies to be prosecuted too long after the offence has taken place goes against natural justice principles.	

Conclusion

44. MfE recommends amending the EEZ Act to implement the two options outlined above. Making these changes will help ensure that the compliance regime under the EEZ Act operates effectively and consistently with the original policy intent. This will ensure that ongoing activities in the EEZ are in line with the purpose of the Act. MfE considers these amendments provide a straightforward approach to improving the effectiveness of the enforcement regime.

Part D: National direction on the EEZ Act

Status quo and problem:

45. Under the EEZ Act, the EPA is the decision-maker of marine consents. The EEZ Act decision-making framework consists of matters that must be taken into account or had regard to, and there is broad discretion for the EPA in considering and weighing the matters.

46. Currently there is no central government guidance (statutory or non-statutory) on EEZ Act matters. Having such guidance would help provide direction to decision-makers on marine consents regarding objectives and policies outlined in the EEZ Act.

47. Individuals who have sat on EPA's decision-making committees have commented that some form of national direction on a range of issues is required to better support their decision-making.

48. The mining industry and allied business interest groups have also expressed concern that there is not national direction on a number of matters relevant to the EEZ Act. In particular, there are concerns that the intent of the requirement to favour caution[5], as currently drafted, is not sufficiently clear and is leading decision-makers, applicants and submitters to focus inappropriately on inadequacies in information rather than on the scale and significance of the effects of the activity.

Options

a) Create non-statutory guidance on the objectives and policies in the EEZ Act

b) Create regulations through the current regulation-making powers in the EEZ Act

c) Develop an enabling provision in the EEZ Act for creating EEZ policy statements to state objectives and policies to support decision-making on applications for marine consents

[5] Section 61(2) of the EEZ Act: "If, in relation to making a decision under this Act, the information available is uncertain or inadequate, the EPA must favour caution and environmental protection."

Option analysis – National direction on the EEZ Act		
Options	**Impacts**	**Net impact and assessment against objectives**
Create non-statutory guidance.	**Benefits** • Would allow national direction on objectives and policies to better support decision-making. • Straight forward to implement and can be produced with no legislative amendments. **Risks and opportunities** • Although it is likely that decision-makers will consider the matters in the guidance, this cannot be ensured. • As national direction cannot override the EEZ Act, it may not be able to address stakeholder concerns around the requirement to favour caution.	Better than status quo. This option meets the objectives and addresses the problem. However, it would not ensure that decision-makers will consider the matters outlined in any guidance produced.
Create regulations through the current regulation-making powers in the EEZ Act.	**Benefits** • The EEZ Act would not need to be amended. **Risks and opportunities** • The Minister can only prescribe standards, methods or requirements through section 27 of the EEZ Act**,** such as creating thresholds or standards on activities. Because of this, any regulations developed under current regulation-making powers would not be able to address the objectives or the problem of there not being a mechanism to develop national guidance to support applicants, submitters and decision-makers.	Same as the status quo. This option does not meet the objectives or address the problem.
Develop an enabling provision in the EEZ Act for creating EEZ policy statements to state objectives and policies to support decision-making on applications for marine consents. These statements would be developed by officials, involve public consultation and be approved by the Minister.	**Benefits** • Would give the Government the ability to provide direction on matters that are relevant to achieving the purpose of the EEZ Act. • Would support decision-makers, applicants and submitters to understand the intent of the EEZ Act and apply this consistently to marine consent applications. • Statutory weight would ensure due consideration of the national direction by decision-makers. • Statutory weight provides more certainty to applicants and other stakeholders over how the legislation is to be applied in practice. • Provides a process for national direction to be developed, including public consultation and matters for the Minister to consider. **Risks and opportunities** • Any direction as to the meaning of the EEZ Act would need to be entirely consistent with the statute to avoid creating legal risk for the decision maker. There is a risk that rather than reduce uncertainty, this mechanism could create further uncertainty by creating an extra layer of legislation that needs to be interpreted. However, this risk can be mitigated by using the weighting of “have	Better than status quo. This option meets the objectives and addresses the problem. Policy statements would ensure decision-makers took national direction into account and would provide a process for how this direction is developed.

	regard to" and ensuring the content of any direction is not contrary to the EEZ Act. • As national direction cannot override the EEZ Act, it may not be able to address industry concerns around the requirement to favour caution.	

Conclusion

49. MfE recommends option c, developing an enabling provision in the EEZ Act for creating EEZ policy statements to state objectives and policies to support decision-making on applications for marine consents.

50. MfE considers that in comparison to non-statutory guidance, the statutory weight of EEZ policy statements would provide more certainty to applicants, submitters and decision-makers in regards to how this national direction would need to be considered in decision-making on marine consents.

51. A mechanism to develop EEZ policy statements would have a wider scope than the current regulation-making powers and would ensure that decision-makers take the direction into account when making decisions on marine consents.

Consultation

52. MfE has discussed the proposals to amend the EEZ Act with the EPA and industry users of the regime, including Straterra, and the Petroleum Exploration and Production Association of New Zealand (PEPANZ). The work to align the decision-making process has been part of these discussions. No other public consultation has occurred.

53. This timeframe has been driven by the 2015 Resource Legislation Amendment Bill 2015, with which these EEZ amendments are proposed to be incorporated as an omnibus bill. The proposed amendments are the result of a single broad policy to further streamline and align the way New Zealand's natural resources are managed, whether they are on land or at sea. The proposals will create a more predictable resource management system, and will improve processes to ensure that they are efficient, transparent, proportionate, and aligned with other related processes in relevant legislation.

54. Government agencies consulted include: Department of Conservation, Ministry of Business, Innovation and Employment, Ministry of Transport, the Treasury, the Environmental Protection Authority and Maritime New Zealand. The Department of the Prime Minister and Cabinet have been informed of the proposals in this paper.

55. Some agencies, including the Treasury and the Ministry for Business, Innovation and Employment, have expressed the opinion that the EEZ amendments proposed do not go far enough in some instances. These agencies argue that more substantive amendments will be required to effect genuine change in the regime and outcomes. In particular, it has been suggested that public participation should be removed from the EEZ Act and moved to an earlier point in the natural resources management process.

56. Another example is the suggestion to amend the EEZ Act to set the threshold for taking a cautious approach, in section 61(2)[6], at 'significant adverse effects' rather than 'uncertain or inadequate information' to address concerns around how the intent of the requirement to favour caution is currently drafted.

57. An amendment such as this would be a fundamental shift in the EEZ regime, and would require amendments to legislation other that the EEZ Act. MfE does not believe it is possible to progress amendments of this scale in the timeframe, or with the current level of evidence and without further consultation. MfE recommends that consideration of the matters be progressed over a longer timeframe and in consultation with other agencies. Therefore, this option is not assessed in the RIS.

[6] Section 61(2) of the EEZ Act: "If, in relation to making a decision under this Act, the information available is uncertain or inadequate, the EPA must favour caution and environmental protection."

Conclusions and recommendations

58. Although the EEZ Act is a relatively new piece of legislation and is still “bedding in”, it is important to ensure the regulatory regime is achieving its sustainable management purpose without acting as an obstacle to future investment and sustainable economic growth in New Zealand.
59. MfE therefore consider it appropriate to address the issues through amendments to the EEZ Act. The proposals outlined are for discrete changes to make the regime work more efficiently, and ensure it reflects the purpose of the EEZ Act.
60. Given the limited evidence available, there is some uncertainty about the scale, nature and urgency of a number of the issues identified in this RIS. Overall, the approach taken in this context is a cautionary one.
61. Broadly, the package of proposals analysed in this RIS are considered viable options for adjusting the current EEZ Act regime, consistent with the intention of the Act and the policy objectives outlined in the RIS.
62. Overall, the proposed changes would provide greater certainty to the EPA, industry and other stakeholders.

Implementation plan

63. The EPA will primarily be responsible for the direct implementation of process changes from the proposed amendments to the EEZ Act. This includes their ongoing responsibility for monitoring and compliance of all activities within the EEZ Act regime. MfE will continue to work closely with the EPA to ensure any changes to the regime are clearly communicated.
64. Details on any transitional provisions to implement the changes are dependent on the final detail for the Resource Legislation Bill.
65. In consultation with the EPA, MfE will ensure that appropriate communication and guidance is provided to stakeholders, including industry, about any consequent changes to the EEZ Act regime.

Monitoring, evaluation and review

66. MfE is currently developing an evaluation programme that will underpin future reviews of the EEZ Act and regulations.
67. As the EPA is a Crown Entity under the Environmental Protection Authority Act 2011, MfE has a role in assisting the Minister to review the operations and performance of the entity. This will capture, at a high level, how the EPA is performing its EEZ functions.
68. MfE will also continue to maintain dialogue with other Government agencies, industry and other stakeholders about the EEZ Act regime.