

Regulatory Impact Statement

Transfer of discharge and dumping regulatory functions from Maritime New Zealand to the Environmental Protection Authority

Agency Disclosure Statement

This Regulatory Impact Statement has been prepared by the Ministry for the Environment. It provides an analysis of options to determine which agency (if any) should be responsible for the regulation of discharges from offshore installations and dumping in the Exclusive Economic Zone (EEZ) and Extended Continental Shelf (ECS).

The preferred option is the regulatory transfer of functions from Maritime New Zealand (MNZ) to the Environmental Protection Authority (EPA).

Some assumptions have been made about the efficiency gains that are expected from transferring functions. Efficiency gains would only be realised in the long term and are difficult to estimate.

The regulatory option considered assumes that:

- Cabinet approval will be given for regulatory changes;
- Parliamentary Counsel Office will have time to draft legislative changes prior to enactment of the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Bill (EEZ Bill);
- Select Committee and the House will agree to the legislative changes;
- the EEZ Bill and regulations will be enacted.

The two options that transfer functions to the EPA may impose some additional costs on businesses that discharge or dump in the EEZ or ECS. These businesses already face costs associated with approval of applications. Any increased costs would result from the regulator recovering more of the processing costs for an application. Costs would represent the actual and reasonable costs of processing an application and would be charged to the applicant. This is opposed to the status quo where some of the processing costs are cross-subsidised from a levy on commercial vessels for marine safety purposes.

Under the status quo MNZ are also investigating increasing the percentage of application costs that are recovered from each applicant.

None of the options assessed would impair private property rights, market competition, or the incentives on businesses to innovate and invest. Nor would the options override fundamental common law principles.

There have been significant time constraints on this analysis given the need to align Cabinet approval of any regulatory changes with the legislative process for the EEZ Bill.

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Status quo and problem definition

Status quo

With the introduction of the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Bill (**EEZ Bill**) the Environmental Protection Authority (**EPA**) and Maritime New Zealand (**MNZ**) will both be regulating the environmental effects of activities in the Exclusive Economic Zone (**EEZ**) and Extended Continental Shelf (**ECS**). This creates uncertainty for industry and diminishes New Zealand's ability to comprehensively manage environmental effects from operations as a whole within the EEZ and ECS. It also negatively impacts on the public's ability to be involved by subjecting the discharges and dumping regulatory regime to different consultation requirements to those under the EEZ Bill.

Currently the environmental effects of discharges and dumping in the EEZ and ECS are managed by MNZ under the Maritime Transport Act 1994 (**MTA**) and Marine Protection Rules (**the Rules**) made under that Act.

Discharges from offshore installations in the EEZ and ECS are managed under Part 200 of the Rules. The process involves an operator submitting a discharge management plan (**DMP**) two months prior to beginning an activity. Industry has indicated preparation of this plan incurs costs in the region of \$50,000-\$150,000.

Discharges include those associated with the routine operations (such as garbage and oily wastes from machinery spaces) and production discharges (such as disposal of drill cuttings containing chemicals and production water containing oil). DMPs must be approved by the Director of Maritime New Zealand and be reviewed every three years.

Dumping (the disposal of wastes at sea) is managed under Part 21 of the MTA and Part 180 of the Rules. The process involves an operator submitting an application to MNZ for approval by the Director. Industry has indicated that preparation of this application incurs costs in the region of \$50,000-\$100,000.

MNZ funds assessment of applications through a combination of money from the Marine Safety Charge (**MSC**) and cost-recovery from the applicant. The total cost of these functions is approximately \$180,000 p.a. The cost associated with assessing a DMP is considered to be approximately \$111,000 with some \$85,000 (77%) cost-recovered. Costs associated with assessing dumping applications are considered to be approximately \$58,000 with some \$27,000 (48%) cost-recovered. An additional \$11,000 for continuing professional development of MNZ staff is also recovered from the MSC.

MNZ is currently reviewing this arrangement with the view of cost recovering 100% of application and down-time costs from applicants.

On 24 August 2011, the EEZ Bill was introduced to the House. The Bill seeks to establish a management regime for the effects on the environment and existing interests of activities in the EEZ and continental shelf. The EPA will carry out all functions under the EEZ Bill.

The EEZ Bill was introduced to fill the gaps in the management of activities in the EEZ and ECS. Therefore, it was not anticipated that the EPA would assess the environmental effects of discharges and dumping activities. The effects of those activities will continue to be managed by MNZ under the MTA and the Rules. Practically, this means that operators of offshore installations in the EEZ and continental shelf may need to apply to the EPA for a marine consent and then to MNZ for approval of a DMP or a dumping permit.

Problem definition

The original policy for the EEZ Bill was that it would fill regulatory gaps. The effects of discharges and dumping were already managed under the MTA. Therefore the EEZ Bill did not seek to manage the effects of discharges and dumping.

Following policy decisions on the EEZ Bill, it was discovered that issues may arise from the gap filling nature of the EEZ Bill and the interface with other legislation such as the MTA. The main implications of the status quo are:

Uncertain processes

Under the MTA, there is a lack of statutory decision-making criteria or timeframes for the processing of DMPs. This results in uncertainty for both MNZ and applicants.

Once the EEZ Bill comes into force, applicants will also need to liaise with the EPA for a marine consent in addition to any DMP or dumping permit approved by MNZ. The separation of regulatory responsibilities is uncertain for applicants.

The requirements of the DMP and marine consent application may overlap and the process in the EEZ Bill for sequencing and separating these controls is complex. Some operators have expressed uncertainty with the difference between a discharge management plan and what will soon be required under the EEZ Bill.

Inefficiency for resource users and applicants

Inefficiencies will likely result from the lack of process certainty under the status quo.

Of particular concern are situations where a DMP application and marine consent will be needed from MNZ and the EPA respectively. Industry is concerned about sequencing these approvals and the associated constraint on development. This is exacerbated by the narrow windows within which certain activities may take place (for example, offshore petroleum exploration occurs during a calm summer season and depends upon rig availability). Operators have indicated that if they do not receive their approvals from the EPA and from MNZ within a similar timeframe, this could have significant implications for their ability to commence operations. The financial costs to industry could be significant.

Currently, MNZ fees do not reflect the actual costs of processing an application; the shortfall associated with assessing applications has been cross-subsidised by the MSC.¹ This cross subsidisation is inefficient for commercial vessel operators in New Zealand, whose levy payments are funding other unrelated activities such as marine safety.

Under the MTA, application processes for dumping have been known to take in excess of three years. Large scale or long term dumping applications (such as for marina dredge spoils) can cost an operator up to \$300,000 to prepare.

Lack of holistic management of environmental effects

The MTA and EEZ Bill will contain inconsistent requirements for assessing the environmental effects of different activities in the EEZ or ECS. In general, the status quo prevents one agency from having overall responsibility for holistically approaching the environmental assessment of activities in the EEZ.

¹ The marine safety charge is paid by all New Zealand commercial vessels and visiting foreign commercial vessels to New Zealand at a rate based on deadweight tonnage, passenger capacity or vessel length.

As dumping permits for large structures (for example, an offshore installation) are not submitted at the beginning of an operation, but rather once they have ceased functioning, there are often fiscal restraints on the operator and only limited penalties can be considered by MNZ if the operator does not remove a structure. Ideally, DMPs and dumping would be pre-approved as part of an approval process prior to the operation commencing.

The current regime only allows consideration of the environmental effects of discharges or dumping on an application by application basis and does not allow consideration of cumulative effects from multiple facilities or from multiple industries.

Lack of public and iwi engagement

Existing approval processes under the MTA require applicants to consult with the public. There are no standardised requirements to ensure the quality of this consultation. By contrast, the EEZ Bill provides a comprehensive standardised process for engagement, including public notification, submissions and hearing.

Inefficiency for government

MNZ's primary focus is not the assessment of environmental effects. Given the volume of applications dealt with by MNZ, it is not cost-effective to hold the necessary technical and expert skills in-house. MNZ generally finds the skills it needs on a case by case basis by working with technical staff within the old Environmental Risk Management Authority, which is now part of the EPA. The EPA's primary focus is the assessment of environmental effects.

Objectives

On 16 May 2011, Cabinet noted that officials were undertaking further work to consider whether there was an opportunity to increase regulatory efficiency by transferring certain functions from MNZ to the EPA [CAB Min (11) 19/7B].

The overall objective in this analysis is to consider how best to arrange regulatory responsibilities to improve efficiency and efficacy in the way New Zealand manages the effects of discharges from offshore installations and dumping in the EEZ and ECS.

When deciding the policy for the establishment of the EPA, Cabinet agreed to a set of principles to be applied in the future to determine the suitability of other activities that could also be transferred to the EPA [CAB Min (10) 19/9]. The principles are intended to provide guidance in making any decision to add to the functions of the EPA. As those principles were formulated as a guide during the establishment of the EPA generally, not all of the principles are relevant to the current analysis.

Based on the relevant Cabinet principles, criteria have been developed against which the options will be assessed. The evaluation criteria for this analysis are the extent to which:

1. Certainty of process for resource users and applicants is maintained or enhanced;
2. Efficiency gains can be realised for resource users and applicants;
3. The role of the public and Māori can be enhanced;
4. Robust environmental outcomes can be achieved for New Zealand;
5. Government processes are efficient and technical skills can be concentrated in one agency.

In the analysis of options, paragraphs will be numbered 1 to 5 against each of the evaluation criteria.

The outcomes of this analysis are subject to time constraints. The option chosen must be able to be achieved in time to make any necessary changes to the drafting of the EEZ Bill as well as consequential amendments to the MTA. There is unlikely to be another opportunity to make regulatory changes. We expect that the EEZ Bill will be passed before 1 July 2012.

Regulatory impact analysis

A range of options have been considered including:

- De-regulate;
- Improve the status quo;
- Transfer the functions by changing regulations;
- Delegate the functions.

These options will be compared with the status quo throughout the analysis. The analysis of the four options and the status quo option have been summarised in Table 1 below. If the option supports attainment of an objective this is indicated by a tick. Similarly if the option does not support attainment of the objective this is indicated by a cross.

Table 1: Summary of options assessed against evaluation criteria

	Status quo	De-regulate	Improve status quo	Transfer by changing regulations	Delegate
Certainty of process	x	Not assessed	x	✓	x
Efficiency for users	x	Not assessed	x	✓	x
Better environmental outcomes	x	Not assessed	✓	✓	x
Enhanced Public and Māori participation	x	Not assessed	✓	✓	x
Government efficiency	x	Not assessed	x	✓	✓

Option 1: De – regulate

A non-regulatory option would involve repealing or substantially amending relevant parts of the MTA and the Rules without developing any equivalent regulations under the EEZ Bill.

The MTA and relevant Parts of the Rules give effect to New Zealand’s international obligations under:

- The Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matter 1972 and its Protocol of 1996 (London Convention); and
- The Convention for the Prevention of Pollution from Ships 1973 as modified by the Protocol of 1978 (MARPOL).

These obligations must be incorporated in New Zealand law to ensure our continued compliance. Therefore de-regulation is not an option.

Option 2: Improve the status quo

1. The MTA could be amended to provide more certain statutory processes where there are current inadequacies. For example, a statutory timeframe for the processing of dumping applications would be desirable.

This would not solve the potential process confusion in the status quo. Applicants would still need to have a DMP or dumping application approved by MNZ and a marine consent from the EPA. The distinction between these different environmental assessments would remain uncertain.

2. Potential inefficiencies for users would remain under this option. Operators would still need to sequence multiple approvals from both the EPA and MNZ and would face costs due to the potential for delays in commencement of activities.

The inefficiencies for commercial shipping operators associated with MNZ cross subsidisations from the MSC could be remedied through an increase in costs recovery from the applicant in each case.

3. Even if the MTA were amended to mirror consultation requirements in the EEZ Bill, there would then be a duplication of engagement efforts with the public and Māori having to engage twice under different regimes. Therefore any gains under this option with better engagement would be offset by increased inefficiencies.
4. Any amendments to the MTA would be limited by the fact that the MTA is largely a transport act and is not suited to assessments of environmental effects.
5. Government processes would remain inefficient under this option with a split of responsibility between MNZ and the EPA. MNZ would continue to rely heavily on the technical and expert skills of other agencies, primarily the EPA for chemical expertise. Even with good operating practices, this inefficiency could not be entirely alleviated.

Option 3: Transfer the functions by changing regulations

The MNZ functions being considered for transfer to the EPA are the regulation of:

- dumping of waste at sea
- discharges from offshore installations (other than oil spills)

These functions can be permanently transferred to the EPA as part of the EEZ Bill. The scope of the activities restricted under the EEZ Bill would need to be amended to include discharges and dumping. Consequential amendments to the MTA and the Rules would also be required to disentangle the discharge and dumping functions.

1. The regulatory transfer of discharge and dumping functions will provide greater certainty of process for resource users and applicants. The division of responsibility will be much clearer with the EPA responsible for consenting EEZ activities generally. MNZ will only need to be involved where the risks of an activity include oil spill risks. The DMP will become a simple document, fit for the purpose of guiding oil spill response actions and decoupled from broader environmental assessments. This is preferable to the status quo where the requirements of the DMP and marine consent application may potentially overlap and applicants will have to deal with the complexity of sequencing and separating regulatory approvals for the DMP and consent.

Under the EEZ Bill there will be increased process certainty for discharges and dumping. There will be clear statutory timeframes, information principles and requirements, and decision-making criteria.

2. Some efficiency gains for users can be realised from the transfer of these functions. Unlike MNZ, the EPA will not be able to subsidise the discharge and dumping functions from other levies. Therefore, the funding of these functions will be more efficient for resource users. Costs will be charged to the actual user of services rather than a levy on unrelated commercial vessel operators. MNZ will free up \$67,000 of funding per year that will be re-directed to activities for which the MSC is levied.

In the long term, industry will likely experience savings associated with having to prepare information for DMP approvals only once (at the outset of an operation) rather than on the current three-yearly cycle.

There are further potential savings from the merging of discharge and dumping considerations with the rest of the consenting process under the EEZ Bill. While some discharging or dumping consents may be stand-alone, others will likely be part of a consent application for the life cycle of a wider project. Some savings to the EPA and applicant will be achieved through the preparation and consideration of a single impact assessment.

3. The transfer of discharge and dumping functions to the EPA will enhance the role of the public and Māori in the regulation of New Zealand's environmental and natural resources. The EPA is required to have at least one member of its board with knowledge and experience in relation to the Treaty of Waitangi and tikanga Māori. The EPA, in carrying out the discharge and dumping functions will be able to benefit from the advice of the Māori Advisory Committee. Decision makers must also have regard to existing interests, including iwi interests. The EEZ Bill also provides extensive provisions for notifying the public and iwi authorities, customary marine title groups and protected customary rights groups of consent applications. The EEZ Bill provides for a hearing and submission process which is taken into account in decision making. Regulations made under the EEZ Bill will also be developed in consultation with iwi and the public.
4. Environmental outcomes would be enhanced by consideration of dumping applications before operations cease. This avoids situations where operators may be unwilling or unable to remove a structure such as an exploration platform or seabed fixture. This might be the case where operations have ceased and operators no longer have a cash flow to cover the cost of decommissioning.

Locating the functions within the EEZ regime will also allow for a holistic approach to assessing the environmental effects of discharges and dumping along with other activities in the EEZ. The EPA will be able to consider cumulative effects and whole of life effects for entire operations, as well as effects on existing interests.

5. By transferring functions, technical and expert skills will be concentrated in the EPA and not duplicated. The EPA's hazardous substances team have extensive chemical expertise that can be easily utilised from within the agency. This is preferable to the current arrangement where MNZ call on EPA chemical expertise on a case by case basis.

The EPA will build marine environmental expertise for the EEZ functions generally, including in relation to the discharge and dumping functions. The duplication of expertise between the EPA and MNZ will be minimal as MNZ expertise will be focused exclusively on oils spills and shipping.

The EPA estimates that carrying out these functions will cost them \$220,000 per annum. Of this amount, \$150,000 per annum will be cost recovered from applicants. The remainder will be sourced from existing baselines; no new Crown funding will be needed.

Option 4: Delegate functions

The functions to be transferred from MNZ to the EPA are the same under this option as for Option 3. The only difference is the mechanism for carrying out the transfer. Rather than amending the MTA and EEZ Bill, the regulatory regimes would remain the same. MNZ would use the powers under section 73(1)(d) of the Crown Entities Act 2004 to delegate the function to the EPA or a committee of the EPA. This could only be done with the agreement of the Minister of Transport, MNZ, and the EPA.

The critical difference is that the EPA would be carrying out the functions within the framework of the MTA, not the EEZ Bill.

1. If the discharge and dumping functions were delegated to the EPA there would be significant uncertainty of process as the EPA would carry out the function but would not be ultimately responsible for outcomes. The EPA would decide marine consents as well as DMP and dumping applications. However, applicants would still have to navigate the uncertainty between what information would go in the marine consent application and what would go in the DMP or dumping application.

Delegations are inherently uncertain in that they can be revoked or amended very easily at any time. Responsibility could switch between MNZ, the EPA and back, with little or no process for informing the public and applicants.

Delegations under the Crown Entities Act 2004 must be to a specific person or group of persons and the power to delegate further cannot be delegated. Therefore, one group of people within the EPA would hold delegated power and could not delegate that power on further to others. Any new delegation would require another Ministerial approval. This process would be a restriction on the EPA's ability to structure itself to efficiently undertake the function.

2. Unlike the regulatory transfer of functions, this option will not bring about efficiency gains for resource users and applicants. Applicants would still have to prepare multiple documents, for example a DMP or dumping application and a marine consent application. These documents would have to be assessed separately by the EPA. Any DMP would still have to be approved every three years.

3. Through a delegation, the EPA will take on the discharge and dumping functions but will have to carry them out within the legislative framework set by the MTA. Therefore, the status quo would prevail for public and Māori participation. Currently, there are limited consultation mechanisms under the MTA and the Rules. The EPA would not be able to draw on the advice of the Māori Advisory Committee, as that committee can only advise the EPA in relation to the EPA's functions under the EPA Act 2011. Legally, the discharge and dumping functions would not be EPA functions, responsibility would remain with MNZ.
4. Environmental decisions would be made by the EPA but using the legislative framework of the MTA. Therefore, the issues with the status quo are also applicable to this option. In particular:
 - Given the late stage at which DMPs are assessed, there would be significant pressure to approve, given that to decline would prohibit an operation from proceeding after there has been significant investment by an operator; and
 - The MTA regime would only allow consideration of the environmental effects of discharges or dumping on an application by application basis and would not allow the EPA to consider cumulative effects from multiple facilities or from multiple industries.
5. Government efficiencies can be realised and technical and expert skills concentrated within the EPA if the functions are delegated. The same rationale applies here as with the regulatory transfer of functions. However, the EPA may be reluctant to develop long term expertise for discharges and dumping if carrying out the functions only under delegation. The functions could revert back to MNZ at any time.

Consultation

This Regulatory Impact Statement has been prepared in consultation with the following agencies:

The Ministry of Transport, Maritime New Zealand, Environmental Protection Authority, Ministry of Foreign Affairs and Trade, Department of Conservation, Department of Internal Affairs, Department of Labour, Land Information New Zealand, Ministry for Culture and Heritage, Ministry of Agriculture and Forestry, Ministry of Defence, Ministry of Economic Development, Ministry of Fisheries, Ministry of Justice, Ministry of Science and Innovation, Ministry of Transport, New Zealand Customs Service, State Services Commission, and Te Puni Kōkiri. The Department of Prime Minister and Cabinet has been informed of this Regulatory Impact Statement.

Industry associations and a limited group of operators were consulted in the course of preparing this Regulatory Impact Statement. The consultation highlighted a range of opinions about the preferred regulatory responsibilities for discharges and dumping. Key observations were that:

- Clarity of process is vitally important, regardless of which agency is responsible for the functions
- The decision-making process in the EEZ Bill may be able to provide a more certain method for decision-making and timeframes than is currently the case under the MTA and the Rules

The limited consultation undertaken validated the assumptions made in this analysis about industry costs and process clarity.

Industry consultation was limited to the Petroleum Exploration and Production Association of New Zealand and three offshore operators with mixed interests in both discharges and dumping in the EEZ. The scope of consultation undertaken was limited due to the time constraints under which this Regulatory Impact Statement was prepared.

Conclusions and recommendations

The Department's preferred option is the regulatory transfer of discharge and dumping functions to the EPA via the EEZ Bill.

De-regulation was not assessed on the basis that New Zealand must continue to give regulatory effect to international obligations in relation to discharges and dumping.

The enhanced status quo is considered a weak option due to the uncertainty of any changes to the MTA and the fact that many of the issues around process certainty and efficiency would not be resolved.

Delegation is also considered inferior primarily due to the significant level of uncertainty involved for all agencies and users as well as the continued inefficiencies associated with assessing activities under two separate pieces of legislation.

The status quo maintains the inadequacies of the MTA in the assessment of environmental effects for discharges and dumping. This option will also result in process confusion and some duplication of effort by applicants and between the EPA and MNZ.

In contrast, the regulatory transfer of the discharge and dumping functions meets all of the policy objectives. It is therefore the preferred option. Implementing this option will be funded from within existing EPA baselines.

Implementation

The discharge and dumping functions can be permanently transferred to the EPA as part of the EEZ Bill. The scope of the activities restricted under clause 15 of the EEZ Bill would need to be amended to include discharges and dumping. Consequential amendments to the MTA and the Rules would also be required to disentangle the discharge and dumping functions. Parts 19 and 21 of the MTA will be particularly affected along with Parts 180 and 200 of the Rules. Part 180 may be able to be repealed entirely; however some of Part 200 would have to remain in relation to oil spill planning and response.

Transitional arrangements will also have to be drafted into the EEZ Bill to manage DMPs and dumping permits granted by MNZ. It would be unreasonable to require operators to seek a marine consent from the EPA for discharges or dumping if a DMP or dumping permit had already been granted by MNZ for the activity.

There will be no net gain in regulation as the reduction and removal of existing provisions in the MTA and the Rules will be equivalent to any new regulations made under the EEZ Bill.

All affected persons will be notified in advance of any regulatory changes. As with all legislation, the Parliamentary process will be public. Key documents will be available on the Parliament and Legislation New Zealand websites.

As the discharge and dumping regulatory functions will become part of the wider EEZ Bill, all of the compliance and enforcement provisions in the EEZ Bill will also apply to these functions.

If the transfer occurs, the EPA will be responsible for the implementation of the discharge and dumping regulatory functions. The EPA has indicated that it will fund the functions through cost recovery and from existing baselines. The EPA has created a team who will prepare the agency for taking on all of the functions under the EEZ Bill. That team is aware of the proposed transfer of discharge and dumping functions and have been closely consulted. In preparing to take on the functions, the EPA will look at the expertise, equipment, systems, and processes that are required.

Monitoring, evaluation and review

The discharging and dumping functions will be monitored, evaluated and reviewed as part of the wider EEZ framework. They will not be able to be monitored in isolation.

As the responsible policy agency, the Ministry for the Environment will provide advice to government on the effectiveness of the EEZ regime as a whole. Part of this ongoing monitoring, evaluation, and review may include:

- evaluation of compliance costs and the “user-friendliness” of all EEZ functions, including discharges and dumping
- the extent to which the legislation can effectively be coordinated with other marine management statutes, including the MTA
- evaluation of how the EPA and other management agencies such as MNZ can work efficiently together to reduce costs to government and compliance costs.