

Regulatory Impact Statement

Exclusive Economic Zone and Extended Continental Shelf Environmental Effects Legislation


Agency Disclosure Statement

This Regulatory Impact Statement (RIS) has been prepared by the Ministry for the Environment. It provides an analysis of options to manage the effects of activities in New Zealand's Exclusive Economic Zone and extended continental shelf (EEZ and ECS).

There are some constraints, caveats and uncertainties concerning the analysis in this RIS:

- Information about deep sea environments and resource opportunities in New Zealand's EEZ and ECS is limited. This RIS relies on estimates of the likelihood of future activities in the EEZ and ECS, and the potential impacts of novel activities.
- There is uncertainty about the quantifiable benefits and costs of the options assessed in this RIS. Benefits of the proposals are largely environmental and reputational, and therefore difficult to compare to the monetary costs of implementation. Costs have been quantified as far as possible, but the actual costs will be highly dependent on the level of activity in the EEZ and ECS, which is uncertain.
- The total costs of the preferred option (for enabling legislation) are dependent on future decisions. Indicative costs per consent application have been estimated; however the likely number of applications is dependent on how activities are classified in subsequent regulations made under the legislation (ie, which activities will need consent). As noted above there is also uncertainty around the likely level of activity.
- Public consultation was undertaken in 2007 on options similar to those assessed in this RIS. There has been no consultation on the updated proposals, which have been updated to reflect the policies and priorities of the current government. While the proposed changes are of medium impact, they are within the scope of the issues and feedback canvassed in previous consultation. However there are risks around the limited consultation that has taken place because stakeholders and the public have not had an opportunity to provide feedback on the details of the proposal.

Mark Sowden, Director Natural and Built Environment


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20/4/11
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1. Background

The Exclusive Economic Zone and extended continental shelf

This paper relates to both New Zealand's Exclusive Economic Zone (EEZ) and extended continental shelf (ECS):

- The EEZ is the area of sea, seabed and subsoil from 12 to 200 nautical miles offshore (beginning at the edge of the territorial sea).
- The continental shelf is the seabed and the subsoil of a country's submerged land mass. The extended continental shelf is where the continental shelf extends beyond the EEZ.

New Zealand's EEZ and ECS are subject to international law, such as the United Nations Convention on the Law of the Seas (UNCLOS). UNCLOS grants New Zealand sovereign rights in the EEZ for the purposes of exploring and exploiting the living and non-living resources of the EEZ, as well as obligations relating to conserving and managing these resources. In the ECS these rights and obligations relate to the seabed and subsoil only.

Cabinet decisions

~~The previous Government proposed legislation to manage the environmental effects of activities currently unregulated in the EEZ and ECS. The proposal was agreed by Cabinet and drafting of the legislation commenced, but was not completed before the 2008 general election. The Bill was not introduced into Parliament.~~

The following decisions were made under the previous Government:

- In December 2006 Cabinet agreed to the development of a legislative option for an improved regulatory regime for environmental effects in the EEZ and ECS [CAB Min (06) 47/4B].
- In May 2007 Cabinet Economic Development Committee agreed to a consultation process involving the release of a discussion paper with proposals for EEZ and ECS legislation [CAB Min (07) 18/4]. Key stakeholders and iwi were consulted on the paper.
- In June 2008 Cabinet approved the policy for drafting of the EEZ and ECS legislation [CAB Min (08) 23/7]. Further policy decisions were made in August 2008 [CAB Min (08) 30/3A].

The current proposal is to proceed with the previous Government's proposed legislation, with some changes. The most notable changes proposed are:

- making the Environmental Protection Authority (EPA) responsible for decision-making and administration
- rebalancing the legislation to focus more strongly on the economic benefits of activities in the EEZ and ECS.

2. Status quo and problem definition

Status quo

Fishing and shipping are the predominant uses of the EEZ, however new activities will develop as technology advances and cost barriers diminish.

Regulatory regime

There is currently no overarching regime in place to assess and manage the environmental effects of activities carried out in the EEZ and ECS. Some controls have been imposed on a sector-by-sector basis in the EEZ, for example:

- The Fisheries Act 1996 provides for the management of fisheries, including the environmental impacts of fishing.
- Marine pollution issues, such as discharges from ships and offshore installations, oil spills and dumping of waste such as dredged material, are covered by Marine Protection Rules under the Maritime Transport Act 1994.
- Safety inspections of offshore petroleum structures are covered by the Health and Safety in Employment Act 1992.
- Licences granted under the Continental Shelf Act 1964 can specify environmental obligations, although there is no guidance in this Act on how to do so.
- Voluntary and non-enforceable guidelines exist for petroleum activities and seismic surveys.

Changes in uses of the EEZ and ECS

These controls have sufficed so far because they cover most of the activities occurring in the EEZ. However, as new technologies develop there is potential for changes in the use of the EEZ and ECS, and an increase in activities that are not currently regulated for their environmental effects.

Petroleum development is likely to be a growth area – a recent global petroleum survey ranked New Zealand the 18th most attractive jurisdiction out of the 133 jurisdictions surveyed¹. Under the current regulatory regime there are controls on discharges and spills from petroleum operations, but no mechanisms in place to assess the overall impacts of the operation from the outset. For example, the effects on specific locations of low-probability high-impact events such as oil spills are not formally considered under the status quo.

There is also interest in gold placer deposits off the west coast of New Zealand, and seabed mineral resources including ironsands, precious metals and phosphates. Some mineral prospecting is already underway. Future activities, which are not regulated for their environmental effects, could include energy generation, aquaculture, carbon capture and storage, and biodiscovery.

Environmental pressure from these activities has been low in the past, due to a low level of activity in the EEZ and ECS.

Voluntary measures for environmental impact assessment

Some companies operating in the EEZ have voluntarily undertaken environmental impact assessment measures, even though not required to do so by law. For example:

- In 2005, OMV, the Maari petroleum field developers, voluntarily prepared a comprehensive environmental impact assessment (EIA) in accordance with international best practice. However, there were no formal decision-making or governance arrangements in place for the government to assess the environmental impact assessment.
- In 2002, Neptune Resources was granted a licence under the Continental Shelf Act to prospect for minerals over several seamounts in the EEZ. There was no formal legislative process for consideration of the environmental effects of prospecting activities. The Continental Shelf Act enables the Minister of Energy to grant minerals licenses, but does not specify what, if any, environmental assessment is required on an application. The Ministry of Economic Development (MED) consulted with relevant departments to work out the best way forward. This was the most sensible process for good governance in the absence of any formal decision-making framework. The

¹ Fraser Institute, Global Petroleum Survey 2010, (June 2010) available from www.fraseramerica.org/commerce.web/product_files/global-petroleum-survey-2010_US.pdf

licence was granted approximately two years after application and included conditions agreed by government.

Problem definition

Current gaps

The current regulatory regime has significant gaps, including:

- assessing effects of activities (other than fishing) on seafloor habitats and biodiversity (eg, the effects of seabed mining)
- assessing effects of activities (other than fishing) on biodiversity in the water column (eg, effects of seismic surveys on marine life)
- assessing effects of new activities on existing interests (eg, effects of a petroleum platform on fishing and shipping)
- managing the cumulative effects of all activities in the EEZ and ECS, as they are regulated under multiple regimes with variable ability to take other sorts of activities into account in decision-making.

These gaps are a problem for several reasons:

- There is potential for unregulated activities to cause environmental harm, impacting on ~~marine life, habitats, and biodiversity. Due to the nature of the activities these effects~~ could be severe – for example oil spills or destruction of significant benthic communities. Some examples of potential risks are set out below.
- There is a lack of certainty for industry on the regulatory processes that may affect their investment. There also is a reputational risk to companies wishing to undertake activities when they cannot demonstrate compliance with high environmental standards.
- There is no mechanism for ensuring public participation in decision-making around these activities. Due to the controversial nature of some of the activities – for example petroleum or iron sands exploration and extraction, New Zealanders are likely to want to contribute to the decision-making process.
- There is a reputational risk for New Zealand if we are perceived as not meeting our obligation to manage the EEZ and ECS environment under UNCLOS, or at the least aiming for high environmental standards. New Zealand is lagging behind other jurisdictions which have comprehensive environmental assessment processes in place for activities in their marine environments. The Comparative Review of Health, Safety and Environmental Legislation for Offshore Petroleum Operations, released by the Ministry of Economic Development in December 2010, noted that the four comparison countries discussed in the report (United Kingdom, Australia, Ireland and Norway) had frameworks to assess environmental effects based on environmental impact assessments and public participation.

Examples of potential problems

Mining of hydrothermal vents

Two different companies have applied for or been granted licenses under the Continental Shelf Act to extract precious metal deposits from around seafloor hydrothermal vents in the Kermadec Arc. Hydrothermal vents are the submarine equivalent to geysers. They produce mineral resources such as seafloor massive sulphide deposits, and are home to unique ecosystems. Relative to the majority of the deep sea, the areas around submarine hydrothermal vents are biologically more productive, often hosting complex communities fuelled by the chemicals dissolved in the vent fluids. These rare and possibly unique biota also potentially have as-yet undiscovered high-value chemical compounds.

These ecosystems are reliant upon the continued existence of the hydrothermal vent field as the primary source of energy, which differs from most surface life which is based on solar energy. Relatively little is known about the life forms that exist around hydrothermal vents, or their potential benefits to science. Under the status quo, with no formal mechanisms or guidance to assess the environmental impacts of a mining proposal, there is a risk that mining of seafloor massive sulphides may result in irreparable damage to these ecosystems.

Seabed dredging

Under the status quo a company may be granted a mining license under the Continental Shelf Act to extract seafloor mineral deposits. Any dredging operation would occupy the space for a considerable amount of time with dredging vessels. Mining could cause a significant amount of direct damage to the seafloor habitat and has the potential to create a large sediment plume, which may smother benthic habitats not directly being mined. There is no robust process under the Continental Shelf Act to assess and monitor these impacts, or to require changes to the activity should problems be found. There is also no consideration of the impact of dredging on existing benthic protected areas (BPA) (in which bottom trawling is banned) and areas of high value for fisheries.

Location of petroleum drilling operation

Another possible scenario is where Crown Minerals grants a petroleum prospecting permit in the Kermadec Arc. If a petroleum company proposed drilling of an exploration well close to the Kermadec Islands marine reserves, an oil spill from a rig would directly affect these marine reserves. Under the status quo the Continental Shelf Act does not require any consideration of the well's location in relation to the environmental values protected in the Kermadecs. The rules of the marine reserves only prevent mining within their boundaries; there is no consideration of cross-boundary effects.

Aquaculture development

A final example is that of an aquaculture company which proposes a 500-hectare marine farm off Pegasus Bay in Christchurch. Half of the farm lies within the territorial sea and half in the EEZ. Within the territorial sea the applicant requires resource consent under the Resource Management Act. Over the EEZ boundary there is no legislative process to assess and consent the other half of the farm, which is built subject only to navigational and discharge controls under the Maritime Transport Act.

Scale of risk

Current indications suggest that New Zealand will not see a large number of new operations in the EEZ or ECS in the next ten years, as commercial and technical viability are barriers to developing resources. Indications from industry suggest that we can expect to see two oil and gas discoveries being fully exploited within the next ten years, as well as the development of up to three mining operations for seabed massive sulphides, phosphate nodules, and iron sands. Marine energy generation is likely to take longer to develop in the EEZ or ECS.

The development landscape is, however, changing quickly and there is the potential for activity levels to accelerate at relatively short notice. For example, proposals for ironsands and phosphate mining are relatively recent.

The low projected level of activity in the EEZ and ECS means that there is not a high risk of environmental damage in the short term. To date, there have been no notable instances of the problems that are possible under the status quo. The key choice confronting government is the extent to which controls should be put in place now before the level of activity increases – and the limited consideration of other interests and increasing environmental risk becomes unacceptable.

There is a window of opportunity now to improve the environmental management regime before the need becomes more urgent. Delaying action until activity levels have increased carries a greater risk of environmental harm and would have a greater adverse impact on investment certainty.

3. Objectives

The objectives of the policy development are to ensure:

- A. Processes are in place to assess and manage the adverse environmental effects of all activities in the EEZ and ECS, reducing the risk of environmental harm.
- B. Greater certainty is provided to all parties, including industry and existing interests, on the process required to permit operations in the EEZ and ECS.
- C. New Zealand acts within its rights and fulfils its obligations under relevant international law (such as UNCLOS).
- D. The approach is cost-effective with the cost to government and users proportional to the problem being addressed.

4. Regulatory impact analysis

Four main approaches, each with many possible permutations, could be taken to address the problems. This RIS focuses only on the most feasible option relating to each of these broad approaches. For example, officials' preferred option, to fill the gaps under the status quo, could be implemented in a number of different ways (creating new legislation, amending existing legislation, creating new regulations under existing legislation), but this RIS focuses on the option to create new legislation.

The four feasible options are:

1. **No legislative change – voluntary agreements and government guidance:** Government would work with industry to develop voluntary environmental operating procedures.
2. **Develop new legislation to fill the gaps in existing legislation in the EEZ and ECS:** New enabling legislation, which would use a rules and consents framework, would be developed to fill the existing legislative gaps in managing environmental effects in the EEZ and ECS; existing statutes governing the EEZ and ECS would remain in place.
3. **Extend the Resource Management Act (RMA) to the EEZ and ECS:** The RMA would be extended to cover the EEZ and ECS where it would coexist with other statutes such as the Fisheries Act.
4. **Develop an entirely new regime for managing all activities in the EEZ and ECS:** A single piece of legislation governing the environmental effects of all activities in the EEZ and ECS would be developed and existing statutes governing the EEZ and ECS would be reformed.

Option 1: No legislative change – voluntary agreements and government guidance

Under this option government would work with industries, not currently regulated for environmental effects, to develop further voluntary environmental operating procedures. For example, there are existing environmental best practice guidelines between government and some petroleum companies. Voluntary agreements would be based on international best practice.

Non-statutory guidance could also be developed for government departments on how to deal with activities in the EEZ or ECS.

Assessment against objectives

This option would be an improvement on the status quo, but would not effectively achieve the policy objectives.

Objective	Meets objective	Explanation
A: Manage adverse environmental effects	x	Depending on how this option was implemented, it may partially achieve this objective; however, it is considered that a non-enforceable approach would not adequately manage the adverse environmental effects of activities or reduce the risk of harm.
B: Provide greater certainty	x	A voluntary approach would not give the requisite level of certainty that some industry stakeholders would like through legal consents for their activities. It would provide no certainty to existing interests on how their interests will be taken into account.
C: Meet international obligations	-	This would go some way to meeting New Zealand's obligations under international law, though a voluntary approach may not be particularly robust.
D: Cost-effective	✓	This is a low cost approach relative to the size of the problem.

Net benefits or costs

Given the low costs and low benefits, this option is likely to provide negligible benefits over the status quo.

Benefits

A voluntary approach has relatively low costs to government. It will create a clear framework for operators to assess effects in accordance with environmental best practice.

Costs

The costs to government will be relatively low.

Operators in the EEZ and ECS are likely to experience additional costs in complying with the guidelines. However, as voluntary guidelines would be aligned with international best practice, which many operators already follow, any additional costs would only be incurred by a small number of operators.

Risks

This option presents the risk of non-compliance by some operators. This may mean the system is not robust and not enforceable should problems arise. It also presents a reputational risk to government. However, these risks are present under the status quo.

Option 2: Develop new legislation to fill the gaps in existing legislation in the EEZ and ECS

This option would see the development of new legislation to fill the gaps within New Zealand's UNCLOS obligations for managing environmental effects in the EEZ and ECS. Existing statutes, such as those governing fisheries and maritime transport, would remain in place in the EEZ.

As noted above, there are various alternative legislative mechanisms to achieve this option, ranging from new standalone legislation to substantial amendments to existing laws (for example the Continental Shelf or Maritime Transport Acts).

This is the option for new standalone legislation proposed in the associated Cabinet paper, and is the option preferred by officials. The Cabinet proposal is for gap-filling legislation. The associated Cabinet paper contains a high level of detail and provides a basis for drafting of legislation. As noted above, the current proposal is to proceed with the previous Government's proposed legislation, with some changes.

Key elements of the proposal are summarised below:

- The proposal is for enabling legislation setting up a regulatory framework with the technical details set out in regulations. The details of the regulations would be determined through a separate process. Legislation would not take effect until the first set of regulations is passed.
- This option would establish a framework that is flexible to adapt to changing issues and technologies for operations in the EEZ and ECS. Activities in the EEZ and ECS will be regulated through a rules and consent framework. Regulations (rather than the primary legislation) will define effect thresholds for different categories of activity: permitted, discretionary and prohibited. Consents under this regime will be required for any discretionary activities. An applicant for consent would be required to prepare an impact assessment statement assessing the impact of a proposal on the environment and other interests. The required contents of an impact assessment statement will also be set through regulations.
- Low-impact activities will be permitted activities, and will not require consent if they comply with thresholds set in the regulations. Prohibited activities will not be allowed. The use of delegated legislation to classify activities, thresholds and standards is consistent with Legislation Advisory Committee (LAC) guidelines. However, this means that the overall costs cannot be determined at this stage as much depends on decisions made for the regulations (eg, the status of activities).
- The legislation would set up a general duty to avoid, remedy, or mitigate adverse environmental effects of activities in the EEZ and ECS, and require decision-makers to balance environmental and economic considerations. It would require consideration to be given to existing interests, environmental controls set through other statutes, as well as setting up a process for public participation. It would establish information principles, for example requiring decision-makers to take into account the best available information.
- The particular details of this proposed approach to filling the gaps in the environmental management regime are based on key elements of international regimes and international best practice regarding environmental impact assessments. A summary of key elements of international regimes is included in Appendix 1.

One of the key changes since the 2008 proposal is the role of the EPA as decision-maker on consent applications. This change is likely to result in lower costs than the alternative of setting up a new function within the Ministry for the Environment (EEZ Commissioner).

This proposal also rebalances the previously proposed legislation to focus more strongly on the economic benefits of activities in the EEZ and ECS.

Assessment against objectives

This option would meet all policy objectives.

Objective	Meets objective	Explanation
A: Manage adverse environmental effects	✓	By filling the legislative gaps relating to environmental effects in the EEZ and ECS, processes would be in place to assess and manage the adverse environmental effects of all activities in the EEZ, reducing the risk of environmental harm.
B: Provide greater certainty	✓	Filling the legislative gaps would give greater certainty to industry on the process required to permit operations in the EEZ and ECS, meaning that operators would be able to demonstrate compliance. It would also provide certainty on the required process for other interests and the public.
C: Meet international obligations	✓	This option is consistent with UNCLOS.
D: Cost-effective	✓	The costs of this option are considered proportional to the size of the problem being addressed.

On balance, it is considered that the costs of this approach are warranted given the potential environmental risks associated with uncontrolled effects of development in the EEZ and ECS.

Net benefits or costs

This option would have net benefits relative to the status quo. The environmental benefits provided are expected to out-weigh the costs associated with this option. As it is not possible to quantify the environmental benefits, it is not possible to determine the net benefits with any precision. However it can be asserted that this option would be an improvement on the status quo.

Benefits

This option would provide environmental benefits by managing the adverse environmental effects that would be experienced under the status quo. As this option would involve applying enforceable legislation to all activities, these benefits would be of a greater magnitude than those of option 1, and similar to those of options 3 and 4.

This option would also provide greater consistency with overseas approaches.

Costs

This option will not incur any significant costs until regulations are made (aside from the costs involved in making the regulations). The total costs of this option will be dependent on the decisions made in the regulations; the regulations will impact on the number of consent applications, and the costs of preparing and processing each of these. For example the regulations will determine which activities are classed as permitted, prohibited or discretionary (ie, what requires consent), and the required contents of impact assessment statements accompanying applications. The regulations will be subject to a regulatory impact analysis.

As noted in the problem definition, there is also a high degree of uncertainty around the level of activity likely to occur in the EEZ and ECS. Despite these uncertainties, indicative costs per consent application have been estimated below. These estimates are based on recent information on costs of processing RMA resource consents and call-ins to the EPA, information from regional councils on the costs of processing resource consents for petroleum activities in the territorial sea, and a 2008 review of the Ministry for the Environment's capability to take on functions under the then-proposed EEZ legislation.

Because there are greater synergies in the EPA carrying out these functions, the costs will be lower than those forecast for the Ministry for the Environment, and have been updated in this regulatory impact statement.

Total potential costs to EPA

- Baseline costs (per annum): \$250,000 (assuming up to 3 FTEs in EPA).
- Additional costs (per consent): up to a maximum of \$470,000 non-cost recoverable, consisting of:
 - Monitoring, information management, enforcement, legal expenses: up to \$300,000.
 - Appeals: up to \$170,000.
 - Consent process (cost recoverable): \$40,000 – \$500,000.

Total potential costs to operator (per consent)

- \$340,000 – \$1,170,000, consisting of:
 - Cost recovery of consent process: \$40,000 – \$500,000 (average cost projected \$40,000 to \$200,000).
 - Preparation of application (for a large scale proposal): \$300,000 – \$500,000.
 - Appeals (assuming similar cost to EPA): up to \$170,000 per appeal.
 - Costs associated with avoiding, remedying and mitigating adverse effects: not quantified, as it depends on the circumstances of the activities and the controls established by the EPA.

There is further detail on these potential costs below.

Baseline costs for the EPA

The EPA is likely to have a very uneven workload in relation to the proposed legislation – with a low forecast level of activity with potential long gaps (of years) between consents. Some kind of standing resource would still be required to liaise with industry, deal with lower-impact activities that don't require consents, monitor compliance with the legislation and be prepared to deal quickly and efficiently with proposals.

The standing resource is estimated at up to three FTEs or approximately \$250,000 per annum. There would be some synergies between this role and the EPA functions around consents called-in under the RMA, which potentially could reduce costs.

Aside from the baseline costs to the EPA, all other costs of this option are effectively user-pays as they are dependent on the occurrence of activity in the EEZ.

Consent processing costs

For comparison, regional council processing costs for a large offshore consent under the RMA could be expected to total approximately \$100,000. The 2008 capability report estimated approx \$270,000 per annum for two consents. Experience of call-ins to the EPA under the RMA reveals a wide range from approximately \$40,000, and up to \$500,000 for a high end, complicated and controversial proposal. Costs tend to scale to the number of consents required for a proposal and the degree of public interest and effects on other parties (for example the number of submissions to be processed and the length of hearings). Due to the scale of the projects, it is not anticipated that an EEZ/ECS consent would attract the same costs as a high-end RMA call in, and a likely range is therefore \$40,000 to \$200,000.

Cost to applicants of consultation and preparing application

The upper end cost to operators of preparing an impact assessment statement for a consent application for discretionary activities, and all associated processes, is likely to be between \$300,000 and \$500,000 depending on the scale of the activity. This is an indicative cost in relation to past experience with offshore petroleum platforms. Costs for lower impact activities such as seismic surveys would be much lower. It is hard to predict potential costs specifically around activities that have not yet been through an EIA process (eg, seabed mining).

Marginal costs for some operators would be lower than the net figures above if they already voluntarily prepare EIAs.

Relative to the status quo, operators may also experience delays; however the legislation will set statutory timeframes for decision-making.

Other costs

Other potential costs to the EPA include:

Monitoring, information, enforcement, legal expenses – up to \$300,000 per year per consent (cost scales are considerably dependant on whether enforcement or court proceedings are required).

Appeals – approximately \$170,000 per appeal.

Cost recovery

Cost recovery provisions are intended to operate in relation to the direct benefits to applicants of government expenditure – ie, consent processing costs and monitoring costs. Costs to applicants would scale considerably according to the size/complexity and interest in the proposal. The EPA would not have power to recover costs for "business as usual" expenditure.

Risks

There is uncertainty on the nature of Maori rights and interests, and the application of the Treaty of Waitangi, in the EEZ or ECS. It is important that policy development creates mechanisms for engagement with Maori and recognition of the Treaty, and certainty for users on how these may affect their activities.

Under this option, the possibility that a consent may be declined does create a risk to operators that does not exist under the status quo (because there is no limited ability to stop an activity occurring).

Another risk under this option is that marine environmental regulation will remain poorly integrated across statutes with a discrepancy in the environmental controls in place. This risk can be mitigated through, as much as possible, coordinating implementation across statutes and agencies, although the underlying statutory issues will remain.

Option 3: Extend the Resource Management Act (RMA) to the EEZ and ECS

This option would see the RMA extended to the EEZ and ECS from its current limit at the outer edge of the territorial sea. The purpose of the RMA is to promote the sustainable management of natural and physical resources, with a focus on managing the effects of activities. In the territorial sea, the RMA coexists with the Fisheries Act, Maritime Transport Act, and Crown Minerals Act (though it is not always well integrated with these laws) – as would be the case if the RMA was extended to cover the EEZ and ECS.

The RMA has been designed to operate on the basis that resource management decisions should be made by the authority that has the best available information, will be most affected by those decisions and therefore is best placed to promote sustainable management. Responsibility for implementing the RMA is, therefore, currently devolved to local authorities and the role of central government is to set policy on matters of national significance, provide support and training, and monitor the implementation of the Act.

In the territorial sea activities are categorised through regional coastal plans which are developed by regional councils. Decisions on consent applications must take into account public submissions, and are made either by local government or, for proposals of national significance, by either a Board of Inquiry or the Environment Court (administered by the EPA).

If the RMA was extended to the EEZ and ECS under this option, several changes would be needed to the way that the RMA operates. For instance, it would be impractical for local government to maintain its role of creating plans and making decisions on consent applications in the EEZ and ECS. For this option to work effectively, an entity such as the EPA would need to have responsibility for planning and facilitating decision-making. Other aspects of the RMA such as processing and appeal provisions would also need to be simplified. A new part of the RMA that is substantially different from the existing parts would be required to give effect to this option.

Assessment against objectives

This option would meet three policy objectives, though it would not be consistent with New Zealand's obligations under international law.

Objective	Meets objective	Explanation
A: Manage adverse environmental effects	✓	An extension of the RMA would ensure that processes are in place to assess and manage the adverse environmental effects of all activities in the EEZ and ECS, reducing the risk of environmental harm.
B: Provide greater certainty	✓	Extending the RMA to the EEZ and ECS would give operators certainty of the processes required and enable them to demonstrate compliance. It would also provide certainty on the required process for other interests and the public.
C: Meet international obligations	x	The RMA was designed for application in areas over which New Zealand has full sovereignty and its unmodified application to the EEZ or ECS where New Zealand's rights are limited and where other states also have rights would not be consistent with New Zealand's obligations under international law.
D: Cost-effective	✓	The costs of this option are likely to be proportional to the size of the problem being addressed.

On balance, while the costs of this option have not been established in detail, they are likely to be proportional to the size of the problem being addressed. However, this option does not meet the important objective of consistency with New Zealand's rights and obligations under UNCLOS.

Net benefits or costs

Like option 2, this option would have net benefits relative to the status quo. The environmental benefits provided are expected to out-weigh the costs associated with this option; however these benefits cannot be quantified.

Benefits

This option would provide environmental benefits by managing the adverse environmental effects that would be experienced under the status quo.

It would have the additional benefit of providing integration across the boundary of the EEZ and the territorial sea.

Costs

The costs of this option, for example to the EPA and operators, are likely to be very similar to those of option 2. There is potential for additional costs under this option associated with appeals, as the RMA is characterised by high process and appeal costs and allows appeals on merits of decisions, in addition to points of law.

Total potential costs to EPA

- Baseline costs (per annum): \$250,000.
- Additional costs (per consent): up to \$470,000 non-cost recoverable, consisting of:
 - Monitoring, information management, enforcement, legal expenses: up to \$300,000.
 - Appeals: up to \$170,000, possibly higher.
 - Consent process (cost recoverable): \$40,000 – \$500,000.

Total potential costs to operator (per consent)

- \$340,000 – \$1,170,000, consisting of:
 - Cost recovery of consent process: \$40,000 – \$500,000.
 - Preparation of application: \$300,000 – \$500,000.
 - Appeals (assuming similar cost to EPA): up to \$170,000 per appeal, possibly higher.
 - Costs associated with avoiding, remedying and mitigating adverse effects: not quantified, as it depends on the circumstances of the activities and the controls established by the EPA.

Risks

The option of extending the RMA has many similarities with option 2, and therefore the same risks apply. However there are significant differences which create additional risks for this option.

It would not be possible to extend the RMA in its current form without significant changes to the governance arrangements (for example to the devolved nature of planning and decision-making). It is also inconsistent with New Zealand's rights and obligations under international law. The RMA is complex and has a large volume of case law behind it. Adapting the RMA to cover the EEZ and ECS is likely to result in unintended consequences as it was designed for application in areas over which New Zealand has full sovereignty.

Option 4: Develop an entirely new regime for managing all activities in the EEZ and ECS

Under this option, existing statutes would be reformed to develop a single piece of legislation governing the environmental effects of all activities in the EEZ and ECS. In particular it would require changes to the fisheries and maritime transport legislation.

Assessment against objectives

This option would meet three policy objectives.

Objective	Meets objective	Explanation
A: Manage adverse environmental effects	✓	The use of one overarching statute to cover the environmental effects of all activities in the EEZ and ECS would ensure processes are in place to assess and manage the adverse environmental effects of all activities in the EEZ and ECS, reducing the risk of environmental harm.
B: Provide greater certainty	✓	Certainty on process requirements would be provided to all operators and interests in the EEZ.
C: Meet international obligations	✓	This option would be consistent with New Zealand's rights and obligations under UNCLOS.
D: Cost-effective	x	The costs of this option would be disproportionate to the problems being addressed.

This approach would not be cost effective, as the costs would be disproportionate to the problems being addressed. The scale of this approach significantly out-weighs the problem to be addressed as it would impact on the (significantly larger) fishing industry.

Net benefits or costs

There is a high degree of uncertainty associated with the costs of this option, which means it is uncertain whether this option would have a net benefit, and if so, the magnitude of this benefit. What is certain is that the costs of this option would be higher than the costs of options 2 and 3 – and therefore the net benefit over the status quo, if any, would be smaller.

Benefits

This option would provide environmental benefits by managing the adverse environmental effects that would be experienced under the status quo. As this option would involve applying enforceable legislation to all activities, these benefits would be of a greater magnitude than those of option 1.

This would also provide the benefit of a consistent regulatory framework across the EEZ and ECS.

Costs

Reforming existing statutes and institutions to fit under one new regime would be costly and potentially time consuming. This option may be unable to be implemented fully without a significant increase in expenditure for marine planning, marine research and monitoring. It would also involve significant staff resources across a number of agencies and possibly the cost of independent expert advice. These high establishment costs would be unique to this option as it would involve reforms to a number of statutes, therefore affecting a larger number of agencies (compared to options 2 and 3 for example).

As this option is not the preferred option, its costs have not been determined in detail. However, it is clear from preliminary analysis that the implementation costs of this option would be greater than those of options 2 and 3, whilst providing a similar level of benefit.

Compliance costs for operators also cannot be accurately estimated as they would depend on the design details of this option. However, all operators in the EEZ would experience compliance costs as follows.

- Operators of currently uncontrolled activities do not face any compliance costs under the status quo. Under this option, compliance costs to these operators would be similar to the costs of options 2 and 3.
- Operators subject to controls under the status quo, for example the fishing and shipping industries, would also face costs under this option. The costs to individual operators could be within a roughly similar range to those of options 2 and 3; however there may be additional costs associated with adjusting from current controls to the new regime. Additionally, the number of operators affected would be significantly greater given the size of these industries.

Risks

There are significant risks in reforming existing statutes when the problem is not with activities that are currently regulated, but activities that are not. Reforming existing statutes would not necessarily enhance the ability to deal with existing uses and/or associated problems; it may just shift the current institutional responsibilities. This option could detract focus from the key issue which is the lack of controls on some activities.

There is also a risk that this option would take a long time to implement. This could create unnecessary short-term uncertainty for the fishing and shipping industries, and an interim regime may be necessary while this regime is developed.

5. Consultation

Public consultation was undertaken in 2007. The discussion document *Improving Regulation of Environmental Effects in New Zealand's Exclusive Economic Zone* was released for public submissions and workshops were held with key stakeholder groups. A Summary of Submissions was prepared following the consultation and is available on the Ministry for the Environment's website.

The discussion document proposed establishing new legislation to fill key gaps in the environmental regulation of New Zealand's EEZ and ECS, and promoted a consistent approach to environmental management across different statutes. The focus of the proposal was on the effects of activities not covered by existing statutes. The discussion document identified two broad options to address the policy issues. These options correlate to options 2 and 4 in this RIS.

Stakeholder groups who submitted on the discussion document included: fishing, petroleum, minerals, submarine cables/telecommunications, science/academic/research, environmental non-governmental organisations, local government, iwi, and individuals.

The proposals for EEZ legislation were generally well supported. Some key messages from consultation were:

- Environmental groups in general would prefer a more comprehensive review of marine environmental statutes (including fisheries legislation), but support any improvements to the management of marine environmental effects.
- Industry groups in general supported the legislation so long as any new controls are proportional to the issues and do not create an undue regulatory burden.

Following this public consultation on broad options, in 2008 Cabinet agreed the policy for drafting of legislation. While there was no further public consultation on the specific details of the proposed legislation, the decisions made by Cabinet were since released publicly. There is currently wide awareness among stakeholders of the details of the 2008 decisions.

There has been no further consultation on the updated proposals presented in the current Cabinet paper. Since the 2007 consultations there has been an increasing consensus amongst both industry and environmental groups that there is a need for this legislation. Since the 2007 consultations, the proposal has changed to reflect the policy of the current government. The main change has been the proposal that the EPA carry out decision-making under the legislation rather than an EEZ Commissioner within the Ministry for the Environment. Submissions on the recent *Comparative Review of Health, Safety and Environmental Legislation for Offshore Petroleum Operations*, commissioned by the Minister of Energy and Resources in June 2010, make it apparent that submitters are in favour of the EPA carrying out decision-making under the proposed legislation. While the proposed changes are of medium impact, they are within the scope of the issues and feedback canvassed in previous consultation.

The following agencies have been consulted on the development of the Cabinet paper and this RIS: Department of Conservation, Ministry of Fisheries, Ministry of Transport, Maritime New Zealand, Ministry of Economic Development, Tē Puni Kōkiri, Ministry of Foreign Affairs and Trade, Ministry of Justice, Ministry of Agriculture and Forestry, State Services Commission, Treasury, Ministry of Defence, Department of Internal Affairs, New Zealand Customs Service, Land Information New Zealand, Ministry for Culture and Heritage, Ministry of Research, Science and Technology. The Department of Prime Minister and Cabinet has been informed of the proposals.

6. Conclusions and recommendations

Option 1, a voluntary approach, has the lowest costs but limited benefits, and does not meet the policy objectives. Therefore option 1 is not being advanced.

Option 2, to develop new legislation to fill the gaps in existing legislation in the EEZ and ECS, meets all policy objectives and is officials' preferred option. It would put processes in place to assess and manage the adverse environmental effects of all activities in the EEZ, reducing the risk of environmental harm, and providing greater certainty to industry on the process required to permit operations in the EEZ and ECS. The approach is considered cost-effective with the cost to government and users proportional to the problem being addressed. It is also consistent with New Zealand's rights and obligations under international law. While the level of activity in the EEZ and ECS in the short term is likely to be low, the types of activities that may occur carry high environmental risks. This approach will manage these risks.

Option 3, to extend the RMA into the EEZ and ECS, is inconsistent with New Zealand's rights and obligations under UNCLOS. Major changes to the RMA would be required to make it compatible with international law and applicable to the EEZ. It is simpler and more efficient to write legislation tailor-made for the EEZ than to amend the RMA to fit.

Option 4, to develop an entirely new regime for managing all activities in the EEZ and ECS, would cost considerably more to government and industry, compared with options 2 and 3, while providing a similar level of benefit. The higher costs associated with this option would be incurred through reforming existing statutes, rather than simply addressing the regulatory gaps. Reforming existing statutes (which regulate activities that are not part of the problem) would also create higher risks as it would be a greater level of intervention than is necessary to address the problem.

~~Option 2 is the preferred option outlined in the associated Cabinet paper. It is considered the only option that meets all of the policy objectives, and the implementation costs are warranted given the potential environmental risks associated with uncontrolled effects of development in the EEZ and ECS. Compared to options 3 and 4, this option would have lower costs to government and industry, while providing approximately the same level of benefit.~~

7. Implementation

The operational detail of the legislation will be set out in delegated legislation through regulations. This is considered an appropriate vehicle to guide implementation, because regulations will be easier to develop and change than primary legislation.

It is proposed that the legislation come into force through Order in Council when the first complete set of regulations have been developed under the legislation, otherwise there will be a period with no regulations against which to assess activities.

There will be a gap between passage of the legislation and "Day 1" for implementation of the new regime – during which the regulations will be developed. During this time the Ministry for the Environment and EPA will need to work together to develop appropriate capacity and business processes for implementation of the legislation.

There may be opportunities to delegate or contract functions from the EPA to other agencies or organisations if the functions would be more efficiently or effectively performed elsewhere. This may be a particular issue in the early years of the legislation if the workload is highly variable due to a low level of activity in the EEZ and ECS.

8. Monitoring, evaluation and review

As the responsible policy agency, the Ministry for the Environment will provide advice to government on the effectiveness of the regime. Key issues to be addressed under a monitoring, review and evaluation framework include:

- improving information on the EEZ and ECS environment and potential resources
- improving information on the effects of new activities (eg, seabed mining)
- evaluation of compliance costs and the "user-friendliness" of the legislation

- the extent to which the legislation can effectively be coordinated with other management statutes
- feedback of information into review of the policy statement and regulations to ensure they evolve over time as information improves
- evaluation of how the EPA and other management agencies can work efficiently together to reduce costs to government and compliance costs.

Appendix 1: EEZ petroleum and seabed mining – International comparison of management

Country	Environmental Impact Assessment	Public process	Cost recovery	Type of permission (eg, consent, licence)	Obligation to avoid, remedy, or mitigate adverse effects (or similar)	Protection for other interests	Precautionary approach	Overarching environmental assessment legislation or sector specific
Australia	Yes: Where a project is deemed to be a "controlled action" with significant impacts on a national environmental matter, including commonwealth waters 3-200nm.	Yes: Public consulted in initial referral to determine if action is controlled. In an EIA there is at least one period of public consultation.	No: Although the potential to recover costs was considered in the 2009 an independent statutory review of the legislation.	Approval.	Approval is conditional and can require protection, repair or mitigation of damage as well as establishing management and monitoring requirements, audit requirements, or acceptable outcomes.	No: Undue adverse effects test, action must not have significant impact on commonwealth marine environment (ecosystem approach may include fisheries).	Yes: Under s391 of the EPBC Act precautionary principle is mandatory consideration for some decisions. S391 states "that lack of full scientific certainty should not be used as a reason for postponing a measure to prevent degradation of the environment where there are threats of serious or irreversible environmental damage".	Overarching: The Environmental Protection and Biological Conservation (EPBC) Act.
Canada	Yes: Under the Canadian Environmental Assessment Act 1992 (EAA).	Yes: Depending on the categorisation of the application. The decision-making body has discretion around whether consideration of projects which are not likely to have significant adverse effects are open for public participation.	Yes: Also some funding for participants.	Depends on the project. Decision-makers must complete an EA before doing anything that would permit a project to proceed. Certificate of completion once EA report finalised.	Yes: The decision-maker determines how adverse effects should be avoided or mitigated. But the decision-maker can approve projects which will have significant adverse effects if it believes they are justified in the circumstances.	No: Focus is on environmental effects. There is scope for public participation but it is unclear how decision-makers would balance interests.	Yes: Part of the purpose of the Act.	Overarching: The EAA applies to all physical work or activities unless they will have an insignificant effect on the environment or are specifically excluded under regulations.

Country	Environmental Impact Assessment	Public process	Cost recovery	Type of permission (eg, consent, licence)	Obligation to avoid, remedy, or mitigate adverse effects (or similar)	Protection for other interests	Precautionary approach	Overarching environmental assessment legislation or sector specific
Norway	Yes: Under the Pollution Control Act 1981.	Yes: Depending on categorisation of project.	Yes.	Yes: A permit is issued once the EIA has been completed.	Yes: The guidelines to application of the Act require avoidance of pollution and waste problems, and section 7 requires a project to avoid pollution. The decision-making body can apply conditions which prevent pollution, nuisance or damage.	Yes.	Not mentioned in the English summary of the Act.	Overarching: Pollution is widely defined. The legislation applies to all activities unless explicitly excluded, in all areas including the EEZ and continental shelf.
United Kingdom	Yes: Under series of regulations giving effect to EU directive on EIA, one for petroleum, another for seabed mining.	Yes: For petroleum the Department notifies public have 28 days to submit For seabed mining there is a 42 day public consultation process.	Yes: Cost recovery for marine licences but not for petroleum consents.	Consent.	For seabed mining it is up to an applicant to show in the environmental statement efforts to avoid, reduce and offset adverse effects. Decisions must take this into account For petroleum Ministerial discretion as to what statement must show and what conditions apply.	For seabed mining project must be unlikely to have a significant impact on the receiving environment, including any protected sites. For petroleum Ministerial discretion as to what statement must show and what conditions apply to consent.	No: However a high level of information is required in an environmental statement and any lack of knowledge must be identified. Further info can be requested if the info is not sufficient.	Sector specific regulations.
United States	Yes: In federal waters beyond 3nm, under the National Environmental Policy Act (NEPA). Three levels of activities with some not meeting threshold for EIS.	Yes: Scoping consultation for 45 days, draft EIS public consultation for 60 days. The final EIS is also published and 30 days allowed for comment.	No: Up to the federal department responsible. For Petroleum and other minerals there is not specifically cost recovery under NEPA.	There is no separate permission; an EIS is needed when applying for federal leases or production approval.	No obligation to act in a certain way. However the extent to which an effect can be avoided, remedied or mitigated must be considered and can be a condition of a lease or approval.	No: However, there are protections in other Acts which EIS must take account of - eg, the Endangered Species Act, Marine Mammal Protection Act, and Migratory Bird Treaty Act prevent certain types of harm to species.	No: However a responsible department must take a "hard look" at all the effects including cumulative effects.	NEPA overarching.