

## **Regulatory Impact Statement:**

### **Proposal for Marine Legislation Bill Supplementary Order Paper to introduce a non-notified discretionary classification to the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012**

#### **Agency Disclosure Statement**

This Regulatory Impact Statement (RIS) has been prepared by the Ministry for the Environment (MfE). It provides an analysis of options for regulating certain discharges and dumping activities that are being transferred from the Maritime Transport Act 1994 (MTA) to the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 (EEZ Act), and recommends the introduction of a non-notified discretionary activity classification to the EEZ Act via the introduction of a Supplementary Order Paper (SOP) during the Committee of the Whole House stage of the Marine Legislation Bill (MLB).

The options assessed look to address concerns that the EEZ Act will not allow for a transfer of regulatory functions to the Environmental Protection Authority (EPA) that closely resembles what already takes place under the current MTA regime enforced by Maritime New Zealand (MNZ), and in some cases will not allow for effective environmental effects management or a decision-making process that is commensurate with the likely effect of the activities. More information on the transfer of functions and the identification of potential issues for classifying discharge and dumping activities is provided in the background and context section of the RIS.

It should be noted that while examples of discharge and dumping activities that take place in the exclusive economic zone (EEZ) and continental shelf have been used in this RIS to assess how the recommended option would provide for better regulation of these activities, this RIS is not recommending the classification of activities. Discharge and dumping activities in the EEZ and continental shelf are not currently regulated under the EEZ Act, The Minister for the Environment will publicly consult on how these activities should be classified in the EEZ Act following the passing of the Marine Legislation Bill, and a separate RIS will be written for this.

There are a number of limitations associated with the analysis. Time constraints have been imposed on the preparation of this document due to a need to seek Cabinet policy approval in time to prepare a SOP prior to undertaking consultation on the classification of activities in the EEZ Act. Owing to the time constraints, thorough consultation was not possible on the proposals assessed in this RIS. There is also a lack of comprehensive information about areas of the EEZ, which makes assessing the environmental impacts of proposals uncertain. Comparable costs associated with all of the options discussed have not been possible to obtain due to the time constraints on the preparation of this RIS.

This RIS has been updated since it was first signed by Kevin Currie (Director, Environmental Regulation) in February 2013. This is due to a change being sought to the non-notified discretionary classification that was adopted by Cabinet on 25 February 2013. At that time, the design of the non-notified discretionary classification included appeal rights for existing interests on marine consent decisions on points of law, and enabled the EPA to delegate decision making on all non-notified discretionary activities to the Chief Executive of the EPA. Due to further policy development during the drafting of the SOP for the new classification, the Cabinet Paper that will accompany the SOP will seek the removal of these appeal rights, and seek to enable delegation of decision making by the EPA to the Chief Executive of the EPA to only discharge and dumping activities. Consequently, the RIS has been updated to reflect the change in the non-notified discretionary classification and RIAT have issued an updated Quality Assessment Statement based on the updated RIS.

Compared to the status quo, which under-regulates environmental effects of certain activities if they are classified as permitted, but over-regulates the effects of these activities if classified as discretionary or prohibited, the recommended option is likely to reduce costs to businesses

and improve incentives to invest in New Zealand's natural resources in the EEZ and continental shelf, while providing for better environmental effects management. It is also unlikely to impair private property rights, impair incentives for businesses to innovate, override fundamental common law principles, or impact on market competition.

Further work and consultation is recommended to ensure that activities that will be regulated under the EEZ Act, including certain discharge and dumping activities, will be appropriately classified in the regulations when they are promulgated in order to ensure the regime operates in an effective and efficient manner.

Malcolm McKee – Acting Director, Climate and Risk

Signature of person



Date

14/8/13

## Contents

BACKGROUND AND CONTEXT .....	4
STATUS QUO AND PROBLEM DEFINITION .....	5
OBJECTIVES .....	7
REGULATORY IMPACT ANALYSIS .....	8
Option 1: The Status Quo .....	8
Option 2: Introduction of non-notified discretionary activity classification (Minister decides which activities are non-notified discretionary in regulations) .....	8
Option 3: Introduction of non-notified discretionary activity classification (EPA decides which discretionary activities are notified or non-notified on acceptance of an application).....	10
Option 4: Introduction of controlled activity classification .....	10
ASSESSMENT OF OPTIONS 2, 3 AND 4 AGAINST THE STATUS QUO .....	11
ASSESSMENT OF OPTIONS AGAINST THE OBJECTIVES.....	14
CONSULTATION .....	19
CONCLUSIONS AND RECOMMENDATIONS .....	19
IMPLEMENTATION .....	20
MONITORING, EVALUATION AND REVIEW .....	21

## BACKGROUND AND CONTEXT

Part 2 of the Marine Legislation Bill (MLB) transfers regulatory responsibility for certain discharge and dumping activities in the exclusive economic zone (EEZ) and continental shelf from Maritime New Zealand (MNZ) to the Environmental Protection Authority (EPA). Specifically, the MLB amends the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 (EEZ Act) and consequentially the Maritime Transport Act 1994 (MTA), in order to transfer the regulation of discharges from offshore installations, mining discharges from production facilities on board mineral mining ships and dumping to the EEZ Act from Parts 200 and 180 of the Marine Protection Rules made under the MTA.

The regulation of the following discharge and dumping activities will remain with MNZ under the MTA:

- discharges associated with ships (except from production facilities on ships engaged in mineral mining activities)
- issue of International Oil Pollution Prevention Certificates (including warrants for oil filtering equipment and bilge water holding tanks)
- requirement to maintain an oil record book for machinery space operations
- marine oil spill response planning, preparedness, and response
- reporting of events, such as oil spills
- dumping from New Zealand ships in the high seas, beyond New Zealand's EEZ and continental shelf.

Also under development are the regulations that accompany the EEZ Act. This process includes classifying activities among the three categories currently provided for in the EEZ Act:

- permitted – able to be undertaken as of right, without a marine consent, provided any conditions set in regulations relating to the activity (such as monitoring and reporting) are complied with. In other words, the EPA has no discretion to decline the activity
- discretionary – able to be undertaken if a marine consent has been granted by the EPA. The marine consent process includes public notification of the application, a submissions period and hearings
- prohibited – unable to be undertaken under any circumstances

The need for the consideration of a fourth activity classification arose during the course of the Ministry for the Environment's (the Ministry's) investigations to inform proposals for classifying activities in the EEZ and continental shelf, as it became apparent that there are a number of activities which should be subject to regulatory discretion in order to provide for better environmental effects management and are therefore not suitable for a permitted status. However, these activities are not of the scale that require or warrant the full public process associated with a discretionary classification. For example, certain discharges and dumping, which are being transferred from the MTA to the EEZ Act via the MLB, are likely to fall within this sphere.

This RIS seeks to explore the merits of introducing a fourth activity classification into the EEZ Act. It should be noted that while examples of discharge and dumping activities that take place in the EEZ and continental shelf have been used in this RIS to assess how a fourth classification would provide for better regulation of them, this RIS is not recommending the classification of activities. Activities in the EEZ and continental shelf are not currently classified under the EEZ Act regulations. Activity classification will be subject to public consultation via a discussion document that is scheduled for release in August 2013, and the Minister for the Environment (the Minister) will ultimately decide on the classification status of activities in the EEZ and continental shelf.

## STATUS QUO AND PROBLEM DEFINITION

### *Status quo*

The purpose of the EEZ Act is to promote the sustainable management of the natural resources of the EEZ and the continental shelf. Currently the EEZ Act only allows for activities in the EEZ and continental shelf to be classified as permitted, discretionary or prohibited. Discharge and dumping activities that are being transferred from the MTA to the EEZ Act must be classified into one of these three categories by the Minister in order to bring the transfer of functions into effect

The purpose of the transfer is to have the environmental effects of discharge and dumping activities associated with operations that will be regulated by the EEZ Act assessed holistically within one regime under the EPA, rather than having the EPA assess the environmental effects of an operation, and MNZ assess the environmental effects of discharge and dumping activities related to the operation.

Until regulations are promulgated under the EEZ Act, MNZ will continue to regulate all discharge and dumping activities in the EEZ and on the continental shelf.

### *Problem definition*

The existing process set out in the MTA to decide applications for discharge and dumping permits has proven cost-effective and is set at a scale appropriate to the nature of discharge and dumping activities and their effects.

The enactment of the MLB and the promulgation of its associated regulations will result in the transfer of certain discharge and dumping functions from MNZ to the EPA. The EEZ Act currently does not provide a classification category that would allow the EPA to regulate certain discharges and dumping similar to how MNZ currently regulates them. This outcome will either create greater uncertainty of process and outcome for operators than is currently the case, or will limit the regulatory flexibility and discretion of the EPA. This result also creates doubt for the public that the current and proposed activities in the EEZ and continental shelf can be carefully managed and independently overseen.

The risk of not addressing this problem may result in poor environmental outcomes, uncertainty of process for those wishing to utilise resources in the EEZ and continental shelf, and lost economic opportunities if regulation is onerous or liability is unclear.

### *Discharge activities under the status quo*

Under the current MNZ regime operators must submit a Discharge Management Plan (DMP) to MNZ for discharge activities that require approval at least two months' prior to the activity taking place. This process does not invite public input, i.e. MNZ does not publicly notify the DMP, nor does it invite submissions or hold hearings before deciding whether to approve the DMP. Transferring these functions to the EEZ Act in its current form would not allow for a process where the EPA can exercise regulatory discretion on discharge applications without the full public notification required in the discretionary classification being applied to every application. The discretionary process set out in the EEZ Act will take up to six months, excluding possible appeals, and has been estimated by the EPA to cost between \$250,000 and \$1,500,000, depending on the complexity of the application, for the processing and decision making associated with the consent. MNZ have estimated that the current process for assessing DMPs requires about of 75 hours staff time, the equivalent of about \$15,000 staff cost. However costs can vary depending on the scale and type of activity.

There are a small number of routine discharges in the EEZ and continental shelf that are regulated by the International Convention for the Prevention of Pollution from Ships 1973 as modified by the Protocol of 1978 (MARPOL). These discharges are permitted for discharge up to certain thresholds, past which point they are prohibited. For example, machinery space oil discharges from installations fall into this

category, whereby the discharge into the sea of oil or oily mixture from fixed or floating platforms is prohibited except when the oil content of the discharge without dilution does not exceed 15 parts per million, in which case it is permitted. The status quo provides both a permitted and prohibited classification that will allow these discharges to be transferred from MNZ to the EPA without any issues.

There are a wider range of discharges that aren't subject to international obligations, and MNZ currently regulate these by requiring operators to submit a DMP for approval as described above. Examples of these types of discharges include operational chemical discharges from installations, and in some cases operational oil discharges from the production and processing of oil. Furthermore, as activities commence, operators may identify other discharges (e.g. different chemicals, tweaked processes) that must be currently approved by MNZ before they can occur. The timing, amount and duration of some discharges that can occur once an activity is underway are often unpredictable, and therefore these processes do not involve public participation under the current MNZ regime.

The status quo in the EEZ Act would not allow for these discharges to be regulated by the EPA in a way that closely resembles the current MNZ regime. These discharges would either be permitted, with no regulatory discretion for the EPA, or would be discretionary, a process that would take up to six months, with full public participation. The effects of these discharges are often technically complex as well as being uncertain, therefore public notification for what are often routine operational discharges will likely increase the cost of application based on comparing MNZ's current cost estimates for approving a DMP, and the EPA's cost estimates for a full discretionary process.

The oil and gas industry are the major existing interest affected by the transfer of certain discharge and dumping activities from MNZ to the EPA. They have indicated that a discretionary classification for their discharge activities would be unworkable for the exploration phase of their activities due to the sequencing and timing required between gaining consent, contracting and transporting rigs to New Zealand, and carrying out the exploratory drilling operation, which last on average for around 30 to 40 days.

#### *Dumping activities under the status quo*

Due to New Zealand's international obligations under the 1996 Protocol of the London Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter 1972 (London Convention), dumping cannot be classified as permitted as it must go through some form of discretionary approval process, such as the marine consent process. This would mean that all dumping applications will be subject to full public notification, and as stated above, the EPA estimate the full process will cost between \$250,000 and \$1,500,000, depending on the complexity of the application.

The current MNZ regime only notifies some dumping applications<sup>1</sup>; the test for non-notification being that in the Director's judgement, the dumping activity would have a minor adverse effect on the marine environment. Under the MTA, notification of dumping applications is often undertaken in order to obtain information about the application's effects on the environment and other users; under the EEZ Act, the EPA have more power to seek further advice and to investigate the impacts of dumping than MNZ currently do under the MTA. Additionally, the EEZ Act requires applicants to describe consultation with existing interests and relevant iwi in their initial application but this is not a requirement for dumping permits under the MTA.

MNZ estimates of the staff resources required for assessing dumping applications range from 15 staff hours (about \$2,000) for burials at sea and up to around 700 hours (about \$170,000) for more complex applications. Most typical dumping applications cost around \$9,000.

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<sup>1</sup> Marine Protection Rule 180.7 – Notification not required in certain cases

The Director is not required to notify an application for a permit and consult as provided for under rule 180.5 before assessing that application if the Director is satisfied that the application relates to dumping of waste or other matter that—

(a) will have, in the Director's view, a minor adverse effect on the marine environment; or  
(b) is clearly in breach of the London Convention and the application will not be granted.

## OBJECTIVES

The following five objectives were set for the transfer of certain discharge and dumping functions from MNZ to the EPA<sup>2</sup>:

1. Certainty of process for operators 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.

For the purposes of carrying out this RIS, these five high level objectives have been used to develop a number of assessment criteria with which to assess activity classification options. These criteria are set out in Table 1 below.

**Table 1: Assessment criteria under each of the high level objectives**

High Level Objective	Criteria
Certainty of process for operators is maintained or enhanced	<ul style="list-style-type: none"> <li>• The new process provides a similar or improved level of certainty compared to the current process</li> </ul>
Efficiency gains can be realised for resource users and applicants	<ul style="list-style-type: none"> <li>• Discharge and dumping applications in the EEZ and continental shelf can be assessed alongside the wider activity of which they are a part in the EPA consenting regime</li> <li>• Limited compliance costs for operators</li> </ul>
The role of the public and Māori can be enhanced	<ul style="list-style-type: none"> <li>• Public and iwi involvement is proportionate to the effects of an activity on their interests</li> <li>• Opportunity provided for public and iwi participation in application process</li> <li>• Effects on existing interests are effectively managed</li> </ul>
Robust environmental outcomes can be achieved for New Zealand	<ul style="list-style-type: none"> <li>• Adverse effects to the environment are avoided, remedied or mitigated</li> <li>• New information about the EEZ and continental shelf will be easily factored in to conditions on activities to ensure effective environmental effects management</li> </ul>
Government processes are efficient and technical skills can be concentrated in one agency	<ul style="list-style-type: none"> <li>• Applications for discharge and dumping activities in the EEZ and continental shelf will be assessed by one regulator</li> </ul>

<sup>2</sup> These objectives were developed based on an agreed set of Cabinet principles regarding activities that could be transferred to the EPA, and were used in the RIS of 14 September 2011 that analysed which agency (if any) should be responsible for the regulation of discharges from offshore installations and dumping in the EEZ and continental shelf. This RIS can be found at [www.treasury.govt.nz/publications/informationreleases/ris#tdrf](http://www.treasury.govt.nz/publications/informationreleases/ris#tdrf).

## REGULATORY IMPACT ANALYSIS

The following options have been considered in response to the problem definition stated above:

1. Maintain the status quo of classifying activities in the EEZ Act regulations using the three activity classifications of permitted, discretionary and prohibited currently provided for in the EEZ Act.

Create a Supplementary Order Paper that would introduce one of the following activity classifications to the EEZ Act through Part 2 of the MLB:

2. Non-notified discretionary classification (Minister would decide which activities should be classified as non-notified discretionary in regulations)
3. Non-notified discretionary classification (The EPA would decide on acceptance of an application for an activity that the Minister has classified as discretionary whether it should be notified or non-notified)
4. Controlled activity option.

### *Option 1: The Status Quo*

Option 1 involves retaining the status quo of regulating activities, including discharges and dumping, into one of the three activity classifications (permitted, discretionary or prohibited) currently provided for in the EEZ Act. This option requires no further changes to the MLB or EEZ Act additional to those already being undertaken. The Minister must classify the discharge and dumping activities that are being transferred from the MTA to the EEZ Act in order to complete the transfer.

### *Option 2: Introduction of non-notified discretionary activity classification (Minister decides which activities are non-notified discretionary in regulations)*

This option will provide for the Minister to classify activities as non-notified discretionary in the EEZ Act regulations.

Operators wishing to undertake such activities will prepare an impact assessment and provide it to the EPA as part of a marine consent application. Operators would be required to describe what consultation they undertook with existing interests<sup>3</sup> and iwi while developing their impact assessment, but neither existing interests nor iwi would have the right to veto an application. The application will not be publicly notified, there will not be an opportunity for the public to make submissions, and there will not be a public hearing.

On receiving an application, the statutory timeframe for the EPA to process a non-notified discretionary marine consent application will be 60 working days (this compares to the discretionary marine consent

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- <sup>3</sup> EEZ Act interpretation of existing interests: "existing interest means, in relation to New Zealand, the exclusive economic zone, or the continental shelf (as applicable), the interest a person has in—
    - (a) any lawfully established existing activity, whether or not authorised by or under any Act or regulations, including rights of access, navigation, and fishing;
    - (b) any activity that may be undertaken under the authority of an existing marine consent granted under section 62;
    - (c) any activity that may be undertaken under the authority of an existing resource consent granted under the Resource Management Act 1991;
    - (d) the settlement of a historical claim under the Treaty of Waitangi Act 1975;
    - (e) the settlement of a contemporary claim under the Treaty of Waitangi as provided for in an Act, including the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992;
    - (f) a protected customary right or customary marine title recognised under the Marine and Coastal Area (Takutai Moana) Act 2011"



process which takes up to working 140 days, not including the possibility of appeals). This process is comprised of the following steps:

1. lodgement of an application and acceptance/rejection by the EPA of application as complete within 10 working days
2. the EPA can request and receive further advice and/or information under section 44 of the EEZ Act. This provision will be used to seek and receive any expert analysis required as well as information from parties who claim to have an existing interest which is not adequately addressed by the application information
3. analysis by the EPA of the application in light of any new information, advice, and the further information obtained in step 2 for decision-makers to question or clarify any of this information
4. final decision to be issued within 50 working days after the EPA has accepted an application as complete.

For an application that is deemed complete in the first instance the time required to process would be as little as 30 working days or less.

If more than 60 working days is needed to process the application due to the applicant needing additional time to prepare and provide any additional information the EPA may require, the EPA has the power to extend the timeframes. However, with the provision of good guidance material and early engagement between the EPA and the applicant the need for additional information should be minimised.

For discharge and dumping activities that are classified as non-notified discretionary, the EPA will have the discretion to delegate decision making on marine consent applications to the Chief Executive of the EPA, who can then sub-delegate decision making to employees. This allows for experts at the EPA to make decisions on discharge and dumping applications as is currently the case at Maritime New Zealand, allowing for timely processing of these applications.

Decision making for all other non-notified discretionary activities that are covered by section 20 of the EEZ Act will be restricted from delegation, reflecting the need the fact that these activities have not previously been regulated in the EEZ and continental shelf for their impacts on the environment and existing interests, and will therefore require greater scrutiny. Section 16 of the EEZ Act requires that the EPA Board makes decisions on these activities, or delegate decision making to a committee as provided for in section 16 of the Act.

If a proposal requires both discretionary (i.e. notified) and non-notified marine consents, operators may submit all of the consent applications together, but the EPA will only be able to notify the discretionary consent/s, and not the non-notified discretionary consent/s. This will also apply where the non-notified consent application is part of a nationally significant cross-boundary proposal under the Resource Management Act.

Reviews of non-notified consents will be non-notified, and the right of appeal will be to the High Court on points of law and limited to applicants. Because there will be no submitters on non-notified discretionary applications, applicants will be the only party that is able to appeal non-notified discretionary consents on points of law. Any party will still be able to seek a judicial review of a decision on a marine consent.

The EPA estimates the cost of processing a non-notified discretionary marine consent will be between \$100,000 and \$450,000, depending on the complexity of the application. If operators apply for a non-notified discharge marine consent for a discharge at the same time they apply for a marine consent to which the discharge relates, the EPA expects the marginal costs of the discharge component to be minimal or zero, depending on the quality of the discharge application.

*Option 3: Introduction of non-notified discretionary activity classification (the EPA decides which discretionary activities are notified or non-notified on acceptance of an application)*

This option will require the EPA to decide whether an application for marine consent will be notified or not on a case by case basis. The decision will be based on the following test:

An application for resource consent will be publicly notified if:

- the proposed activity will have or is likely to have adverse effects on the environment or existing interests that are significant, or
- notification is requested by the applicant, or
- special circumstances exist.

If the application proceeds as non-notified, the process set out in Option 2 above will apply.

If a proposal requires both notified and non-notified marine consents, the EPA would consider the consent applications separately, but could take into account the cumulative effects of the whole proposal in decision making. The notification test would also apply to reviews of marine consents, and for non-notified consents, the right of appeal will be to the High Court on points of law, limited to applicants, and any party will be able to seek a judicial review of a decision on a marine consent.

This option would not provide for the same level of certainty for operators as non-notified discretionary option A, as operators will not know whether a consent application is going to be subject to full public consultation before they apply for a consent; instead this decision will be made by the EPA after an application has been lodged. Over time as operators get used to the EPA regime, uncertainty should decrease. Pre-application meetings between the EPA and operators would also help to further alleviate any uncertainty that could arise under this option.

MNZ currently has the ability to apply discretion to publicly notify dumping applications, but not discharge applications. This option would therefore introduce a new level of uncertainty for operators with discharge activities than that which currently exists in the MNZ regime.

If the EPA decides a consent application should proceed as non-notified discretionary, it will proceed in the same way as Option 2 above.

The EPA estimates the cost of processing a non-notified discretionary marine consent will be between \$100,000 and \$450,000, depending on the complexity of the application. If operators apply for a non-notified discharge marine consent for a discharge at the same time they apply for a marine consent to which the discharge relates, the EPA expects the marginal costs of the discharge component to be minimal or zero, depending on the quality of the discharge application.

*Option 4: Introduction of controlled activity classification*

This option will provide for the Minister to classify any activities as controlled in the EEZ Act regulations.

A controlled classification requires the operator to meet conditions set out in regulations, as well as any additional conditions imposed by the EPA, before undertaking the controlled activity. The EPA does not have discretion to approve or decline the activity, only to impose conditions related to any matters the regulations state the EPA has reserved control over. This would necessitate highly prescriptive regulations, which would require regular updating as new information comes to light to inform the best approach for appropriate environmental effects management of activities that the Minister classifies under this category.

While this option would provide far greater certainty for operators, it limits the situational flexibility of the EPA. For activities where case by case consideration of environmental impacts is warranted, flexibility is desirable so that the EPA can adapt any of the conditions on an activity, especially in light of new information that may arise. Therefore the controlled classification is unlikely to fully meet the objective relating to effective environmental effects management.

Furthermore, due to New Zealand’s international obligations, dumping cannot be classified as controlled as it must go through some form of approval process that assesses each application according to its merits. This obligation can only be met through a discretionary consent process.

## ASSESSMENT OF OPTIONS 2, 3 AND 4 AGAINST THE STATUS QUO

The following four tables (tables 2, 3, 4 and 5) use the example of a discharge activity that currently requires MNZ approval before the activity can take place (for example operational chemical discharges from installations), and compares the cost and benefits to government, to operators and applicants, and to the public, iwi and existing interests of the permitted and discretionary categories currently included in the EEZ Act with the three classification options proposed in this RIS not currently in the EEZ Act. For the purpose of this comparison, the prohibited option currently included in the EEZ Act is not assessed, as this RIS addresses activities that will not be prohibited in the regulations.

**Table 2: Options 2 and 3 compared to the permitted classification**

Stakeholder	Benefit	Cost	Net Impact
<b>Government</b>	Greater regulatory oversight and case by case environmental effects management	Unlikely to be significant cost to government due to cost recovery from applicants	Better than status quo
<b>Operators/Applicants</b>	Operators will enjoy public confidence of regulatory oversight of their industry	More time and cost than the permitted process  Less certainty of outcome	Worse than status quo
<b>Public/Iwi/Existing Users</b>	Assessment by the EPA of operator engagement with existing interests  Greater regulatory oversight and case by case environmental effects management	No cost compared to a permitted classification	Better than status quo

**Table 3: Options 2 and 3 compared to the discretionary classification**

<b>Stakeholder</b>	<b>Benefit</b>	<b>Cost</b>	<b>Net Impact</b>
<b>Government</b>	Will build operator confidence in the government regime (industry have indicated support for this option)	The information provided to the EPA on how the activity impacts existing interests may not be as comprehensive	Better than the status quo
<b>Operators/Applicants</b>	Much lower cost to operators (the EPA will require operators to cover most of the cost for discretionary and non-notified discretionary applications)  Application process is faster and more certain because of reduced public input	No cost compared to a discretionary classification	Much better than status quo
<b>Public/Iwi/Existing Users</b>	Confidence that the current discharge and dumping governance regime will be closely replicated in the new regime	There will be a loss of ability for public, iwi and existing interests to provide input into applications, or to appeal decisions on points of law	Worse than status quo

**Table 4: Option 4 compared to the permitted classification**

<b>Stakeholder</b>	<b>Benefit</b>	<b>Cost</b>	<b>Net Impact</b>
<b>Government</b>	Allows the EPA to assess the quality of the impact assessment and to set conditions additional to those set in regulations to ensure quality environmental effects management	Unlikely to be significant cost to government due to cost recovery from applicants	Better than the status quo
<b>Operators/Applicants</b>	Operators will enjoy public confidence of regulatory oversight of their industry	Uncertainty as to what additional conditions might be  Longer and more costly process	Worse than the status quo
<b>Public/Inwi/Existing Users</b>	Increased requirement for operator engagement with existing interests  Greater regulatory oversight and case by case environmental effects management	No cost compared to the status quo	Better than the status quo

**Table 5: Option 4 compared to the discretionary classification**

<b>Stakeholder</b>	<b>Benefit</b>	<b>Cost</b>	<b>Net Impact</b>
<b>Government</b>	Will build operator confidence in the government regime (industry have indicated support for this option)	The EPA has limited discretion in relation to the activity; it can't decide if the activity should proceed on a case by case basis, which may hinder environmental effects management	Worse than the status quo
<b>Operators/Applicants</b>	Much lower cost to operators (the EPA will require operators to cover most of the cost for discretionary and non-notified discretionary applications)	Operators may have to adhere to arbitrary conditions in the regulations that don't take into account the nature of the activity, placing unnecessary cost on operators for little or no environmental gain	Better than status quo
<b>Public/Iwi/Existing Users</b>	No benefit compared to discretionary	There will be a loss of ability for public, iwi and existing interests to provide input into decisions on marine consents	Much worse than the status quo

## **ASSESSMENT OF OPTIONS AGAINST THE OBJECTIVES**

As mentioned earlier in this RIS, there are five objectives set for the transfer of certain discharge and dumping activities from MNZ to the EPA. They are:

1. Certainty of process for operators 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.

### *Certainty of process for operators is maintained or enhanced*

The status quo does not allow for a transfer of certain discharge and dumping activities to the EPA that would closely resemble the current regime under MNZ. No discharge activities and only a few dumping activities that MNZ assess are currently subject to public notification; however MNZ retains discretion as to the outcome of the application, can assess the adequacy of engagement with existing interests and iwi by the operator, and can apply conditions. The status quo, which only provides for the Minister to classify activities as either permitted, discretionary or prohibited, does not allow for a similar process to occur.

Options 2 and 3 would allow for an application process to take place that closely resembles the current process in the MNZ regime. Option 2 would give operators certainty as to whether their proposed activity will be subject to full public consultation, while option 3 would give the EPA discretion to notify discharge and dumping applications (MNZ currently has the discretion to notify dumping applications, but not discharge applications).

Like the permitted classification available under the status quo, industry would be provided with certainty of process under options 2 and 3 for discharge and dumping consent applications, however unlike the permitted classification, would not have certainty of outcome. Only option 2 would provide certainty for operators as to how their application will proceed prior to lodging an application with the EPA. Process certainty could be achieved over time if option 3 were adopted as the EPA regime settles in, and process certainty under option 3 could be improved through establishing a process of pre-application meetings between the operator and the EPA to make the EPA discretion to notify a more transparent process.

Because any new classification would be introduced into the EEZ Act and not just apply to discharge and dumping activities, it would apply to all activities in the EEZ Act regulations. Therefore option 3, while allowing for a classification option that more closely resembles the current MNZ regime for dumping, would give the EPA discretion to notify all activities the Minister classifies as discretionary, not just discharge and dumping activities. This RIS has assessed these options as they relate to discharge and dumping activities, and has not addressed other activities that will take place in the EEZ and continental shelf, and therefore it is not possible to provide a thorough assessment as to whether the EPA discretion for notification would be appropriate for all discretionary activities that occur in the EEZ and continental shelf.

Adding a controlled option would not resemble the current regime, as it does not allow for the EPA to exercise discretion on a case by case basis as is currently the case in the MNZ regime with certain discharge and dumping activities. The controlled classification provided by option 4 would only be suitable for activities which do not require regulator discretion. Some discharge activities may fall into this category but some will not and will warrant regulator discretion. For those activities which warrant regulator discretion, under option 4 the only discretionary process available will be the publicly-notified discretionary process currently available under the status quo. Thus option 4 does not maintain or improve certainty through resembling the current regime as closely as possible.

### *Efficiency gains can be realised for resource users and applicants*

The status quo does not allow for a non-notified process containing EPA discretion to approve or decline discharge and dumping consent applications. Due to international obligations under the London Convention, dumping applications cannot be classified by the Minister as permitted because approval from a regulator is required. Under the status quo, only the publicly-notified discretionary process will be available for dumping activities. While some of these applications may be deemed by the Minister to require full public notification, minor dumping activities such as burial at sea and technically complex routine discharges may not warrant a full public process, which would increase process time and costs unnecessarily for operators.

Options 2 and 3 would provide for a shorter consent process than the discretionary classification. The EPA has estimated that the cost of processing a non-notified discretionary marine consent will be between \$100,000 and \$450,000, depending on the complexity of the application, and if operators apply

for a non-notified discharge marine consent for a discharge at the same time they apply for a marine consent to which the discharge relates, the EPA expects the marginal costs of the discharge component to be minimal or zero, depending on the quality of the discharge application.

This compares to the costs of processing a discretionary application, which the EPA has estimated will cost between \$250,000 and \$1,500,000. Therefore, the non-notified discretionary classification will more closely align with the costs associated with applications for discharge management plans and non-notified dumping applications in the current MNZ regime. The statutory timeframe of up to 60 working days for the EPA to consider a non-notified discretionary application is a lot shorter than that provided for the discretionary process, which will take up to 140 working days, excluding the possibility of appeals.

A controlled option could provide lower compliance costs for industry than the discretionary classification for certain discharge activities if the Minister were to classify them as controlled, however it will require the development of highly prescriptive regulations that would need to be updated regularly as new information comes to light. Prescriptive regulations may not adequately address environmental effects management issues, and may put in place arbitrary conditions for operators that impose unnecessary cost without improving environmental outcomes.

A controlled option would not alter the status quo for dumping activities, as these would still be subject to the discretionary classification due to New Zealand's international obligations.

#### *The role of the public and Māori can be enhanced*

Only the discretionary classification under the status quo provides for full public and iwi participation in the consent process and for appeal rights on points of law for any submitter.

In December 2012 Cabinet agreed the regulations for permitted activities will require operators undertaking a permitted activity to engage with iwi to inform the development of their initial environmental impact assessments, but the EPA will not be able to assess the quality of this engagement. These requirements would most likely be included in regulations for controlled activities, if this classification were added as described in option 4.

Under options 2 and 3, operators will have to undertake the same level of engagement prior to development of an impact assessment as per the permitted classification, but the EPA will be able to assess the quality of this engagement as part of the consent application process and to inform their decision to grant or decline the consent. Unlike the full discretionary process, activities classified under the non-notified discretionary option would not have provision for public and iwi participation once the application has been lodged with the EPA, unless the EPA seeks further information from these parties.

Although New Zealand does have an obligation to provide public participation and comment on impact assessments produced for activities in its EEZ and continental shelf that are likely to have significant adverse effect on biological diversity or are considered "major projects"<sup>4</sup>, many discharge and dumping activities are not considered to meet the threshold of "major project".

As option 2 involves the Minister classifying an activity as non-notified discretionary through regulations which are subject to public consultation, the public and iwi will have input on this decision and will have clarity as to what activities are in that classification. Under option 3, the decision on whether to notify an application for a discretionary activity will rest with the EPA and be taken on a case by case basis. The public and iwi will not have input into the EPA's decision to notify and the public and iwi will not have certainty under option 3 as to which activities they will be able to submit on prior to operators lodging an application for consent to the EPA. However compared to option 2, option 3 provides a much higher potential for the public and iwi to have input on an application as the EPA may choose to notify.

Activities are yet to be classified under the EEZ Act, and regardless of which of the four options discussed in this RIS is adopted, the public and iwi will have the opportunity to provide input into the

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<sup>4</sup> Convention for the Protection of the Natural Resources and Environment of the South Pacific Region (Noumea Convention), 1986.



proposals to classify activities via a discussion document that the Ministry for the Environment plans to release in August 2013.

#### *Robust environmental outcomes can be achieved for New Zealand*

All of the options still allow for the Minister to classify activities as discretionary, which provides for all of the environmental impacts of a proposed activity to be assessed and subjected to public notification and consultation.

If the Minister were to classify activities as non-notified discretionary, this classification would provide for the EPA to consider the effects of activities on a case by case basis, and impose conditions that enhance environmental effects management specific to the activity, without the ability for the public to provide input. In some cases, for example technically complex routine discharges such as operational chemical discharges, public input is unlikely to add information that enhances the ability of the EPA to come to a sound decision. Therefore the non-notified discretionary option provides for better environmental effects management than if these activities were classified as permitted, while limiting potentially time consuming and unproductive public notification and hearings under a notified discretionary process for minor activities.

A controlled option would be subject to the conditions set in regulations, and the EPA will be able to impose additional conditions that improve environmental effects management on a case by case basis. A controlled activity would not be subject to approval and therefore is only an appropriate classification for activities which have environmental impacts that can be adequately managed through a combination of generic and case-specific conditions. In order to provide for enhanced environmental effects management, the conditions relating to controlled activities may need to be overly prescriptive or run the risk of not covering every possible scenario related to the activity. This increases the risk that New Zealand would fail to comply with its international obligation to mitigate any significant adverse effects on the marine environment likely to arise from activities under its jurisdiction.

#### *Government processes are efficient and technical skills can be concentrated in one agency*

All of the options presented would allow for discharge and dumping consent applications to be assessed by the EPA alongside other activities relating to the wider operation under one regulatory regime. The transfer of certain discharge and dumping functions from the MTA to the EEZ Act via Part 2 of the Marine Legislation Bill allows for this, and none of the options assessed will prevent this from taking place.

There is some risk regarding the possibility that in theory an activity could be permitted by the Minister, but discharge activities associated with the activity could be classified as discretionary (either non-notified or notified), effectively making the activity a notified or non-notified discretionary activity. This will need to be taken into account as regulations are developed and classification options for activities are considered and consulted on.

#### *Summary assessment of the policy options against the criteria*

The following table (Table 6) uses the example of a discharge activity that currently requires MNZ approval before the activity can take place (for example operational chemical discharges from installations), and compares how the permitted and discretionary categories currently included in the EEZ Act, and the three classification options proposed in this RIS not currently in the EEZ Act would assess the equivalent activity in the forthcoming EPA regime. For the purpose of this comparison, the prohibited option currently included in the EEZ Act is not assessed, as this RIS is addressing activities that will not be prohibited in the regulations.

**Table 6: Summary assessment of the policy options against the criteria**

Criteria	Option 1: Status Quo		Option 2: Non-notified discretionary (Minister decides)	Option 3: Non-notified discretionary (the EPA decides)	Option 4: Controlled
	Permitted	Discretionary			
The new process provides a similar or improved level of certainty compared to the current process	✓✓	xx	✓	-	✓✓
Discharge and dumping applications in the EEZ and continental shelf can be assessed alongside the wider activity of which they are a part in the EPA consenting regime	✓✓	✓✓	✓✓	✓✓	✓✓
Limited compliance costs for operators	✓	xx	-	-	x
Public and iwi involvement is proportionate to the effects of an activity on their interests	x	x	✓	✓✓	x
Opportunity provided for public and iwi input in application process	x	✓✓	-	-	x
Effects on existing interests are effectively managed	x	x	-	-	x
Adverse effects to the environment are avoided, remedied or mitigated	x	✓✓	✓✓	✓✓	-
New information about the EEZ and continental shelf will be easily factored in to conditions on activities to ensure effective environmental effects management	xx	✓✓	✓✓	✓✓	xx
Applications for discharge and dumping activities in the EEZ and continental shelf will be assessed by one regulator	✓✓	✓✓	✓✓	✓✓	✓✓

Key: ✓✓ = much better than MNZ regime; ✓ = better; - = same; x = worse; xx = much worse

## CONSULTATION

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

The Department of Conservation, Department of Internal Affairs, Environmental Protection Authority, Maritime New Zealand, Ministry for Culture and Heritage, Ministry for Primary Industries, Ministry of Business, Innovation and Employment, Ministry of Foreign Affairs and Trade, Ministry of Justice, Ministry of Transport, Te Puni Kōkiri and Treasury.

The policy options in this RIS were informed by submissions from consultation with the public, industry, iwi and key stakeholders during the development of the EEZ Act, and in the public submission stage of the Transport and Industrial Relations Select Committee consideration of the Marine Legislation Bill. Consultation with other government departments has also informed the policy options assessed.

Six out of seven industry submitters to the Transport and Industrial Relations Select Committee on the MLB who are affected by the transfer of certain discharge and dumping activities from MNZ to the EPA raised the idea of introducing a non-notified discretionary classification, however this option has not been subject to select committee process or public scrutiny due to the time constraints under which this RIS was prepared.

Key observations from stakeholders that informed this RIS include:

- Six out of seven industry submissions (there were a total of 13 submissions on Part 2 of the MLB, 9 of which referred to the transfer of certain discharge and dumping activities from MNZ to the EPA) on Part 2 of the MLB to the Transport and Industrial Relations Select Committee believed that the EEZ Act does not have an activity classification sufficiently like the MNZ status quo for discharge and dumping to fit cleanly into the EEZ Act and requested a non-notified consent process be allowed for.
- The only non-industry submission on Part 2 of the MLB that referred to the classification of discharge and dumping activities was received from Ngati Porou, who expressed their desire for applications to be assessed on a case by case basis; and asked to be included and consulted on the development of the EEZ Act regulations.
- Submitters on the EEZ Act also requested a non-notified classification, citing a need to fill the gap in regulatory oversight between the permitted and discretionary classifications.

As stated earlier in this RIS, no activities have been classified as yet by the Minister under the EEZ Act. Regardless of whether a fourth activity classification is added to the EEZ Act or not, a discussion document on the EEZ Act regulations will be released by the Ministry for the Environment for public and iwi consultation. The public and iwi will have the opportunity to have input into how activities that take place in the EEZ and continental shelf should be classified in the regulations before the Minister makes the final decision on classifications and the regulations are promulgated.

It is intended that the discussion document will be released for consultation in August 2013.

## CONCLUSIONS AND RECOMMENDATIONS

The Ministry for the Environment's preferred option is the introduction of a non-notified discretionary activity classification. Both options 2 and 3 would provide for this, and provide for regulation that is either the same as or better than the current MNZ regime when assessed against all of the objectives, and will provide for a better regulatory regime than the status quo. The objectives have not been weighted because of information constraints on account of the limited preparation time for this RIS, so an apparent best option out of options 2 and 3 has not been established.

However, the effects on the overall EEZ Act regulatory regime of option 2 are better known than those of option 3. This is because although the current MNZ regime for regulating dumping activities allows for

MNZ discretion as to whether to notify these activities, and option 3 would better resemble this, the impact this would have on other activities, including discharge activities, in the EEZ and continental shelf that the Minister will classify as discretionary is uncertain. For this reason, giving the Minister discretion to classify activities as either notified or non-notified in the regulations would provide far more certainty of process for the wider EEZ Act regime.

Keeping the status quo will provide stark options for the Minister when assessing how certain discharges and other activities in the EEZ should be classified, due to the very different natures of the permitted and discretionary options provided for currently in the EEZ Act. Either effective environmental regulation or operator certainty will be significantly compromised if the Minister were to classify certain activities under either of these options.

Therefore, the introduction of a non-notified classification option will give the Minister more flexibility when assessing how activities should be classified, without limiting the Minister's ability to classify options as permitted or discretionary where appropriate.

A controlled option fails to address the issues in the status quo as they relate to dumping consent applications, does not enhance environmental effects management and fails to provide the opportunity for improved public and iwi participation. Also, it is not sufficiently robust to ensure New Zealand complies with its international obligations to mitigate significant adverse impacts on the marine environment.

## **IMPLEMENTATION**

A non-notified discretionary activity classification can be introduced into the EEZ Act via the introduction of a Supplementary Order Paper during the Committee of the Whole House stage of the MLB (predicted to be around September 2013). The Office of the Clerk of the House of Representatives has confirmed that the proposed SOP is within procedural and policy scope of the MLB. Successful implementation is subject to Cabinet approval for the Supplementary Order Paper and the progression of the MLB in the House.

While the transfer of discharge and dumping functions from MNZ to the EPA via Part 2 the MLB amends the EEZ Act and consequentially the Maritime Transport Act 1994, the introduction of a non-notified discretionary classification will not require additional amendments to the Maritime Transport Act.

Proposals for discharge and dumping regulations will be subject to public consultation via a discussion document in August 2013. The Supplementary Order Paper will be tabled in the House before the planned discussion document is released, and therefore the public will be able to have input into how activities are classified, with option 2 included in this consultation.

The EPA is currently preparing for the eventual transfer of certain discharge and dumping functions. The addition of a fourth activity classification will not hinder the EPA operationalising regulations. The EPA has the requisite expertise to manage the regulation of discharge and dumping activities.

A non-notified discretionary process will likely cost less than a discretionary option due to the removal of the public participation requirement, but more than a permitted process, due to the greater level of regulatory scrutiny. The EPA will be able to recover most of the costs associated with a non-notified discretionary process from the applicant, as per the current discretionary classification.

Because the EEZ Act only came into force on 28 June 2013, it is unknown what the overall cost of the regulatory regime will be if a non-notified discretionary option is included, compared to the status quo. This is due to the fact that it is unknown whether some activities that end up being classified as non-notified discretionary in the regulations would have been classified as permitted or discretionary under the status quo.

## **MONITORING, EVALUATION AND REVIEW**

The effectiveness of the non-notified discretionary classification will be monitored, evaluated and reviewed as part of the wider EEZ framework.

As the responsible 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 effectiveness of all EEZ functions, including the non-notified discretionary activity classification
- Evaluation of the activity classifications, including their ease of use for operators, and their effectiveness in managing environmental effects.