



Cabinet

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Minute of Decision

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Proposal for Exclusive Economic Zone Environmental Effects Legislation

Portfolio: Environment

On 16 May 2011, following reference from the Cabinet Economic Growth and Infrastructure Committee, Cabinet:

Background

- 1 **noted** that in June and August 2008, the previous government approved the policy for the drafting of a Bill to fill gaps in the regulation of environmental effects in New Zealand's Exclusive Economic Zone (EEZ) and extended continental shelf [CAB Min (08) 23/7 and CAB Min (08) 30/3A];
- 2 **noted** that the drafting of the proposed legislation was not completed before the 2008 general election, and that the Bill was not introduced to Parliament;
- 3
 - 3.1 **rescinded** all decisions that are included in the minutes referred to in paragraph 1 above; and instead
 - 3.2 **agreed** to proceed with the EEZ and extended continental shelf environmental effects legislation proposed in 2008 while making changes to the policy to reflect the priorities of the government;
- 4 **noted** that the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Bill has a category 4 priority (to proceed to a select committee in 2011) on the 2011 Legislation Programme;

Purpose and principles of legislation

- 5 **agreed** that the purpose of the legislation will be:
 - 5.1 to manage the adverse environmental effects of activities in the EEZ and extended continental shelf;
 - 5.2 achieved by balancing the adverse effects of the activities with the benefits activities provide;

- 6 **agreed** that, in addition to applying to the EEZ, the legislation shall apply to the extended continental shelf to the extent possible under United Nations Convention on the Law of the Sea (UNCLOS);
- 7 **agreed** that decision-makers under the legislation are to act consistently with international obligations, and to take into account the rights and duties of other states, for example in relation to international cables and pipelines and marine scientific research;
- 8 **agreed** that the legislation establish an over-arching jurisdiction over environmental effects of activities in the EEZ and extended continental shelf, from which effects managed under existing legislation are excluded, including under the:
- 8.1 Fisheries Act 1996;
 - 8.2 Maritime Transport Act 1994;
 - 8.3 Marine Mammals Protection Act 1978;
 - 8.4 Wildlife Act 1953;
 - 8.5 Biosecurity Act 1993 (the Biosecurity Law Reform Bill currently before the Primary Production Committee provides for the management of biosecurity risks in the EEZ);
 - 8.6 allocation provisions of the Crown Minerals Act 1991 and Continental Shelf Act 1964;
- 9 **agreed** that those activities that fall within the scope of the new legislation will not be exempted from the provisions of any other relevant legislation;
- 10 **agreed** that the legislation set out an obligation for adverse environmental effects to be avoided, remedied, or mitigated;
- 11 **agreed** that, in addition to the purpose of the legislation and the obligation to avoid, remedy, or mitigate adverse effects, the principal considerations for decision-makers will include:
- 11.1 the present and future economic wellbeing of New Zealand;
 - 11.2 effects on the health and safety of people;
 - 11.3 protecting existing uses, interests and values;
 - 11.4 safeguarding the biological diversity and integrity of marine species and ecosystems and processes, protecting rare and vulnerable ecosystems as well as the habitat of depleted, threatened or endangered species;
 - 11.5 managing the cumulative effects of all activities on the receiving environment;
 - 11.6 the efficient use and development of natural and physical resources;
 - 11.7 improving information and knowledge of the marine environment, including the effects of human activity on the marine environment;
- 12 **noted** that the legislation will recognise and respect the Crown's responsibility to give effect to the principles of the Treaty of Waitangi through the provisions referred to in paragraphs 21, 22, 24, 25, 47 and 55 below;

- 13 **agreed** that nothing in the legislation limit or otherwise affect the Marine and Coastal Area (Takutai Moana) Act 2011;
- 14 **agreed** that decision makers under the proposed legislation must:
- 14.1 take into account the best available information;
 - 14.2 consider any uncertainty or insufficiency in the information available;
 - 14.3 exercise caution when information is uncertain or insufficient;
- 15 **agreed** that the legislation enable decision-makers to take an adaptive management approach;
- 16 **agreed** that persons whose activities are subject to the legislation, be responsible for their actions, and have a general duty under the legislation to:
- 16.1 provide training and supervision to employees in order to maintain compliance with the legislation;
 - 16.2 provide sufficient resources to ensure compliance with the legislation, including establishing and following appropriate management systems;

Governance

- 17 **agreed** that the Minister for the Environment:
- 17.1 will be responsible for the legislation and the development of regulations under the legislation;
 - 17.2 will not be able to direct the Environmental Protection Authority (EPA) in relation to specific consent applications and decisions;
- 18 **agreed** that the Ministry for the Environment be the administering agency for the legislation, with the following functions and duties:
- 18.1 providing policy advice on the legislation, including monitoring its effectiveness and advising of any amendments;
 - 18.2 developing regulations in consultation with other agencies;
- 19 **agreed** that the EPA will have functions under the legislation including:
- 19.1 making decisions on applications for consents;
 - 19.2 monitoring operations and compliance with the legislation;
 - 19.3 enforcing the legislation;
 - 19.4 collecting and managing access to information on the EEZ and extended continental shelf;
 - 19.5 promoting awareness of the requirements of the legislation;

- 20 **agreed** that the EPA have the standard ability of a Crown Entity to delegate its functions and powers under the legislation;
- 21 **agreed** that the EPA Maori Advisory Committee be able to provide advice and assistance on matters relating to policy, process, and decisions under the legislation;
- 22 **noted** that the Maori Advisory Committee would not be a substitute for consultation with individual iwi who choose to be involved in the development of regulations, and in the consenting process;

Aligning decision-making and managing cumulative effects

- 23 **agreed** that the legislation will manage the cumulative environmental effects of all activities in the EEZ and extended continental shelf by:
- 23.1 requiring decision-makers to consider the cumulative effects of all activities on the receiving environment at the regulation and consenting level;
 - 23.2 managing the situation where individual permitted activities may have minimal effects, but could collectively have a significant environmental impact;
- 24 **agreed** that when developing regulations, the Minister for the Environment's considerations will include any relevant:
- 24.1 sustainability measures, regulations and fisheries plans under the Fisheries Act 1996;
 - 24.2 rules under the Maritime Transport Act 1994;
 - 24.3 policy and planning instruments made under the Resource Management Act 1991;
 - 24.4 Treaty of Waitangi settlements;
 - 24.5 customary rights or interests granted under the Marine and Coastal Area (Takutai Moana) Act 2011;
 - 24.6 international obligations;
 - 24.7 industry best practice;
 - 24.8 conservation legislation;
- 25 **agreed** that when making decisions under the legislation, the EPA's considerations will include any relevant:
- 25.1 sustainability measures, regulations and fisheries plans under the Fisheries Act 1996;
 - 25.2 rules under the Maritime Transport Act 1994;
 - 25.3 policy or planning instruments made under the Resource Management Act 1991;
 - 25.4 Treaty of Waitangi settlements;
 - 25.5 customary rights or interests granted under the Marine and Coastal Area (Takutai Moana) Act 2011;

- 25.6 international obligations;
- 25.7 industry best practice;
- 25.8 conservation legislation;
- 26 **agreed** that the Minister of Fisheries, when setting sustainability measures, regulations or fisheries plans, shall consider any relevant provisions under the legislation and regulations;
- 27 **agreed** that the Maritime Transport Act 1994 be amended to ensure the responsible Minister or Director of Maritime New Zealand, when creating rules, shall consider any relevant provisions under the legislation and regulations;
- 28 **agreed** that decision-makers under the Resource Management Act be required to consider any relevant provisions under the legislation and regulations;

Regulations

- 29 **agreed** that regulations may be made to achieve the purpose and principles of the legislation, and that those regulations may be developed on the recommendation of the Minister for the Environment;
- 30 **agreed** that regulations may be developed for any or all parts of the EEZ and extended continental shelf;
- 31 **noted** that any regulations made over the extended continental shelf will need to:
 - 31.1 reflect New Zealand's sovereign rights, which apply only to the resources of the seabed and subsoil;
 - 31.2 meet the obligation under Article 82 of UNCLOS to make payments to the International Seabed Authority in respect of production from the extended continental shelf;
- 32 **agreed** that the legislation provide for regulations for various matters which may include:
 - 32.1 qualitative or quantitative standards;
 - 32.2 standards for any discharge or the ambient environment;
 - 32.3 methods for classifying a natural or physical resource;
 - 32.4 methods, processes, or technology to implement standards;
 - 32.5 exemptions from standards;
 - 32.6 transitional provisions for standards, methods, or requirements;
- 33 **agreed** that regulations may identify areas requiring specific controls, for reasons that may include:
 - 33.1 they are important or vulnerable due to their biophysical characteristics;
 - 33.2 they are important in relation to specific uses;

- 33.3 they would benefit from aligning regulation across different laws;
- 33.4 they could support the concentration of activities through less stringent regulations or standards;
- 33.5 they have potential for conflict between different activities;
- 33.6 they face cumulative environmental pressures from different activities;
- 34 **agreed** that the regulations be able to incorporate documents or standards by reference;
- 35 **agreed** that regulations categorise activities based on their effects as either permitted, discretionary, or prohibited;
- 36 **agreed** that regulations set standards with which an activity must comply to be permitted or discretionary;
- 37 **agreed** that permitted activities be allowed without a consent so long as:
- 37.1 the effects of the activity are below the thresholds set in regulations;
- 37.2 the performance of the activity complies with any standards defined in the regulations;
- 38 **agreed** that persons undertaking permitted activities will be required to notify their activities to the EPA, which will enable assessment of compliance with the legislation, and assessment of the cumulative effects of multiple activities;
- 39 **agreed** that regulations may require persons undertaking permitted or discretionary activities to maintain accurate records and to provide these records to the EPA;
- 40 **agreed** that discretionary status means an activity requires a consent, the granting of which is at the discretion of the EPA;
- 41 **agreed** that the regulations define effects or activities as discretionary:
- 41.1 on the basis of the actual or potential environmental effects of an activity;
- 41.2 where necessary to manage the cumulative effects of activities;
- 41.3 where the activity would, or is likely to, have a significant adverse effect on other defined interests that must be considered in the consenting process;
- 42 **agreed** that prohibited activities cannot be consented;
- 43 **agreed** that activities or effects will be discretionary if they are not otherwise categorised in regulations as permitted, discretionary, or prohibited;
- 44 **agreed** that the legislation or regulations provide specifically for activities with special status under international law, such as international cables and pipelines, and marine scientific research;
- 45 **agreed** that regulations may be made that have the effect of closing an area to activities covered by the proposed legislation, if doing so is required to meet the purpose and principles of the legislation;

- 46 **agreed** that the Minister for the Environment publicly notify the intent to develop regulations;
- 47 **agreed** that when developing regulations, a process will be established that gives adequate time and opportunity to seek comment from the public, iwi, relevant persons, organisations, departments and Ministers;

Consents

- 48 **noted** that only discretionary activities will require consent (see paragraphs 37-42 above);
- 49 **agreed** that an application for a consent must describe all aspects of the proposal, and identify effects of the proposal on the environment and other interests, through an impact assessment statement;
- 50 **agreed** that the legislation or regulations specify matters that must be included in the application;
- 51 **agreed** that the content of the impact assessment statement may be scaled to the size and significance of the effects that the activity may have on the environment and other interests;
- 52 **agreed** that the impact assessment statement must be sufficient to enable consideration of:
- 52.1 the actual and potential effects on the environment;
 - 52.2 the actual and potential effects on other interests;
 - 52.3 any consultation undertaken;
 - 52.4 any alternative locations or methods for undertaking the activity to help avoid, remedy or mitigate any significant adverse effects;
- 53 **agreed** that the EPA be able to decline applications that are deemed incomplete, or to ask for further information from the applicant;
- 54 **agreed** that the EPA may:
- 54.1 seek independent audit of the impact assessment statement for peer review and to determine if it contains sufficient information;
 - 54.2 commission any independent advice considered necessary to fulfil its responsibilities under the legislation;
- 55 **agreed** that all consent applications be publicly notified, and notice given directly to agencies, iwi, and other persons that the EPA considers will have an interest in the application;
- 56 **agreed** that submissions on a consent application may be made by any person;
- 57 **agreed** that when making a decision on an application for consent, the EPA must determine whether there will be a significant adverse effect on recognised “interest holders”;
- 58 **agreed** that in considering an application for consent, the EPA will recognise “interest holders” as those that appear to the EPA likely to be affected by the proposal;

- 59 **agreed** that when determining whether adverse effects on recognised interests are significant, the matters to be considered may include:
- 59.1 international obligations;
 - 59.2 the effects of the proposed activity on the recognised interest;
 - 59.3 the area that the proposed activity would have in common with the recognised interest;
 - 59.4 the degree to which both the proposed activity and recognised interests must be carried out to the exclusion of other activities;
 - 59.5 whether the recognised interest can be exercised only in a particular area;
- 60 **agreed** that the EPA not consider the effects on a recognised interest if the interest holder gives written approval for the proposed activity;
- 61 **agreed** that the EPA may request an applicant to meet with submitters, or request they enter into mediation, for the purpose of resolving the issues;
- 62 **agreed** that hearings will be held if the applicant or any submitter requests one to present their application or submission, and give evidence in support;
- 63 **agreed** that the EPA can decide to hold a hearing;
- 64 **agreed** that when making a decision, the EPA must consider matters including:
- 64.1 any submissions on the application;
 - 64.2 the actual and potential environmental effects of the proposed activity, including cumulative effects and effects that may extend into the territorial sea or on land;
 - 64.3 existing recognised interests likely to be affected, including interests in the territorial sea or on land;
 - 64.4 any decisions relating to the area or resource that are made under any other relevant legislation;
 - 64.5 proposals to avoid, remedy or mitigate any adverse effects;
- 65 **agreed** that when making a consent decision, the EPA must keep a record of the reasons for the decision and the conclusions regarding the issues raised in submissions;
- 66 **agreed** that when making a decision, the EPA must not consider trade competition issues;
- 67 **agreed** that the EPA will not consider the effects on climate change of discharging greenhouse gases;
- 68 **agreed** that the EPA can either approve the consent in whole or in part, and with or without conditions; or decline the consent;
- 69 **agreed** that the legislation will specify timeframes for all stages of the consenting process binding on both the decision-maker and the applicant;

- 70 **noted** that activities at the interface of the EEZ and the territorial sea may require both a consent under the legislation and a resource consent under the Resource Management Act (referred to as cross-boundary consents);
- 71 **agreed** that the legislation establish a single process for cross-boundary consent applications whereby:
- 71.1 the applicant is required to prepare a single consent application covering both the resource consent and the EEZ or extended continental shelf consent;
 - 71.2 the EPA and relevant resource consent authority will jointly:
 - 71.2.1 publicly notify the application;
 - 71.2.2 receive submissions;
 - 71.2.3 hold hearings (if applicable);
 - 71.2.4 make decisions on applications;
 - 71.3 if approved, a separate resource consent and EEZ or extended continental shelf consent will be issued by each relevant authority in accordance with each statute;
- 72 **agreed** that, if cross-boundary proposals are considered nationally significant under the Resource Management Act:
- 72.1 if a board of inquiry is the decision-maker for a resource consent, the EPA be able to delegate its EEZ and extended continental shelf decision-making functions to a committee made up of the same members as the board of inquiry;
 - 72.2 if the Environment Court is the decision-maker for a resource consent, it be able to decide the EEZ and extended continental shelf consent;
 - 72.3 the EPA may retain its administrative functions under the Resource Management Act;
 - 72.4 the EPA may also be appointed as advisor to the board of inquiry or Environment Court on the EEZ application;
- 73 **agreed** that activities requiring cross-boundary consents will need to comply with the relevant requirements under each statute;
- 74 **agreed** that for cross-boundary consent processes, the statutory timeframes in the Resource Management Act and the legislation be aligned;
- 75 **agreed** that the EPA be responsible for administrative matters relating to cross-boundary consent applications, including responsibility for meeting statutory timeframes;
- 76 **agreed** that:
- 76.1 a consent will be a use permission, defined strictly by the nature and conditions of the consent, and not legal or personal property;
 - 76.2 the maximum term of a consent be 35 years;

- 76.3 on expiry of a consent a new consent would be required to continue the activity;
- 76.4 the duration of a consent should meet the purpose and principles of the legislation, including the adaptive approach to management;
- 76.5 the duration of a consent should take into account the duration of any other legislative authorisations for the activity;
- 76.6 the legislation set out timeframes for the commencement of a consent at the completion of the decision-making process, based on those in the Resource Management Act;
- 77 **agreed** that the duration of a consent can be reviewed and changed through the consent review process;
- 78 **agreed** that consents are transferable if the conditions of the consent remain the same for the new holder and the location is unchanged;
- 79 **agreed** that any conditions that are considered appropriate to meet the purpose and principles of the legislation may be attached to a consent to define ongoing requirements for the consent to remain valid;
- 80 **agreed** that consent conditions:
- 80.1 may relate to end-of-life or emergency considerations, such as decommissioning, liability, and clean-up provisions;
- 80.2 have the ability to require bonds or insurance to be taken for these purposes;
- 81 **agreed** that the EPA may review a consent where adverse effects have arisen that were not anticipated at the time of the decision, or where new information is available that would have materially influenced the decision on the consent had it been available at the time;
- 82 **agreed** that consents also may be reviewed in the event of non-compliance with consent conditions;
- 83 **agreed** that the holder of a consent can apply for changes to the conditions of consent;
- 84 **agreed** that:
- 84.1 the conditions of a consent may be modified after review, or the consent may be cancelled;
- 84.2 the process for reviewing and modifying consents shall be modelled on the full consent process and the EPA will be the final decision-maker;
- 84.3 there will be discretion to use a non-notified process, without the requirement for hearings, when making minor modifications to consents;

- 85 **agreed** that a consent may be cancelled only in the following circumstances:
- 85.1 no material efforts have been made to exercise the consent in five consecutive years;
 - 85.2 review of the consent reveals information that, if known, would have resulted in the consent not originally being granted, and cannot be addressed through modification of consent conditions;
 - 85.3 repeated non-compliance with conditions of consent;

Appeals

- 86 **agreed** that there be appeal rights to the High Court on points of law against:
- 86.1 the decision to grant or decline a consent;
 - 86.2 the conditions placed on a consent;
 - 86.3 any decision to review or cancel a consent;
- 87 **agreed** that appeals in relation to consents may be lodged only by applicants for consent or submitters;
- 88 **agreed** that the legislation create a new jurisdiction for the Environment Court to have powers necessary for issuing enforcement orders and convicting for offences;
- 89 **agreed** that persons may appeal to the High Court on the merits and on points of law against enforcement orders and conviction for offences under the proposed legislation;

Monitoring, enforcement and offences

- 90 **agreed** to a wide range of monitoring options which can include:
- 90.1 information reporting requirements for activities, including self-monitoring;
 - 90.2 observer coverage;
 - 90.3 inspections;
 - 90.4 audit of operations, including independent evaluation;
- 91 **agreed** that methods for dealing with non-compliance with the legislation may include:
- 91.1 enforcement orders;
 - 91.2 offence provisions;
 - 91.3 review and modification or cancellation of consent;
- 92 **agreed** that enforcement orders could:
- 92.1 require a person to cease, or prohibit a person from commencing, an activity;
 - 92.2 require actions to ensure compliance with the legislation;
- 93 **agreed** that any person may apply to the Environment Court for an enforcement order;

- 94 **agreed** that the legislation contain offence provisions that set out the categories of offence and maximum penalties;
- 95 **agreed** that offences under the legislation may include contravention of, or permitting the contravention of:
- 95.1 regulations;
 - 95.2 the requirement to hold a consent;
 - 95.3 a consent condition;
 - 95.4 an enforcement notice;
 - 95.5 the requirement to notify the EPA of an activity to which the legislation applies;
 - 95.6 the requirement to produce a document on request of the EPA;
 - 95.7 the requirement to not wilfully obstruct, hinder, resist or deceive any person in the execution of any powers conferred on that person by or under the legislation;
- 96 **agreed** that that the legislation establish scaled penalties for different categories of offence;
- 97 **agreed** that the maximum statutory penalties be aligned with those under the Maritime Transport Act and Resource Management Act;

Cost recovery

- 98 **agreed** that the legislation set out the power for the EPA to cost recover;
- 99 **agreed** that the costs to be recovered, in part or whole, may include:
- 99.1 the processing of a consent application;
 - 99.2 administering and monitoring the consent once granted;
 - 99.3 any other costs related to consent conditions;
 - 99.4 monitoring permitted activities, where this is provided for in the regulations;
- 100 **agreed** that the principles of equity, efficiency, justifiability, and transparency should be applied for cost recovery under the legislation;
- 101 **agreed** that the calculation of these costs will also include the cost of any associated overheads;

Consequential amendments

- 102 **agreed** that if necessary the Environment Act 1986 be amended to take account of the legislation;
- 103 **agreed** that, if necessary, the Fisheries Act and the Maritime Transport Act be amended to allow for better management of the cumulative effects on the environment of all activities in the EEZ, and to achieve better alignment across statutes;

- 104 **agreed** that, if necessary, the Resource Management Act be amended to give effect to a single cross-boundary consent process;
- 105 **agreed** that the Biosecurity Act be amended to provide for a temporary exemption from consent requirements for biosecurity activities in an emergency situation in the EEZ;

Commencement and transitional provisions

- 106 **agreed** that the legislation come into force through Order in Council when the first complete set of regulations has been developed;
- 107 **agreed** that when the legislation comes into force, persons carrying out pre-existing activities shall:
- 107.1 notify the EPA of the activity within six months of the legislation coming into force;
 - 107.2 be issued with a transitional consent from the EPA that will make the activity lawful for the duration of the transitional consent;
 - 107.3 apply for a consent within a stipulated time, where the EPA has determined this to be necessary after assessing the effects of the activity (if the effects of the activity are considered minor a consent will not be necessary);
- 108 **agreed** that the transitional provisions will not apply to the operation of existing oil and gas production installations and associated infrastructure, such as pipelines, in the EEZ;
- 109 **agreed** that there will be discretion to make a decision on a transitional consent through a non-notified process;
- 110 **invited** the Minister for the Environment and the Minister of Energy and Resources, in consultation with other relevant Ministers, to report back to EGI by the end of July 2011 with a proposal to address the potential environmental impacts of activities, including oil and gas activities, in the EEZ and extended continental shelf that occur before the legislation and a complete set of regulations come into force;

Application to defence activities

- 111 **agreed** that the legislation shall not apply to defence activities;

Financial implications

- 112 **noted** that the EPA's costs associated with consents will be recoverable (see paragraphs 98-101 above), and that any additional funding for these functions will be reprioritised from existing baselines, with no net impact on the operating balance or debt;
- 113 **noted** that the costs for the Ministry for the Environment in developing regulations under the EEZ legislation will be part of the Ministry's baseline policy function;
- 114 **authorised** the Minister of Finance and the Minister for the Environment to approve any appropriation changes necessary once the legislation is passed;

Legislative implications

- 115 **agreed** that the legislation should apply to the Crown;
- 116 **agreed** that the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Bill remain as a category 4 priority (to be referred to a select committee in 2011) on the 2011 Legislation Programme;

Next steps

- 117 **noted** that the Minister for the Environment will publicly signal the intention to develop the legislation and outline key features of the proposal;
- 118 **noted** that the Minister for the Environment intends to release the paper under EGI (11) 64 and the associated Cabinet decisions, subject to consideration of any information that would be withheld if the information had been requested under the Official Information Act 1982;
- 119 **noted** that officials are investigating transferring from Maritime New Zealand to the EPA the management of discharges in the EEZ and extended continental shelf (but not oil spill planning and response);
- 120 **invited** the Minister for the Environment to issue drafting instructions to the Parliamentary Counsel Office for the preparation of the Bill to implement the decisions referred to above;
- 121 **authorised** the Minister for the Environment, in consultation with other Ministers as appropriate, to approve any further technical matters as required in drafting the Bill to be submitted for approval to the Cabinet Legislation Committee;
- 122 **invited** the Minister for the Environment to report back to the Cabinet Legislation Committee later in 2011 with a draft bill for introduction to the House.

[Withheld]

Secretary of the Cabinet

[Withheld]

Distribution: (see over)

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