

**Cabinet Economic Growth and Infrastructure Committee**

**Proposal for Exclusive Economic Zone Environmental Effects Legislation**

**Proposal**

1. This paper seeks approval for drafting of legislation to fill gaps in the regulation of environmental effects in New Zealand's Exclusive Economic Zone (EEZ) and extended continental shelf (ECS).
2. This legislation will provide for the development of natural resources in the EEZ and ECS, while protecting the environment from the adverse effects of activities.

**Executive Summary**

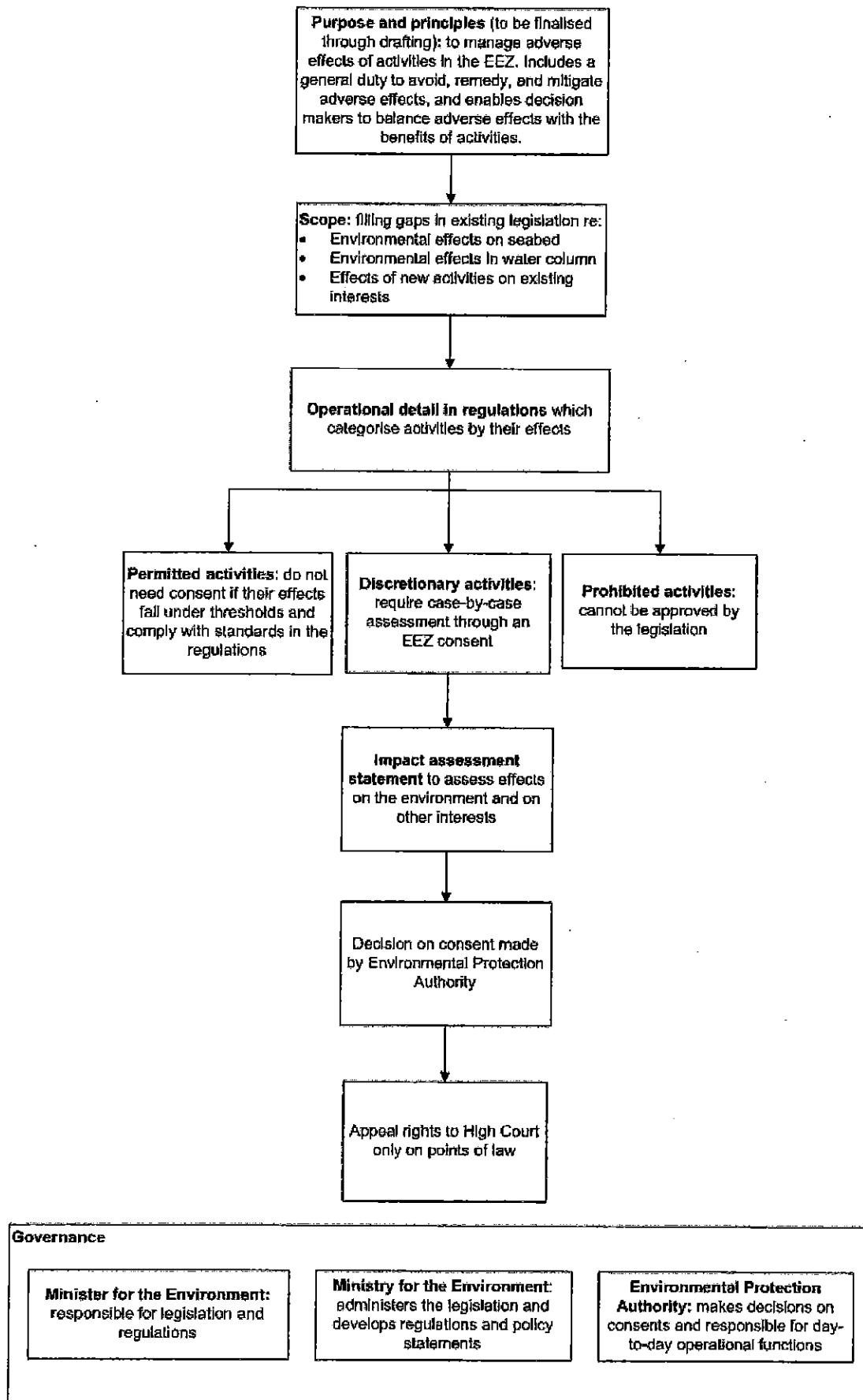
3. New Zealand's EEZ is one of the largest in the world at over four million square kilometres, but it lacks a comprehensive environmental management regime that is standard in many other jurisdictions. This creates a risk of harm to the marine environment, a reputational risk for the country and for industry, and does not provide high levels of certainty for industry on the regulatory processes that may affect their investment.
4. Work on legislation to assess and manage the environmental effects of activities in the EEZ and ECS began under the previous government, but a bill was not introduced to Parliament before the 2008 general election. This paper reworks the proposals to reflect this government's greater emphasis on economic development opportunities and minimising compliance costs. In particular, while the proposal is for environmental legislation, it will have a much stronger emphasis on balancing the environmental effects of activities with the benefits they provide – rather than solely focusing on preventing adverse effects.
5. The need for this legislation has been identified in many places, including:
  - a. *A Bluegreen Vision for New Zealand*
  - b. the *Comparative Review of Health, Safety and Environmental Legislation for Offshore Petroleum Operations*, commissioned by the Minister of Energy and Resources in June 2010 in response to the Gulf of Mexico oil spill
  - c. the Waitangi Tribunal's *Report on the Management of the Petroleum Resource*, released in December 2010.
6. Industry too has called for improved environmental legislation in the EEZ. Petroleum Exploration and Production Association of New Zealand executive officer John Pfahlert was critical of the Government for not progressing this legislation and said it was creating industry uncertainty.
7. The proposal is summarised in Figure 1. The proposed legislation provides an opportunity to improve New Zealand's environmental systems, and its reputation for environmentally sound business practices. The legislation will protect the

- environment from adverse environmental effects, and provide industry with certainty on the legal requirements for investing in New Zealand's EEZ and ECS.
8. The proposed legislation fills gaps in the regulation of the environmental effects of activities in the EEZ and ECS. I favour this approach over amending existing legislation, as the activities that are currently unregulated account for a small proportion of activity in the EEZ and ECS. Amending existing laws such as for fisheries and maritime transport would create unnecessary uncertainty for these industries. Activities that would be covered by the new legislation include seabed mining, some aspects of petroleum activities, energy generation, carbon capture and storage, marine farming, and biodiscovery.
  9. The purpose of the legislation will be to manage the adverse environmental effects of activities in the EEZ and ECS. The purpose of the legislation will be accompanied by principles that enable decision-makers to balance adverse effects of activities with the benefits activities provide and include a general duty to avoid, remedy, or mitigate adverse environmental effects.
  10. The legislation will require assessment of the effects of proposed activities on existing interests, such as fisheries. The legislation does not duplicate the undue adverse effects test in the aquaculture legislation; rather it requires a balancing of the benefits of a new proposal against the effects on existing interests.
  11. The legislation will be an enabling act. It will set up the general framework for the regulatory system, but the specific controls and standards will be set out in subsequent regulations. Activities will be regulated through a rules and consent framework. Regulations will define effect thresholds for different categories of activity: permitted, discretionary and prohibited. Consents under this regime will be required for any discretionary activities. 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.
  12. The general approach in the legislation is similar to the Resource Management Act 1991 (RMA), insofar as it uses a rules and consents framework, and requires environmental impact assessment of significant proposals. However, the EEZ and ECS legislation will be simpler and streamlined in comparison to the RMA. For example, rather than the range of instruments under the RMA, such as national policy statements, national environmental standards, and district and regional plans; regulations will be the primary mechanism to set direction under this proposed legislation. There will also be fewer categories of activities. Decisions on consents will be made by a national-level expert body, and therefore I propose that appeal rights be available only on points of law.
  13. I propose the following governance arrangements:
    - a. The Minister for the Environment will be responsible for the legislation and development of regulations.
    - b. The Ministry for the Environment will be the administering agency, responsible for providing policy advice on the legislation.
    - c. The Environmental Protection Authority (EPA) will make decisions on consent applications, and will be responsible for the day to day operation of the legislation, including information management, monitoring and enforcement functions.
  14. Because there is a low level of information on the EEZ and ECS environment and the effects of new activities, I consider that decision-makers may need to exercise

caution. I propose the legislation apply information principles and enable decision-makers to use an adaptive management approach, which will allow activities to be monitored and adjusted as information improves.

15. The legislation will contain provisions detailing how the proposals take account of the Treaty of Waitangi and interests under the Marine and Coastal Area (Takutai Moana) Act 2011.
16. I also expect that the EPA will expand the terms of reference for the proposed Maori Advisory Committee to include advice and assistance on matters relating to policy, process, and applications under the new legislation.
17. Existing laws, such as for fisheries and maritime transport, will continue to operate largely as at present, and effects regulated under those statutes will not be covered by the new legislation. However, I propose consequential amendments to other enactments, as is necessary to enable consistency between the implementation of all management regimes operating in the EEZ and ECS.
18. The proposed legislation addresses all of the current gaps in the environmental management regime, except for a dedicated and comprehensive marine protection tool. The Marine Reserves Bill currently before select committee proposes enabling the creation of marine reserves in the EEZ. The Marine Reserves Bill is compatible with the proposals in this paper and I consider that Bill to be the proper place for dealing with marine protection.
19. It is my intention to have environmental controls in place in the EEZ and ECS by the end of the year.
  - a. The proposal is currently Category 4 on the 2011 legislative programme, meaning it will be referred to select committee within the year. This paper proposes raising the priority to Category 2, meaning it must be passed within the year.
  - b. There is a high probability that some activities may occur in the EEZ before this regime has fully taken effect. I propose that the Minister of Energy and Resources and I, in consultation with other relevant Ministers, report back to Cabinet by the end of July 2011 with a proposal to address the potential environmental impacts of activities, particularly oil and gas activities, in the EEZ and ECS that occur before the legislation and a complete set of regulations come into force.

**Figure 1: Summary of Proposal**



## Background

### *Previous Cabinet decisions and public consultation*

20. 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].
21. 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.
22. The proposals for legislation were generally well supported. Some key messages from consultation were:
  - a. Environmental groups in general preferred a more comprehensive review of marine environmental statutes (including fisheries legislation), but supported any improvements to the management of marine environmental effects.
  - b. Industry groups in general supported the legislation so long as any new controls were proportional to the issues and did not create an undue regulatory burden.
23. In June 2008 Cabinet approved the policy for the drafting of legislation [CAB Min (08) 23/7]. Further policy decisions were made in August 2008 [CAB Min (08) 30/3A]. Drafting of the legislation was not completed before the 2008 general election and the Bill was not introduced into Parliament.
24. I propose proceeding with the legislation, but making changes to the policy to reflect the different priorities of this government, with a greater emphasis on supporting economic development opportunities and minimising compliance costs. In particular, I propose rescinding the previous Cabinet decisions made in CAB Min (08) 23/7 and CAB Min (08) 30/3A and replacing these with new decisions for the legislation, which will include:
  - a. changing the governance arrangements so that the expanded EPA, is responsible for decision-making and administration; the Environmental Protection Authority Bill establishing the expanded EPA is currently before Parliament
  - b. rebalancing the legislation to focus more strongly on providing for economic development opportunities
  - c. clarifying how the legislation will consider Maori engagement and Treaty issues.
25. The proposal is currently Category 4 on the 2011 legislative programme, meaning it will be referred to select committee within the year. This paper proposes raising the priority to Category 2, meaning it must be passed within the year.

### *The Exclusive Economic Zone and extended continental shelf*

26. The EEZ is the area of sea, seabed and subsoil from 12 to 200 nautical miles offshore. The EEZ comprises 95% of the ocean over which New Zealand has jurisdiction.
27. The United Nations Convention on the Law of the Sea (UNCLOS) grants New Zealand sovereign rights for the purpose of exploring and exploiting natural resources in the EEZ but does not confer full sovereignty. This means that New

Zealand cannot exercise the same jurisdiction in the EEZ as it can on land and in the territorial sea. In addition to the sovereign right to explore and exploit their natural resources in the EEZ, under UNCLOS states also have an obligation to protect and preserve the marine environment.

28. The 'extended continental shelf' (ECS) is the seabed and subsoil of New Zealand's submerged landmass where it extends beyond the EEZ. In that area, New Zealand has exclusive sovereign rights for the purpose of exploring the continental shelf and managing, conserving, and exploiting its natural resources. These resources are limited to those found on or under the seabed; New Zealand does not have sovereign rights in the water column or air space over the ECS. A map of the EEZ and ECS is attached as Appendix 1.
29. Other states have freedoms and rights in New Zealand's EEZ and ECS under international law such as the right to freedom of navigation and over flight, the right to lay international cables and pipelines and, in general, the right to carry out marine scientific research.

## **Comment**

### *EEZ and ECS activities and environmental controls*

30. Fishing and shipping are the predominant uses of the EEZ and ECS. New activities will develop as technology advances and cost barriers diminish. For example, there is interest in petroleum resources off Taranaki, the Great South Basin, and the East Coast of the North Island; gold placer deposits off the West Coast of New Zealand; and seabed mineral resources including iron sands, precious metals and phosphates. Some minerals prospecting is already under way. Future activities could include energy generation, aquaculture, carbon capture and storage, and biodiscovery.
31. Environmental effects are currently managed on a sectoral basis:
  - a. The Fisheries Act 1996 provides for the management of fisheries, including the environmental impacts of fishing.
  - b. 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.
  - c. Safety inspections for offshore petroleum structures are covered by the Health and Safety in Employment Act 1992.
  - d. Licences granted under the Continental Shelf Act 1964 can specify environmental obligations, although there is no guidance in the Act on how to do so.
  - e. Voluntary and non-enforceable guidelines exist for petroleum activities and seismic surveys.
32. This sectoral approach means there are gaps and inconsistencies in the environmental management regime in the EEZ and ECS. The key gaps are noted in Appendix 2. In particular there are gaps for:
  - a. Assessing effects of activities (other than fishing) on seafloor habitats and biodiversity (for example the effects of seabed mining).
  - b. Assessing effects of activities (other than fishing) on biodiversity in the water column (for example effects of seismic surveys on marine life).

- c. Assessing effects of new activities on existing interests (for example effects of a petroleum platform on fishing and shipping).
- d. Managing the cumulative effects of all activities, as they are regulated under multiple regimes with variable ability to take other sorts of activities into account in decision-making.
- e. A dedicated and comprehensive marine protection tool that can offer a high level of protection from all activities for conservation or biodiversity purposes.

*Problem definition*

33. The gaps in the environmental management regime in the EEZ and ECS mean there is a lack of legislative process to assess environmental effects and grant approval for some activities. These gaps are a problem for several reasons:
  - a. 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.
  - b. There is a lack of certainty for industry on the regulatory processes that may affect their investment. There is also a reputational risk to companies wishing to undertake activities when they cannot demonstrate compliance with high environmental standards.
  - c. 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 have their voices heard during the decision-making process.
  - d. In the absence of an environmental management regime for the EEZ, it may be difficult for New Zealand to fully meet its obligation to protect and preserve the marine environment under UNCLOS. This creates a potential reputational risk for New Zealand.
  - e. New Zealand is lagging behind other jurisdictions, which have comprehensive environmental assessment processes in place for activities in their marine environments. This is of particular concern as New Zealand's EEZ is one of the largest in the world at over four million square kilometres. Appendix 3 outlines key features of marine environmental management regimes in other jurisdictions.
  - f. New Zealand also faces a reputational risk because the current regime fails to recognise good environmental practice.
34. This gap in regulation is widely recognised as potentially problematic. Publications highlighting the need for regulation of the environmental effects of activities in the EEZ and ECS include:
  - a. The discussion paper *A Bluegreen Vision for New Zealand*, released in 2008. The discussion paper identifies the introduction of a statutory regime to assess and regulate the environmental effects of activities in the EEZ as a key action for oceans management.
  - b. The *Comparative Review of Health, Safety and Environmental Legislation for Offshore Petroleum Operations Report* commissioned by the Minister of Energy and Resources in June 2010 in response to the Gulf of Mexico oil spill. The

report identifies the lack of regulation in the EEZ as a “major gap” and recommends the establishment of an environmental regulatory framework in the EEZ.

- c. The Waitangi Tribunal's *Report on the Management of the Petroleum Resource*, released in December 2010. The Tribunal also identifies a lack of regulation of environmental effects of activities in the EEZ and “the need for an enforceable environmental protection system for the EEZ/continental shelf area”.

#### *Size of the problems*

35. Industry interest in EEZ and ECS resources is increasing: there have been expressions of interest in a number of activities including iron sand mining and ocean iron fertilisation. In 2009, there were eight offshore wells drilled in New Zealand. Recent modelling work undertaken by the Ministry of Economic Development suggests that this number may more than double by 2020. Marine energy generation is likely to take longer to develop in the EEZ or ECS.
36. There is a window of opportunity now to improve the environmental management regime before the need becomes more urgent. This also provides an opportunity to enhance New Zealand's environmental reputation, and reputation for environmentally sound business practices. Delaying action until activity levels have increased would have a greater adverse impact on investment certainty at the time action is taken.
37. Strong feedback from consultation in 2007 was that industry supports an improved regulatory system if it is clear, simple and proportional to the environmental issues.

#### *Objective*

38. My objective is to ensure processes are in place to assess and manage the adverse environmental effects of activities in the EEZ and ECS. With these processes in place the risk of environmental harm will be reduced, greater certainty will be provided to industry on the processes required to permit their operations, and existing interests will be provided a degree of protection.
39. I propose new legislation to fill the current gaps in environmental regulation in the EEZ and ECS.

#### **Structure of Proposal**

40. This paper seeks agreement to the policy for drafting of legislation. Details of the proposed legislation are presented in the following sections:
  - Part A: Purpose and Principles of Legislation
  - Part B: Governance
  - Part C: Aligning Decision-Making and Managing Cumulative Effects
  - Part D: Regulations
  - Part E: Consents
  - Part F: Appeals
  - Part G: Monitoring, Enforcement and Offence Provisions
  - Part H: Miscellaneous Provisions



- Part I: Commencement and Transitional Provisions
- Part J: Application to Defence Activities

## **Part A: Purpose and Principles of Legislation**

### *Purpose of legislation*

41. I propose that the purpose of the legislation be to manage the adverse environmental effects of activities in the EEZ and ECS.
42. The legislation will provide for the development of natural resources in the EEZ and ECS, while protecting the environment from the adverse effects of activities. The purpose of the legislation will be achieved by balancing the adverse effects of the activities with the benefits activities provide.

### *Avoiding, remedying, or mitigating adverse effects*

43. Protecting the environment and other interests from the potential adverse effects of new activities is an important aspect of the purpose and principles of the legislation. I propose that the legislation set out an obligation for adverse environmental effects to be avoided, remedied, or mitigated.

### *Scope of the legislation*

44. I propose that the legislation establish an umbrella jurisdiction over environmental effects in the EEZ and ECS, from which effects managed under existing legislative controls are then excluded. These existing legislative controls are:
  - a. the Fisheries Act 1996
  - b. the Maritime Transport Act 1994
  - c. the Marine Mammals Protection Act 1978
  - d. the Wildlife Act 1953
  - e. the Biosecurity Act 1993 (the Biosecurity Law Reform Bill currently before select committee provides for the management of biosecurity risks in the EEZ)
  - f. the allocation provisions of the Crown Minerals Act 1991 and Continental Shelf Act 1964.
45. The proposed legislation addresses all of the gaps in the environmental management regime except for a dedicated and comprehensive marine protection tool. I consider that the proper way to deal with this is through the Marine Reserves Bill currently before select committee which would make provision for marine reserves in the EEZ, and is compatible with this proposal.
46. Some activities in the EEZ and ECS are partially regulated under existing law. The new legislation will cover those matters outside the scope of existing laws.
47. For example, a new petroleum platform would already be regulated under the Maritime Transport Act 1994 with regard to discharges and oil spill planning and response. The new legislation will cover those matters outside the scope of existing laws, for example assessment of the environmental effects of a platform's installation, and assessment of any ongoing effects on the environment and other defined interests. A petroleum platform would need to comply with both statutes as they jointly cover all of its effects. In terms of sequencing, it is expected that consent applications under the new legislation, if required, should be determined first.

48. To improve efficiency, officials are investigating transferring the management of discharges (but not oil spill planning and response) in the EEZ and ECS from Maritime New Zealand to the EPA as there are synergies between these and the new legislation. Further work is needed before decisions can be made.
49. Officials will need to ensure that, where activities require consents or permits under more than one piece of legislation, the processes involved are well coordinated in order to minimise compliance costs for industry. The proposed legislation includes a process for cross-boundary consents if an activity requires both resource consent under the Resource Management Act 1991 and consent under the new legislation (see paragraphs 122-126).
50. Those activities that fall within the scope of the new legislation will not be exempted from the provisions of any other relevant legislation.

*Application to extended continental shelf*

51. In the ECS, New Zealand has sovereign rights over only the resources on or below the seabed. I recommend that the legislation clarify which aspects of the regime do and do not apply to activities on the ECS.

*International obligations*

52. I propose that the legislation will require decision-makers to act consistently with international obligations and take into account the rights and interests of other states under international law. It will also reflect New Zealand's sovereign rights in the EEZ and ECS, and the permissive regime for international navigation, cables and pipelines, and marine scientific research under international law.

*Matters for consideration in decision-making*

53. I propose 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:
  - a. the present and future economic wellbeing of New Zealand
  - b. effects on the health and safety of people
  - c. protecting existing uses, interests and values
  - d. 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
  - e. managing the cumulative effects of all activities on the receiving environment
  - f. the efficient use and development of natural and physical resources
  - g. improving information and knowledge of the marine environment, including the effects of human activity on the marine environment.

*Treaty of Waitangi provisions*

54. The Treaty of Waitangi relationship and Maori interests should be recognised in this legislation by including specific, practical provisions which provide for Maori engagement.
55. I propose that the legislation provide for the following:

- a. The ability for the EPA Maori Advisory Committee to provide advice to decision-makers (see paragraph 68).
  - b. Decision-makers must consider Treaty of Waitangi settlements, and customary rights and/or interests granted under the Marine and Coastal Area (Takutai Moana) Act 2011 (see paragraph 78). Although under the Marine and Coastal Area (Takutai Moana) Act 2011 these rights and/or interests cannot be granted in the EEZ or ECS, decision-makers will be required to consider cross-boundary effects.
  - c. Public participation in the making of regulations and consent decisions, for example consent applications will be notified publicly as well as directly notified to affected parties, including iwi, that appear to the relevant decision-maker likely to have an interest in the proposal (see paragraph 106).
56. I also recommend a further provision stating that nothing in the legislation limits or otherwise affects the Marine and Coastal Area (Takutai Moana) Act 2011 subject to the specific provisions set out in this paper.

*Information principles and adaptive management approach*

57. The decision-making framework for the legislation needs to acknowledge that there is little information about the EEZ and ECS environment and new technologies which may be implemented there. In order to manage this I propose that decision-makers under the legislation be required to:
- a. take into account the best available information
  - b. consider any uncertainty or insufficiency in the information available
  - c. exercise caution when information is uncertain or insufficient.
58. Where there is a reasonable chance of adverse effects but scientific uncertainty or insufficiency of information, any burden of proof that adverse effects are acceptable should rest with the applicant. The lack of certainty shall not prevent measures being taken to avoid, remedy, or mitigate potential adverse effects.
59. I propose that the legislation enable decision-makers to take an adaptive management approach as a means of exercising caution in decision-making. Adaptive management is a management tool expressly developed to deal with uncertainty. It can be characterised as 'learning by doing' – applying provisional and reversible decisions, undertaking stringent monitoring, reviewing the results, and making subsequent management changes to reflect the observed effects of the activity. For example, adaptive management could be implemented through strict, but reviewable, consent conditions that allow the activity to be scaled up or down (and even cancelled) depending on the effects observed. Staged work programmes or pilot projects could also be used to manage uncertainty under the adaptive management approach. However, while adaptive management is a management tool expressly developed to deal with uncertainty, it does not negate the need to exercise caution in situations where there is a threat of serious or irreversible environmental damage occurring.

*Responsibilities of persons operating in the EEZ and ECS*

60. I propose that persons whose activities are subject to this legislation are responsible for their actions, and have a general duty under the legislation to:

- a. provide appropriate training and supervision to employees in order to maintain compliance with the legislation
- b. provide sufficient resources to ensure compliance with the legislation, including establishing and following appropriate management systems.

## **Part B: Governance**

### *Minister for the Environment*

- 61. I propose that the Minister for the Environment is responsible for the legislation and preparation of regulations under the legislation.
- 62. I propose that the Minister will not be able to direct the EPA in relation to specific consent applications and decisions.

### *Ministry for the Environment*

- 63. I propose that the Ministry for the Environment administer the legislation, with the following functions, powers and duties:
  - a. providing policy advice on the legislation, including monitoring its effectiveness and advising any amendments
  - b. developing regulations for approval by the Minister for the Environment
  - c. consulting with other agencies as appropriate, including the EPA, on the development of regulations.

### *Environmental Protection Authority*

- 64. The policy decisions made by the previous government had an EEZ Commissioner within the Ministry for the Environment as decision-maker on consent applications. I propose that these consent decisions instead be made by the EPA. Consent decisions will have similarities with national scale consenting functions which the EPA has under the Resource Management Act 1991.
- 65. I propose that the EPA will have the following functions:
  - a. making decisions on consent applications
  - b. monitoring operations and compliance of activities with the legislation
  - c. enforcement of the legislation
  - d. gathering information and improving knowledge of the marine environment in the EEZ and ECS
  - e. promoting awareness of the requirements of this legislation.
- 66. I propose that the EPA have the standard ability of a Crown Entity to delegate any functions and powers it has under the legislation. This may, for example, include delegating decision-making to an expert panel, or monitoring and enforcement powers to persons with specialist knowledge and expertise.

### *Maori involvement in governance structures*

- 67. During consultation on the development of the proposals, there was strong support from iwi for a model similar to Nga Kaihautu Tikanga Taiao, a statutory committee that advises the Environmental Risk Management Authority on Maori issues, and reports on applications which raise significant issues or interests for Maori.

68. The expanded EPA will have a Maori Advisory Committee. The EPA sets the terms of reference for the Maori Advisory Committee and I expect the Maori Advisory Committee to cover those matters under the Hazardous Substances and New Organisms Act 1996 currently undertaken by Nga Kaihau Tikanga Taiao. I propose that the legislation allows for the Maori Advisory Committee to provide advice to the EPA on matters relating to policy, process, and applications under the EEZ and ECS legislation.
69. Any involvement by the Maori Advisory Committee would not preclude the entitlement of iwi to be involved in processes under the legislation and to speak to their own issues, as set out in the relevant sections later in the paper.

### **Part C: Aligning Decision-Making and Managing Cumulative Effects**

70. Measures are necessary to manage cumulative environmental effects and to align decision-making across the different statutes applying in the EEZ.
71. To manage cumulative effects I propose that:
- a. Decision-makers under the legislation are required to consider the cumulative effects of all activities on the receiving environment in their decisions (whether that be at the regulation or consenting level).
  - b. Regulations will contain any necessary provisions to manage a situation where individual permitted activities may have minimal effects, but could collectively have a significant environmental impact.
72. To promote greater consistency in the environmental standards or bottom lines applied to decisions under different pieces of legislation, I propose that the regulations will be developed in consultation with relevant agencies and will consider the environmental controls set under other statutes (for example fisheries standards set under the sustainability provisions of the Fisheries Act 1996, rules under the Maritime Transport Act 1994, and plans under the Resource Management Act 1991). I also propose reciprocal amendments to other legislation regulating the environmental effects of activities in the marine area so they can take into account measures under the EEZ and ECS legislation. These proposals are set out in paragraphs 73-77.

#### *Alignment with Fisheries Act 1996*

73. The impacts of fishing on the baseline environment will be considered by the EEZ and ECS legislation, as will the impacts of proposed new activities on existing fishing interests. The legislation will not manage fishing activity – this will continue to be managed through the Fisheries Act 1996.
74. I propose that:
- a. The Minister for the Environment, when developing regulations, shall consider any relevant sustainability measures, regulations and fisheries plans under the Fisheries Act 1996.
  - b. The EPA, when making decisions under the legislation, shall consider any relevant sustainability measures, regulations and fisheries plans under the Fisheries Act 1996.
  - c. The Minister of Fisheries, when setting sustainability measures, regulations or fisheries plans shall consider any relevant provisions in the new legislation or regulations created under it.

*Alignment with Maritime Transport Act 1994*

75. I also propose:

- a. The Minister for the Environment, when developing regulations, shall consider any relevant rules under the Maritime Transport Act 1994.
- b. The EPA, when making decisions under the legislation, shall consider any relevant rules under the Maritime Transport Act 1994.
- c. 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 in the new legislation or regulations created under it.

*Alignment with the Resource Management Act 1991*

76. I also propose:

- a. The Minister for the Environment, when developing regulations, shall consider any relevant policy or planning instrument made under the Resource Management Act 1991.
- b. The EPA, when making decisions under the legislation, shall consider any relevant policy or planning instrument made under the Resource Management Act 1991.
- c. Decision-makers under the Resource Management Act 1991 be required to consider any relevant provisions in the new legislation or regulations created under it.

77. I am also proposing a process for cross-boundary consents if an activity falls within both the EEZ or ECS and the territorial sea and also requires resource consent (see paragraphs 122-126).

*Alignment and consistency with other relevant legislation and policy*

78. I also propose the Minister for the Environment when developing regulations, and the EPA when making decisions under the legislation, shall consider any relevant:
- a. Treaty of Waitangi settlements
  - b. customary rights and/or interests granted under the Marine and Coastal Area (Takutai Moana) Act 2011
  - c. international obligations
  - d. industry best practice.

**Part D: Regulations**

79. I propose that the operational detail of the legislation be set out in regulations, which may be made on the recommendation of the Minister for the Environment.
80. It is possible that regulations may need to refer to standards, requirements or recommended practices in such detail that makes them too large or impractical. I propose that the scope of regulations includes the power to incorporate documents or standards by reference.
81. I propose that regulations can be made over all or any part of the EEZ and ECS, and apply to any of the effects to which this legislation applies. Any regulations made over the ECS will need to reflect New Zealand's sovereign rights, which

apply only to exploring or exploiting the resources of the seabed or subsoil. They will also need to cover the arrangements necessary to meet international obligation under Article 82 of UNCLOS to make payments to the International Seabed Authority in respect of production from the ECS.

82. I consider the legislation should provide for a broad scope of regulations to provide a flexible system for regulating different types of activity and adapting management over time. I propose that the legislation provide for regulations for various matters which may include:
  - a. qualitative or quantitative standards
  - b. standards for any discharge or the ambient environment
  - c. methods for classifying a natural or physical resource
  - d. methods, processes, or technology to implement standards
  - e. exemptions from standards
  - f. transitional provisions for standards, methods, or requirements
83. I propose that regulations can also be used to identify areas requiring specific controls, for reasons that may include:
  - a. are important or vulnerable due to their biophysical characteristics
  - b. are important in relation to specific uses
  - c. would benefit from aligning regulation across different laws
  - d. could support the concentration of activities through less stringent regulations or standards
  - e. have potential for conflict between different activities
  - f. face cumulative environmental pressures from different activities.
84. I propose that the regulations may also include scope to:
  - a. set thresholds that categorise activities by their effects, as either *permitted*, *discretionary*, or *prohibited*
  - b. set the standards with which an activity must comply to be permitted or discretionary.
85. I propose that activities or effects will be discretionary if they are not otherwise categorised in regulations as permitted, discretionary, or prohibited.
86. Activities will be categorised as permitted, and therefore allowed under this legislation without a consent, if:
  - a. the effects of the activity are below the threshold defined in the regulations
  - b. the performance of the activity complies with any standards defined in the regulations.
87. Permitted activities will still need to comply with the relevant requirements of any other legislation. For example, if a proposed petroleum exploration is defined as a permitted activity, it still will require a petroleum exploration permit under the Crown Minerals Act 1991.
88. While permitted activities will not require consents, I propose 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 cumulative effects of multiple activities.

89. I propose that regulations may require persons undertaking permitted or discretionary activities to maintain accurate records and to provide these records to the EPA.
90. I propose that discretionary status means that an activity requires a consent, the granting of which is at the discretion of the EPA. The EPA may also impose conditions on a consent for a discretionary activity.
91. The thresholds in the regulations which define an effect as discretionary would mostly relate to the environmental effects of individual activities. I propose that the legislation should also provide that the regulations define effects or activities as discretionary:
  - a. where necessary to manage the cumulative effects of activities (see paragraph 71)
  - b. where the activity would, or is likely to, have a significant adverse effect on the other recognised interests (see paragraphs 107-113) that must be considered under the significant adverse effect test in the consenting process.
92. Activities with effects prohibited by the legislation cannot be authorised. This enables clear guidance from government as to which activities will not be consented in New Zealand's EEZ and ECS.
93. Regulations may also be made closing an area to specified effects, through the use of prohibited activity status, if doing so may achieve the purpose and principles of the Act.
94. UNCLOS creates a more permissive regime for international cables and pipelines, and marine scientific research. I propose that the legislation provide specifically for these through specific regulations that provide controls appropriate to their status in international law, for example through permitted activity status.

#### *Process for preparing regulations*

95. I propose that the Minister for the Environment will publically notify his or her intention to develop regulations in order to make potential submitters aware of the process.
96. I propose that the process for developing regulations give the Minister for the Environment adequate time and opportunity to seek comment from iwi, the public, relevant persons and organisations, departments and Ministers.

### **Part E: Consents**

#### *Applying for consent*

97. Before a consent application for a discretionary activity is lodged, the EPA can give guidance to applicants on the level of information needed in the application. Ideally this will be discussed prior to the application to avoid delays for seeking of further information. Experience over time in dealing with EEZ and ECS activities will lead to refinement of the information requirements.
98. An application for a consent must give the EPA all the information required to assess the proposal. The legislation or regulations will list obligatory matters of content and form. I propose the consent application include a description of all



aspects of the proposal, and identify effects of the proposal on the environment and other interests through an impact assessment statement.

*Impact assessment statement*

99. The impact assessment statement is intended to identify the environmental effects of the proposal, and also the effects on other interests (see paragraphs 107-113).
100. I propose that the content of the impact assessment statement be scaled to the size and significance of the effects that the activity may have on the environment and other interests. For example, a lower-impact activity with well known effects would likely require less information and analysis than a large-scale and novel activity. The legislation will set out the required content of an impact assessment statement, which must be sufficient to enable consideration of:
  - a. the actual or potential effect on the environment and other interests
  - b. the consultation undertaken
  - c. any possible alternative locations or methods for undertaking the activity to help to avoid, remedy or mitigate any adverse effects if it is likely these effects will be significant.

*Applicant consultation in preparing an impact assessment statement*

101. It is preferable that early consultation occurs with interested persons to discuss possible impacts, and means to avoid, remedy or mitigate adverse effects. Applicants and interested parties should be encouraged to discuss and resolve issues before the application is processed in order to enable negotiations of 'best use', and the acceptable level of impact on others to be determined directly between the relevant parties.
102. I do not propose the inclusion of requirements to consult specific parties. I propose that applicants be required to identify interested parties through the impact assessment statement. The EPA may offer advice to applicants on any parties, particularly iwi, that might be affected.

*Processing the consent application*

103. I propose that a consent application will be accepted only when it contains sufficient information. There will be the power to decline acceptance of an application that is deemed incomplete, or to ask for further information from the applicant.
104. I propose that the EPA may seek independent audit of the impact assessment statement for peer review and to determine if it contains sufficient information.
105. I propose that the EPA may also commission any independent advice considered necessary to fulfil its responsibilities under the legislation.
106. The EEZ and ECS are managed at a national scale and it is appropriate that the opportunity to participate in the consideration of a consent is available nationally. When a consent application has been accepted, I propose that the EPA will notify the application publicly, and also directly to agencies, relevant iwi and persons with potential interest in the application. I propose also that submissions on a consent application may be made by any person.

### *Assessing effects on other interests*

107. I propose that, when making a decision on the application for consent, the EPA be required to consider whether there would be any significant adverse effects on recognised interest holders.
108. I propose that the EPA will recognise "interest holders" as those that appear to the EPA likely to be affected by the proposal. I propose that interest holders will not be limited to interests in the EEZ and ECS as there may also be interests in the territorial sea or on land.
109. The impact assessment statement will identify actual or potential effects on other interests, proposals to avoid, remedy or mitigate these effects, and whether agreements have been reached with the interest holders. These issues may have been addressed between parties at the pre-application stage, or following meetings or mediation.
110. It is preferable that interest holders are identified by the applicant through the impact assessment statement, however additional interests may be identified through other processes, including submissions on a consent application.
111. I propose the following matters should be considered when determining whether adverse effects on recognised interests are significant:
  - a. international obligations
  - b. the effects of the proposed activity on the recognised interest
  - c. the area that the proposed activity would have in common with the recognised interest
  - d. the degree to which both the proposed activity and recognised interests must be carried out to the exclusion of other activities
  - e. whether the recognised interest can be exercised only in a particular area.
112. I propose that the EPA should not be required to consider the effects on a recognised interest if the interest holder gives written approval for the proposed activity.

### *Dispute resolution*

113. I propose that, if submissions in opposition to a consent application indicate that persons consider the proposal has a significant adverse effect on their existing interests, the EPA may request the applicant and these persons to meet, or request they enter into mediation, for the purpose of resolving the issues.

### *Making the decision*

114. I propose that hearings will be held if requested by the applicant or any submitter or if the EPA decides to direct one.
115. The purpose and principles of the legislation (see Part A) will be the prime considerations for any decision. I propose that when making a decision on a consent application the EPA must apply the purpose and principles of the legislation and any relevant provisions in the regulations, and be required to act consistently with international law.
116. I propose that the EPA must consider submissions and that there must be a record of the reasons for a decision, and the conclusions reached on issues raised in submissions.

117. Decisions will need to examine the specific facts of each consent application. When making a decision, and applying the purpose and principles of the legislation, I propose that the EPA in making its decision must also consider:
- a. 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
  - b. existing recognised interests likely to be affected, including interests in the territorial sea or on land (excluding effects on interests of persons who have given written approval to the proposal)
  - c. any decisions relating to the area or resource that are made under any other relevant legislation or policy
  - d. proposals to avoid, remedy or mitigate any adverse effects.
118. To be consistent with requirements under the Resource Management Act 1991, I propose that the EPA is not required to consider the effects on climate change of discharges into air of greenhouse gases.
119. I recommend that the EPA be excluded from considering any trade competition issues.

#### *The decision*

120. I propose that the EPA can approve the consent, in whole or in part, or decline the consent. Consent may be granted subject to conditions (see paragraphs 133-135).

#### *Timeframes for decision-making*

121. The legislation will have statutory timeframes binding on both the EPA and the applicant. For example, there will be a set time to decide whether to accept or decline an application, and deadlines for appealing a decision.

#### *Interface with consents under the Resource Management Act 1991*

122. Activities at the interface of the EEZ and the territorial sea may require both consent to operate in the EEZ and resource consent under the Resource Management Act 1991. For example petroleum operations in the EEZ may have pipelines running back to shore, or iron sand mining may take place over areas covering both the EEZ and the territorial sea. To avoid duplication and inefficiency, I consider it important in such instances to run a single consent process. Activities requiring such cross-boundary consents will need to comply with the relevant requirements under both statutes, and if approved, consents will be issued by each relevant authority. Due to the different statutes and policies governing the EEZ and resource consents, it is possible that one consent is approved while the other is declined, or that different conditions are imposed on each consent.
123. Under the Resource Management Act 1991, hearings for applications requiring consents from two or more consent authorities (for example from a district council and a regional council), can be held jointly. I propose a similar, but expanded, provision in the EEZ and ECS legislation to enable the EPA and the relevant consent authority under the Resource Management Act 1991, to hold a single process for cross-boundary consents. I propose that the legislation enable an applicant to prepare one application covering both consents. I propose that the EPA and resource consent authority will jointly:
- a. publicly notify the application

- b. receive submissions
  - c. hold hearings (if applicable)
  - d. make decisions on applications.
124. In some instances cross-boundary proposals may be considered nationally significant under the Resource Management Act 1991. I propose that:
- a. if a board of inquiry is the decision-maker for a resource consent, the EPA be able to delegate its EEZ and ECS decision-making functions to a committee made up of the same members as the board of inquiry
  - b. if the Environment Court is the decision-maker for a resource consent, it also decide the EEZ and ECS consent
  - c. the EPA will retain its administrative functions under the Resource Management Act 1991
  - d. the EPA may also be appointed as advisor to the board of inquiry or Environment Court on the EEZ application.
125. I propose that statutory timeframes be aligned for cross-boundary consent processes, including any necessary consequential amendments to the Resource Management Act 1991 to provide for these processes.
126. I propose that the EPA be responsible for administrative matters relating to cross-boundary consent applications, including responsibility for meeting statutory timeframes.

#### *Status of a consent*

127. I propose that a consent be a use permission to the holder, defined strictly by the nature and conditions of the consent. It would not be legal or personal property. Consent for an activity will not mean the holder owns the space or resource to which the consent applies.
128. I propose that 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 1991.
129. I propose a 35 year statutory maximum term for consents. This mirrors the maximum term available under the Resource Management Act 1991, and would allow an activity spanning the boundary of the EEZ and territorial sea to have the same maximum consent time. On the expiry of the consent a new consent would be required to continue the activity.
130. I propose that the consent term granted should meet the purpose and principles of the legislation, including the adaptive approach to management. In the case of novel activities with uncertain effects, a consent, if granted, could be for a short duration, and subject to strict monitoring and review provisions. The activity could 'ramp up' over time through subsequent consents. Consent duration should also be linked to authorisations under other legislation, for example a permit issued under the Crown Minerals Act 1991.
131. I propose that the term of a consent can be reviewed and changed through the consent review process.
132. I propose that consents can be transferrable if the conditions of the consent remain the same for the new holder and the location is unchanged.

#### *Granted subject to conditions*

133. I propose that conditions can be imposed in a consent to define ongoing requirements for the consent to remain valid. They also may relate to end-of-life or emergency considerations such as decommissioning, liability, and clean-up provisions. I propose that consent conditions also have the ability to require bonds and compulsory insurance to be taken for these purposes.
134. The power to set conditions should be flexible. I propose that any conditions may be set on a consent that are considered appropriate to meet the purpose and principles of the legislation.
135. Conditions will need to be coordinated with rules under the Maritime Transport Act 1994, which has a large number of existing controls, for example around discharges, oil spills, management requirements of vessels and installations. Many activities will need approval under both Acts. The administrative processing of consent conditions and Maritime Transport Act 1994 requirements should be closely coordinated to ensure as far as possible a 'one stop shop' for projects. As noted in paragraph 48 officials are investigating transferring the management of discharges (but not oil spill planning and response) in the EEZ and ECS from Maritime New Zealand to the EPA.

#### *Review and cancellation of consents*

136. I propose that the EPA may initiate review of a consent where adverse effects have arisen that were not anticipated at the time of the decision, or where new information is available that materially would have influenced the decision on the consent had it been available at the time.
137. I propose that consents also may be reviewed in the event of non-compliance with consent conditions. It may be better to deal with non-compliance through review of a consent, rather than relying on the enforcement and offence provisions.
138. I propose that the holder of a consent also can apply for changes to the conditions of the consent.
139. I propose that the conditions of a consent may be modified after review, or the consent may be cancelled.
140. The process for reviewing and modifying would be the same as for the consent application process, and the EPA will be the final decision-maker. When making minor modifications to consents there will be discretion to use a non-notified process, without the requirement for hearings.
141. In the case of a large-scale review of consent conditions, it may be appropriate to hold a full public process with submissions and hearings.
142. I propose the power to cancel a consent will be exercised only in the following circumstances:
  - a. no material efforts have been made to exercise the consent in five consecutive years
  - b. 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

- c. repeated non-compliance with conditions of consent. This would be the final sanction; in most cases non-compliance should be addressed first through enforcement orders or the offences provisions.

## **Part F: Appeals**

### *Appeals on consents*

- 143. Decisions on consents are being made by a national-level expert body. In the interests of finality, and as the EPA will be an independent expert body well equipped to make one final decision, I do not consider full appeal on the merits is necessary.
- 144. I do propose that appeal rights on points of law in relation to consents be available.
- 145. Appeal rights on points of law would be available in relation to:
  - a. the decision to grant or decline a consent
  - b. the conditions on a consent
  - c. a decision to review or cancel a consent.
- 146. I propose that appeals may be lodged by applicants for a consent, or submitters on a consent. I do not consider it appropriate for appeal rights to be available to persons who have not earlier been involved in the consent process.

### *Appeals against enforcement orders and prosecutions*

- 147. I propose that persons may appeal on the merits and on points of law against enforcement orders and prosecution for offences under the legislation.

### *Appellate body*

- 148. I propose the High Court as the appellate body for appeals on consent matters, offences and enforcement orders.
- 149. I propose the Environment Court be responsible for enforcement orders and prosecution for offences (see Part G).

## **Part G: Monitoring, Enforcement and Offence Provisions**

### *Monitoring*

- 150. A monitoring scheme is required to ensure that operators are complying with their legislative rights and responsibilities. Under the proposed legislation, monitoring will be required for:
  - a. compliance of permitted activities with the regulations
  - b. the cumulative effects of permitted activities
  - c. consented activities' compliance with consent conditions.
- 151. I propose a wide range of monitoring options which can include:
  - a. self-monitoring: the reporting requirements on operators set out for permitted activities, or in consent conditions
  - b. observer coverage of activities, if required by regulations or a consent
  - c. inspections

- d. audit of operations, including independent evaluation.

#### *Enforcement orders*

- 152. I propose that the Environment Court may issue enforcement orders in the event of non-compliance with the legislation. Examples of circumstances where an enforcement order could be issued include non-compliance with the requirements of permitted activity, or non-compliance with consent conditions.
- 153. The enforcement orders could:
  - a. require a person to cease, or prohibit a person from commencing, an activity
  - b. require actions to ensure compliance with the legislation.
- 154. I propose that any person may apply, using prescribed forms, to the Environment Court for an enforcement order.
- 155. Non-compliance with legislation also may trigger review and/or cancellation of a consent.

#### *Offence provisions*

- 156. I propose that the legislation contain offence provisions to address non-compliance with consents or regulations.
- 157. I propose offences under the legislation can include the contravention, or permitting contravention, of:
  - a. the regulations
  - b. the requirement to hold a consent
  - c. a consent condition
  - d. provisions in an enforcement notice
  - e. the requirement to notify the EPA of an activity to which the legislation applies
  - f. the requirement to produce a document on request of the EPA
  - g. 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.
- 158. I propose that the legislation establish scaled penalties for different categories of offence. I propose that maximum statutory penalties be aligned with those under the Resource Management Act 1991 and Maritime Transport Act 1994.

### **Part H: Miscellaneous Provisions**

#### *Cost recovery*

- 159. As most activities carried out in the EEZ and ECS have predominantly private (rather than public) benefits, there is no justification for full government funding of the consent application process or associated monitoring costs.
- 160. I intend that the costs to be recovered may include, in part or whole:
  - a. the processing of a consent application
  - b. administering and monitoring the consent once granted
  - c. any other costs related to consent conditions

- d. monitoring permitted activities, where this is provided for in the relevant regulation.
161. I propose that the legislation set out a general power for cost recovery.
162. I propose the following principles for cost recovery should be applied to the legislation:
- a. equity: funding generally should be sourced from the beneficiary of a service
  - b. efficiency: costs should be allocated for maximum benefit and minimum cost
  - c. justifiability: costs should relate to actual and reasonable costs
  - d. transparency: costs recovered should relate to the period for which a service is provided.
163. I propose that the calculation of these costs will also include the cost of any associated overheads. This will allow recovery of the full cost to government of providing a service.

#### *Compliance costs*

164. An indicative range for recoverable costs to operators (as set out in paragraphs 159-163) is generally between \$40,000 to \$200,000 per proposal, but up to \$500,000 for a high end, complicated and controversial proposal. In addition to these recoverable costs, operators may face the following costs in complying with the proposed legislation:
- a. costs of preparing a consent application (including impact assessment statement)
  - b. costs associated with avoiding, remedying and mitigating adverse effects
  - c. costs of appeals (if any).
165. An indicative range for these costs starts at approximately \$50,000 for an impact assessment statement as part of a consent application for a small scale project. Compliance costs for large-scale projects with a high degree of public interest may start at around \$300,000 per consent. Additionally, marginal costs for many operators are likely to be low, as most of the costs are associated with preparing impact assessment statements, which many operators already do on a voluntary basis.
166. As noted in paragraph 24, the proposal for EEZ and ECS legislation made under the previous government has been reworked to reflect the greater emphasis on economic development opportunities and minimising compliance costs. Compliance costs have been reduced through:
- a. limiting appeal rights (see Part F)
  - b. having the EPA as decision-maker on consent decisions, rather than the previously proposed EEZ Commissioner (see paragraphs 64-66)
  - c. placing a greater emphasis on development in the purpose and principles of the legislation.

#### *Biosecurity*

167. Proposed amendments to the Biosecurity Act 1993 (contained in the Biosecurity Law Reform Bill) will extend its jurisdiction to the EEZ. I consider it appropriate that biosecurity issues be dealt with under the Biosecurity Act 1993 so as to promote a



seamless approach between the EEZ and territorial sea, and not duplicate biosecurity expertise in another agency.

168. I also propose amendments to the Biosecurity Act 1993 to provide for a temporary exemption from consent requirements for biosecurity activities in an emergency situation in the EEZ.

*Other consequential amendments*

169. The statutes to be amended are likely to include:

- a. the Environment Act 1986 – to take into account the new functions under the proposed legislation
- b. the Fisheries Act 1996 and the Maritime Transport Act 1994 – to allow for better management of the cumulative effects on the environment of all activities, and achieve better alignment across statutes
- c. the Resource Management Act 1991 – to allow for cross-boundary consent processes for activities that require both consent to operate in the EEZ and resource consent
- d. the Biosecurity Act 1993, as noted in paragraph 168 above.

**Part I: Commencement and Transitional Provisions**

170. I propose that the legislation come into force through Order in Council when the first complete set of regulations has been developed, otherwise there will be a period with no regulations against which to assess activities.
171. Transitional provisions will need to address activities existing at the time when the legislation comes into force.
172. I propose that where an activity exists at the time the legislation comes into force, and to which the legislation shall apply:
- a. the person undertaking the activity must notify the EPA of the activity within 6 months of this legislation coming into force
  - b. the EPA will issue to the person a transitional consent that will make the activity 'lawful' for the duration of the transitional consent
  - c. on assessing the effects of the activity the EPA may require the person to make an application for a consent, including an impact assessment statement, within a stipulated time.
173. There will also be discretion to make a decision on a transitional consent through an administrative non-notified process, if the effects of the activity are considered minor.
174. I propose 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. As these installations are already operational, it is impractical to do a retrospective impact assessment on the location and construction of an existing installation. The environmental effects of their ongoing operations are covered by the Maritime Transport Act 1994 with respect to discharges. However, the transitional provisions will apply if decommissioning is proposed or there are changes to aspects of the operation of the installation which have an environmental impact covered by the EEZ and ECS legislation.

175. There is a high probability that some activities may occur in the EEZ before this regime has fully taken effect. I propose that the Minister of Energy and Resources and I, in consultation with other relevant Ministers, report back to Cabinet by the end of July 2011 with a proposal to address the potential environmental impacts of activities, particularly oil and gas activities, in the EEZ and ECS that occur before the legislation and a complete set of regulations come into force.

## **Part J: Application to Defence Activities**

176. I propose the legislation does not apply to defence activities, as defence activities in the EEZ and ECS have a low environmental risk and foreign defence assets have sovereign immunity.

## **Next Steps**

177. I propose that drafting instructions be issued to the Parliamentary Counsel Office for drafting of a bill.
178. I propose that the Minister for the Environment, in consultation with any Ministers with a portfolio interest in a matter, be given power to approve any further technical matters as may be required to be included in a bill to ensure legislation accurately reflects the policy intent of this proposal.

## **Consultation**

179. This paper has been developed in consultation with the following agencies: Department of Conservation, Ministry of Fisheries, Ministry of Transport, Maritime New Zealand, Ministry of Economic Development, Te 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 Science and Innovation.
180. The Department of Prime Minister and Cabinet has been informed of the proposals in this paper.
181. Treasury supports an environmental management regime for 'new activities' but is concerned whether the regulatory costs of the proposed solution are proportionate to the problem at hand. The Treasury therefore recommends that consultation with stakeholders on the proposed solution needs to happen – different from the consultation dating back to 2007 on the high-level legislative options. Reasons include:
- a. Administrative costs – there are gaps in the current impact assessment; particularly around costs and time. The administrative cost to operators per consent application is estimated to be between \$340,000 and \$1,170,000. For successful applications there will also be subsequent compliance and monitoring costs.
  - b. Allocation mechanisms – the proposed regime may not result in getting the greatest benefit of the EEZ because where there are competing parties for the resource or it is reaching sustainable limits, it gives preferential treatment to incumbent activities and otherwise relies on a first-in-first-served allocation mechanism.

## **Financial Implications**

182. Costs associated with consents will be cost-recoverable (see paragraphs 159-163). Any additional funding for these functions will be reprioritised from existing baselines, with no net impact on the operating balance or debt. An indicative cost for the proposed new functions of the EPA could be approximately \$250,000 per annum in baseline costs, based on up to three FTEs. This will be dependent on the level of activity, and costs could be lower.
183. The costs to the Ministry for the Environment in developing regulations under the legislation will be part of the Ministry's baseline policy function.
184. I propose giving financial delegation to the Minister for the Environment and Minister of Finance to approve any appropriation changes necessary once the legislation is passed.

## **Human Rights**

185. The Ministry for the Environment will work with the Ministry of Justice during the drafting of legislation to consider consistency of the proposals with the Human Rights Act 1993 and the Bill of Rights Act 1990.

## **Legislative Implications**

186. It is my intention to have this legislation and an initial set of regulations in place by the end of the year. The proposal is currently Category 4 on the 2011 legislative programme, meaning it will be referred to select committee within the year. This paper proposes raising the priority to Category 2, meaning it must be passed within the year.
187. I propose that the legislation should bind the Crown. If the legislation is to be effective in regulating environmental effects, and effects on existing interests, it needs to apply to the Crown in the same way as any other party.
188. The implications for government departments of the legislation binding the Crown will be that a small number of government activities may be required to apply for a consent, and pay the costs of processing and monitoring any consent. Any additional costs to the Crown are unlikely to be significant.

## **Regulatory Impact Analysis**

189. The Regulatory Impact Analysis (RIA) requirements apply to the proposal in this paper and a Regulatory Impact Statement (RIS) has been prepared and is attached.
190. The Regulatory Impact Analysis Team (RIAT) has reviewed the RIS prepared by the Ministry for the Environment and associated supporting material, and considers that, given the decisions being taken are on the regulatory framework to be adopted, the information and analysis summarised in the RIS partially meets the quality assurance criteria.
191. Although the RIS provides estimates of the range of costs of the preferred regulatory framework, it is not yet known which specific activities will require consents. Therefore it is not possible to determine if the preferred option is a proportionate response to the problem, due to uncertainty around incidence of regulatory costs.

192. The consultation undertaken in 2007 predates the global financial crisis of 2008-09 and the Canterbury earthquakes of 2010-11, which have had major impacts on businesses and the economy and may have changed investors' attitudes to regulatory risks and costs.

### **Consistency with Government Statement on Regulation**

193. I have considered the analysis and advice of my officials, as summarised in the attached Regulatory Impact Statement and I am satisfied that, aside from the risks, uncertainties and caveats already noted in this Cabinet paper, the regulatory proposals recommended in this paper:
- a. are required in the public interest
  - b. will deliver the highest net benefits of the practical options available
  - c. are consistent with our commitments in the Government statement "Better Regulation, Less Regulation".

### **Publicity**

194. I propose to publicly signal the intention to develop EEZ and ECS environmental effects legislation and outline key features of the proposals.
195. I also propose to release this paper and associated Cabinet decisions following public announcements and subject to consideration of any information that would be withheld if the information had been requested under the Official Information Act 1982.

### **Recommendations**

196. The Minister for the Environment recommends that the Committee:

#### *Previous consideration*

- 1 note that in June 2008 Cabinet approved the policy for drafting of the Exclusive Economic Zone and extended continental shelf (EEZ and ECS) environmental effects legislation [CAB Min (08) 23/7] and further policy decisions were made in August 2008 [CAB Min (08) 30/3A]
- 2 note that drafting of the legislation was not completed before the 2008 general election and that the bill was not introduced to Parliament
- 3 rescind all decisions made in CAB Min (08) 23/7 and CAB Min (08) 30/3A
- 4 agree to proceed with the EEZ and ECS environmental effects legislation proposed in 2008 while making changes to the policy to reflect the priorities of this government
- 5 note that the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Bill is Category 4 in the 2011 legislation programme, meaning that it is to be referred to a select committee this year

#### *Purpose and principles of legislation*

- 6 agree that the purpose of the legislation will:
  - 6.1 be to manage the adverse environmental effects of activities in the EEZ and ECS

- 6.2 be achieved by balancing the adverse effects of the activities with the benefits activities provide
- 7 agree that, in addition to applying to the EEZ, the legislation shall apply to the ECS to the extent possible under United Nations Convention on the Law of the Sea (UNCLOS)
- 8 agree 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
- 9 agree that the legislation establish an over-arching jurisdiction over environmental effects of activities in the EEZ and ECS, from which effects managed under existing legislation are excluded, including:
- 9.1 the Fisheries Act 1996
- 9.2 the Maritime Transport Act 1994
- 9.3 the Marine Mammals Protection Act 1978
- 9.4 the Wildlife Act 1953
- 9.5 the Biosecurity Act 1993 (the Biosecurity Law Reform Bill currently before select committee provides for the management of biosecurity risks in the EEZ)
- 9.6 the allocation provisions of the Crown Minerals Act 1991 and Continental Shelf Act 1964
- 10 agree that those activities that fall within the scope of the new legislation will not be exempted from the provisions of any other relevant legislation
- 11 agree that the legislation set out an obligation for adverse environmental effects to be avoided, remedied, or mitigated
- 12 agree 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:
- 12.1 the present and future economic wellbeing of New Zealand
- 12.2 effects on the health and safety of people
- 12.3 protecting existing uses, interests and values
- 12.4 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
- 12.5 managing the cumulative effects of all activities on the receiving environment
- 12.6 the efficient use and development of natural and physical resources
- 12.7 improving information and knowledge of the marine environment, including the effects of human activity on the marine environment
- 13 note 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 recommendation 22, 23, 26 and 56

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

#### *Governance*

- 18 agree that the Minister for the Environment:
  - 18.1 be responsible for the legislation and the development of regulations under the legislation
  - 18.2 will not be able to direct the EPA in relation to specific consent applications and decisions
- 19 agree that the Ministry for the Environment be the administering agency for the legislation, with the following functions and duties:
  - 19.1 providing policy advice on the proposed legislation, including monitoring its effectiveness and advising of any amendments
  - 19.2 developing regulations in consultation with other agencies
- 20 agree that the Environmental Protection Authority (EPA) will have functions under the legislation including:
  - 20.1 making decisions on applications for consents
  - 20.2 monitoring operations and compliance with the legislation
  - 20.3 enforcement of the legislation
  - 20.4 collecting and managing access to information on the EEZ and ECS
  - 20.5 promoting awareness of the requirements of the legislation
- 21 agree that the EPA have the standard ability of a Crown Entity to delegate its functions and powers under the proposed legislation
- 22 agree that the EPA Maori Advisory Committee be able to provide advice and assistance on matters relating to policy, process, and decisions under the proposed legislation
- 23 note 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*

- 24 agree that the legislation will manage the cumulative environmental effects of all activities in the EEZ and ECS by:
  - 24.1 requiring decision-makers to consider the cumulative effects of all activities on the receiving environment at the regulation and consenting level
  - 24.2 managing the situation where individual permitted activities may have minimal effects, but could collectively have a significant environmental impact
- 25 agree that when developing regulations the Minister for the Environment'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 and 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
- 26 agree that when making decisions under the legislation the EPA's considerations will include any relevant:
  - 26.1 sustainability measures, regulations and fisheries plans under the Fisheries Act 1996
  - 26.2 rules under the Maritime Transport Act 1994
  - 26.3 policy or planning instruments made under the Resource Management Act 1991
  - 26.4 Treaty of Waitangi settlements
  - 26.5 customary rights or interests granted under the Marine and Coastal Area (Takutai Moana) Act 2011
  - 26.6 international obligations
  - 26.7 industry best practice
- 27 agree that the Minister of Fisheries, when setting sustainability measures, regulations or fisheries plans shall consider any relevant provisions under the proposed legislation and regulations
- 28 agree 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 proposed legislation and regulations
- 29 agree that decision-makers under the Resource Management Act 1991 be required to consider any relevant provisions under the proposed legislation and regulations

### *Regulations*

- 30 agree 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
- 31 agree that regulations may be developed for any or all parts of the EEZ and ECS
- 32 note that any regulations made over the extended continental shelf will need to:
  - 32.1 reflect New Zealand's sovereign rights, which apply only to the resources of the seabed and subsoil
  - 32.2 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
- 33 agree that the legislation provide for regulations for various matters which may include:
  - 33.1 qualitative or quantitative standards
  - 33.2 standards for any discharge or the ambient environment
  - 33.3 methods for classifying a natural or physical resource
  - 33.4 methods, processes, or technology to implement standards
  - 33.5 exemptions from standards
  - 33.6 transitional provisions for standards, methods, or requirements
- 34 agree that regulations may identify areas requiring specific controls, for reasons that may include:
  - 34.1 they are important or vulnerable due to their biophysical characteristics
  - 34.2 they are important in relation to specific uses
  - 34.3 they would benefit from aligning regulation across different laws
  - 34.4 they could support the concentration of activities through less stringent regulations or standards
  - 34.5 they have potential for conflict between different activities
  - 34.6 they face cumulative environmental pressures from different activities.
- 35 agree that the regulations be able to incorporate documents or standards by reference
- 36 agree that regulations categorise activities based on their effects as either permitted, discretionary or prohibited
- 37 agree that regulations set standards with which an activity must comply to be permitted or discretionary
- 38 agree that permitted activities be allowed without a consent so long as:
  - 38.1 the effects of the activity are below the thresholds set in regulations
  - 38.2 the performance of the activity complies with any standards defined in the regulations



- 39 agree 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
- 40 agree that regulations may require persons undertaking permitted or discretionary activities to maintain accurate records and to provide these records to the EPA
- 41 agree that discretionary status means an activity requires a consent, the granting of which is at the discretion of the EPA
- 42 agree that the regulations define effects or activities as discretionary:
  - 42.1 on the basis of the actual or potential environmental effects of an activity
  - 42.2 where necessary to manage the cumulative effects of activities
  - 42.3 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
- 43 agree that prohibited activities cannot be consented
- 44 agree that activities or effects will be discretionary if they are not otherwise categorised in regulations as permitted, discretionary, or prohibited
- 45 agree 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
- 46 agree that regulations may be made that have the effect of closing an area to activities covered by this legislation, if doing so is required to meet the purpose and principles of the legislation
- 47 agree that the Minister for the Environment publicly notify the intent to develop regulations
- 48 agree 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*

- 49 note that only discretionary activities will require consent (see recommendations 38-43)
- 50 agree 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
- 51 agree that the legislation or regulations specify matters that must be included in the application
- 52 agree 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
- 53 agree that the impact assessment statement must be sufficient to enable consideration of:
  - 53.1 the actual and potential effects on the environment
  - 53.2 the actual and potential effects on other interests
  - 53.3 any consultation undertaken

- 53.4 any alternative locations or methods for undertaking the activity to help avoid, remedy or mitigate any significant adverse effects
- 54 agree that the EPA be able to decline applications that are deemed incomplete, or to ask for further information from the applicant
- 55 agree that the EPA may:
  - 55.1 seek independent audit of the impact assessment statement for peer review and to determine if it contains sufficient information
  - 55.2 commission any independent advice considered necessary to fulfil its responsibilities under the legislation
- 56 agree 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
- 57 agree that submissions on a consent application may be made by any person
- 58 agree 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"
- 59 agree 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
- 60 agree when determining whether adverse effects on recognised interests are significant, the matters to be considered may include:
  - 60.1 international obligations
  - 60.2 the effects of the proposed activity on the recognised interest
  - 60.3 the area that the proposed activity would have in common with the recognised interest
  - 60.4 the degree to which both the proposed activity and recognised interests must be carried out to the exclusion of other activities
  - 60.5 whether the recognised interest can be exercised only in a particular area
- 61 agree that the EPA not consider the effects on a recognised interest if the interest holder gives written approval for the proposed activity
- 62 agree that the EPA may request an applicant to meet with submitters, or request they enter into mediation, for the purpose of resolving the issues
- 63 agree that hearings will be held if the applicant or any submitter requests one to present their application or submission, and give evidence in support
- 64 agree that the EPA can decide to hold a hearing
- 65 agree that when making a decision the EPA must consider matters including:
  - 65.1 any submissions on the application
  - 65.2 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
  - 65.3 existing recognised interests likely to be affected, including interests in the territorial sea or on land

- 65.4 any decisions relating to the area or resource that are made under any other relevant legislation
- 65.5 proposals to avoid, remedy or mitigate any adverse effects
- 66 agree 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
- 67 agree that when making a decision the EPA must not consider trade competition issues
- 68 agree that the EPA will not consider the effects on climate change of discharging greenhouse gases
- 69 agree that the EPA can either approve the consent in whole or in part, and with or without conditions; or decline the consent
- 70 agree that the legislation will specify timeframes for all stages of the consenting process binding on both the decision-maker and the applicant
- 71 note that activities at the interface of the EEZ and the territorial sea may require both a consent under this legislation and a resource consent under the Resource Management Act 1991 (referred to as cross-boundary consents)
- 72 agree that the legislation establish a single process for cross-boundary consent applications whereby:
  - 72.1 the applicant is required to prepare a single consent application covering both the resource consent and the EEZ or ECS consent
  - 72.2 the EPA and relevant resource consent authority will jointly:
    - 72.2.1 publicly notify the application
    - 72.2.2 receive submissions
    - 72.2.3 hold hearings (if applicable)
    - 72.2.4 make decisions on applications
  - 72.3 if approved, a separate resource consent and EEZ or ECS consent will be issued by each relevant authority in accordance with each statute
- 73 agree that if cross-boundary proposals are considered nationally significant under the Resource Management Act 1991:
  - 73.1 if a board of inquiry is the decision-maker for a resource consent, the EPA be able to delegate its EEZ and ECS decision-making functions to a committee made up of the same members as the board of inquiry
  - 73.2 if the Environment Court is the decision-maker for a resource consent, it be able to decide the EEZ and ECS consent
  - 73.3 the EPA may retain its administrative functions under the Resource Management Act 1991
  - 73.4 the EPA may also be appointed as advisor to the board of inquiry or Environment Court on the EEZ application
- 74 agree that activities requiring cross-boundary consents will need to comply with the relevant requirements under each statute

- 75 agree that for cross-boundary consent processes the statutory timeframes in the Resource Management Act and the proposed legislation be aligned
- 76 agree that the EPA be responsible for administrative matters relating to cross-boundary consent applications, including responsibility for meeting statutory timeframes
- 77 agree that:
  - 77.1 a consent will be a use permission, defined strictly by the nature and conditions of the consent, and not legal or personal property
  - 77.2 the maximum term of a consent be 35 years
  - 77.3 on expiry of a consent a new consent would be required to continue the activity
  - 77.4 the duration of a consent should meet the purpose and principles of the legislation, including the adaptive approach to management
  - 77.5 the duration of a consent should take into account the duration of any other legislative authorisations for the activity
  - 77.6 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 1991
- 78 agree that the duration of a consent can be reviewed and changed through the consent review process
- 79 agree that consents are transferable if the conditions of the consent remain the same for the new holder and the location is unchanged
- 80 agree 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
- 81 agree that consent conditions:
  - 81.1 may relate to end-of-life or emergency considerations such as decommissioning, liability, and clean-up provisions
  - 81.2 have the ability to require bonds or insurance to be taken for these purposes
- 82 agree 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
- 83 agree that consents also may be reviewed in the event of non-compliance with consent conditions
- 84 agree that the holder of a consent can apply for changes to the conditions of consent
- 85 agree that:
  - 85.1 the conditions of a consent may be modified after review , or the consent may be cancelled
  - 85.2 the process for reviewing and modifying consents shall be modelled on the full consent process and the EPA will be the final decision-maker

- 85.3 there will be discretion to use a non-notified process, without the requirement for hearings, when making minor modifications to consents
- 86 agree that a consent may be cancelled only in the following circumstances:
  - 86.1 no material efforts have been made to exercise the consent in five consecutive years
  - 86.2 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
  - 86.3 repeated non-compliance with conditions of consent

#### *Appeals*

- 87 agree that there be appeal rights to the High Court on points of law against:
  - 87.1 the decision to grant or decline a consent
  - 87.2 the conditions placed on a consent
  - 87.3 any decision to review or cancel a consent
- 88 agree that appeals in relation to consents may be lodged only by applicants for consent or submitters
- 89 agree that the legislation create a new jurisdiction for the Environment Court to have powers necessary for issuing enforcement orders and convicting for offences
- 90 agree 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*

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

- 95 agree that the legislation contain offence provisions that set out the categories of offence and maximum penalties
- 96 agree that offences under the legislation may include contravention of, or permitting the contravention of:
  - 96.1 regulations
  - 96.2 the requirement to hold a consent
  - 96.3 a consent condition
  - 96.4 an enforcement notice
  - 96.5 the requirement to notify the EPA of an activity to which the legislation applies
  - 96.6 the requirement to produce a document on request of the EPA
  - 96.7 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 proposed legislation
- 97 agree that that the legislation establish scaled penalties for different categories of offence
- 98 agree that the maximum statutory penalties be aligned with those under the Maritime Transport Act 1994 and Resource Management Act 1991

#### *Cost recovery*

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

#### *Consequential amendments*

- 103 agree that if necessary the Environment Act 1986 be amended to take account of the proposed legislation
- 104 agree that if necessary the Fisheries Act 1996 and the Maritime Transport Act 1994 be amended to allow for better management of the cumulative effects on the environment of all activities in the EEZ, and achieve better alignment across statutes
- 105 agree that if necessary the Resource Management Act 1991 be amended to give effect to a single cross-boundary consent process

- 106 agree that the Biosecurity Act 1993 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*

- 107 agree that the legislation come into force through Order in Council when the first complete set of regulations has been developed
- 108 agree that when the legislation comes into force persons carrying out pre-existing activities shall:
- 108.1 notify the EPA of the activity within 6 months of this legislation coming into force
  - 108.2 be issued with a transitional consent from the EPA that will make the activity lawful for the duration of the transitional consent
  - 108.3 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)
- 109 agree 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
- 110 agree that there will be discretion to make a decision on a transitional consent through a non-notified process
- 111 invite the Minister for the Environment and the Minister of Energy and Resources, in consultation with other relevant Ministers, to report back to Cabinet 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 ECS that occur before the legislation and a complete set of regulations come into force

*Application to defence activities*

- 112 agree that the proposed legislation shall not apply to defence activities

*Financial implications*

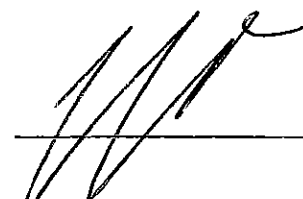
- 113 note that the EPA's costs associated with consents will be recoverable (see recommendations 99-102), and any additional funding for these functions will be reprioritised from existing baselines, with no net impact on the operating balance or debt
- 114 note the costs for the Ministry for the Environment in developing regulations under the EEZ legislation will be part of the Ministry's baseline policy function
- 115 agree that the Minister for the Environment and Minister of Finance be given financial delegation to approve any appropriation changes necessary once the legislation is passed

*Legislative Implications*

- 116 agree that the legislation should apply to the Crown
- 117 agree that the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Bill be raised to Category 2, meaning that it must be passed within the year

*Next steps*

- 118 note that the Minister for the Environment will publicly signal the intention to develop the legislation and outline key features of the proposal
- 119 note that the Minister for the Environment intends to release this paper and 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
- 120 note that officials are investigating transferring from Maritime New Zealand to the EPA the management of discharges in the EEZ and ECS (but not oil spill planning and response)
- 121 agree that the Parliamentary Counsel Office be issued drafting instructed to implement the proposals set out in these recommendations
- 122 agree that the Minister for the Environment, in consultation with interested Ministers, be given power to approve further technical matters as required in a bill to be submitted for approval to the Cabinet Legislation Committee
- 123 invite the Minister for the Environment to report back to the Cabinet Legislation Committee before November with a draft bill for introduction to the House

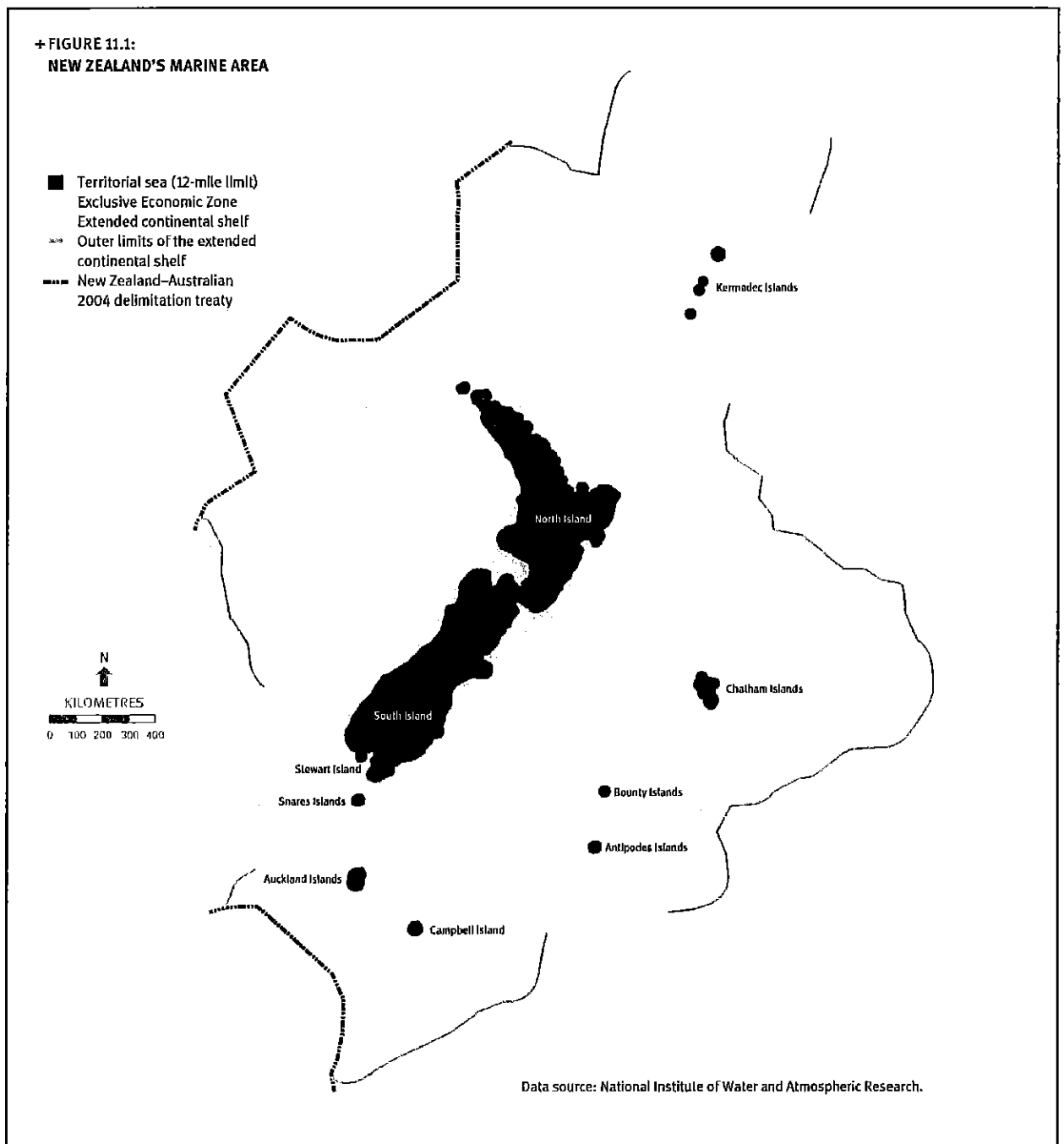


Hon Dr Nick Smith  
**Minister for the Environment**

4 / 5 / 11



## Appendix 1: Map of New Zealand's Exclusive Economic Zone and extended continental shelf





## Appendix 2: Key gaps in Exclusive Economic Zone and extended continental shelf environmental management

Activity	Effects	Coverage	Gaps
<b>Petroleum seismic survey</b>	The acoustic impacts of marine seismic surveys can have adverse effects on marine life.	DOC voluntary guidelines.	No robust enforceable legislative controls on seismic surveys.
<b>Petroleum drilling activities</b>	<p>Potential for contamination of marine environment through drilling muds, oil spills and waste discharges.</p> <p>Disturbance of sediments, marine life and habitats (on the seafloor).</p> <p>Death of marine life (eg, burial, smothering of benthos in the immediate area of the drill site).</p> <p>Construction activities such as pile-driving and blasting can also disturb and kill marine life in localised areas.</p> <p>Occupation of water column can displace other activities (eg, fishing).</p>	<p><i>Maritime Transport Act:</i></p> <p>Approved discharge management plan required for any rig or offshore installation, plus a comprehensive spill prevention and response plan.</p> <p>Offshore installations must hold public liability insurance warranting cover of not less than (approximately) NZ\$30 million for third party pollution damage.</p> <p>Operators can be prosecuted for oil pollution damage or clean up costs.</p> <p><i>Health and Safety in Employment Act:</i></p> <p>The Department of Labour administers and enforces the health and safety regulatory regime (including process safety) on fixed and permanently moored structures.</p>	<p>No specific procedures for setting environmental conditions on the building of platforms or disturbance of the marine environment.</p> <p>No consideration of the effects of activity in a particular location (eg, is the drilling close to an area of high conservation value?).</p> <p>No assessment of effects of activity on other users (eg, exclusion of fishing vessels).</p>
<b>Prospecting and extraction of minerals</b>	Prospecting/exploration activities can include plume sampling, use of submersibles, geochemical sampling, rock sampling by video, grab sampling (from ship or remotely operated vehicle) or dredges. Depending on the prospecting or	Environmental conditions can (and have been) set under the broad discretion powers of the Continental Shelf Act 1964: "every licence granted under this section shall be subject to such conditions as the Minister, when	The Continental Shelf Act is inadequate in providing specific procedures for assessing the environmental effects of minerals activities. Conditions are completely up to the discretion of the Minister of Energy, which does not meet modern

	exploration methods being employed, the environmental impacts will range from nil to localised impacts that could be significant.	granting the licence, thinks fit to impose in the circumstances of each particular case."	legislative good practice standards. There also is a potential conflict of interest between the Minister's allocation of minerals and management of the environmental impacts.
<b>Laying and maintenance of submarine cables and pipelines</b>	Laying and maintenance of submarine cables and pipelines involves clearing of seabed routes by pre-laying grapnel and installation using a cable installation ship and submarine cable plough. This causes highly localised disturbance of marine sediment processes and impact on marine biota and fisheries. Some research methods can cause significant environmental damage (eg, towing a dredge across the sea floor to take rock samples).	The protection of subsea cables and pipelines from hazards presented by ships' anchors and fishing operations is dealt with in regulations made under the Submarine Cables and Pipelines Protection Act 1996.	No requirement to assess the environmental effects of a proposal to lay submarine cables in the EEZ, or assess effects on other users.
<b>Scientific research – non-biological</b>		Biological sampling may require approval under the Fisheries Act.	No procedures for assessing the environmental effects of non-biological scientific research.

### Appendix 3: Petroleum and seabed mining in the Exclusive Economic Zone and extended continental shelf – 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 Environmental Protection and Biological Conservation (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 EPBC Act.

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
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 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.
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.

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
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 application and 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 there is 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.

