

IMPROVING REGULATION OF ENVIRONMENTAL EFFECTS IN NEW ZEALAND'S EXCLUSIVE ECONOMIC ZONE



DISCUSSION PAPER

**Improving Regulation of
Environmental Effects in New
Zealand's Exclusive Economic Zone**

Discussion Paper

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Ministry for the
Environment
Manatū Mō Te Taiao

Foreword

Environmental sustainability is central to our national identity. This government is working to preserve our environment for future generations, and is committed to using and developing resources in a sustainable way.

New Zealand's Exclusive Economic Zone (EEZ) extends from 12 to 200 nautical miles offshore and is one of the largest in the world. The EEZ has a wealth of natural biodiversity values, and great potential for future economic opportunities such as seabed minerals and energy generation. It is in the interests of all New Zealanders to harness this potential while managing the environmental effects in a sustainable way.

We manage some things well. We have a comprehensive and world-renowned system for fisheries quota management, and our marine transport and safety legislation reflects international best practice. There are, however, areas for improvement. In particular, there are gaps and inconsistencies in our legal framework for managing the EEZ.

The laws we have at the moment are focused on existing activities, such as fisheries and transport. We need to prepare for new types of activity in the EEZ and fill any gaps in regulating environmental effects. Although pressures are not yet urgent, we have a window of opportunity now to get the right systems in place before problems start to arise.

I encourage you to make a submission on this discussion paper and contribute to our consideration of these important issues. Thank you.



Hon David Benson-Pope
Minister for the Environment

Feedback

The Ministry for the Environment seeks your views on the proposals in this discussion paper. Questions are placed throughout the paper to help focus your feedback on specific issues, but please feel free to comment on any other matters.

You can make a submission in several ways. An electronic submission form is available on the Ministry's website at: www.mfe.govt.nz/issues/oceans/current-work/

You can email your submission to:
oceans@mfe.govt.nz

or post it to:
EEZ Submissions
Working with Central Government Group
Ministry for the Environment
PO Box 10362
Wellington.

The closing date for submissions is 30 September 2007.

After receiving submissions, the Ministry for the Environment will report to the government with a summary of submissions and detailed policy options. This report will include an assessment of the problem and the options proposed to address it. It will also include a regulatory impact statement.

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Executive Summary

New Zealand's Exclusive Economic Zone (EEZ) is the area of sea and seabed that extends from 12 to 200 nautical miles offshore. The EEZ has a wide range of biodiversity values and economic opportunities. The government wants to promote environmentally responsible access to EEZ resources while ensuring human impacts do not threaten the integrity of oceans ecosystems.

Environmental effects in the EEZ are managed by sector-specific legislation, which creates the following problems:

- gaps and inconsistencies in the operational control of environmental effects
- unclear environmental outcomes against which activities and their effects should be assessed
- uncertainty for investors about the regulatory environment
- uncertainty about how the effects of activities on each other should be managed.

The pressure to improve the regulation of environmental effects will build over time as activities increase. There is a window of opportunity now to improve the regulatory regime before the need becomes urgent.

This paper proposes establishing new legislation to fill key gaps in EEZ environmental regulation and promote a consistent approach to environmental management across different statutes. The focus of the proposals is on the effects of activities not covered by existing statutes, such as seafloor disturbance by the installation of a structure, or by mining.

The proposed purpose of the legislation is “sustainable management”. The legislation will define, through rules, the thresholds for when activities can proceed without any need for assessment, and which activities require assessment and approval through an “EEZ consent”. The process for considering an EEZ consent would be scaled to the size of the proposal. There will also be the ability to make further rules that could apply to specific areas or activities, which will enable a more strategic development of rules over time as information improves.

Rules could either be developed to address existing gaps in the regulatory framework, or to apply more widely and cover activities currently regulated under existing laws, such as under the Fisheries Act 1996 and Maritime Transport Act 1994.

This paper proposes that Ministers or agencies with decision-making powers in the EEZ would be consulted when applications for EEZ consent are being considered and when rules are developed. The proposals aim to achieve consistency of decision-making across statutes and to address cumulative effects.

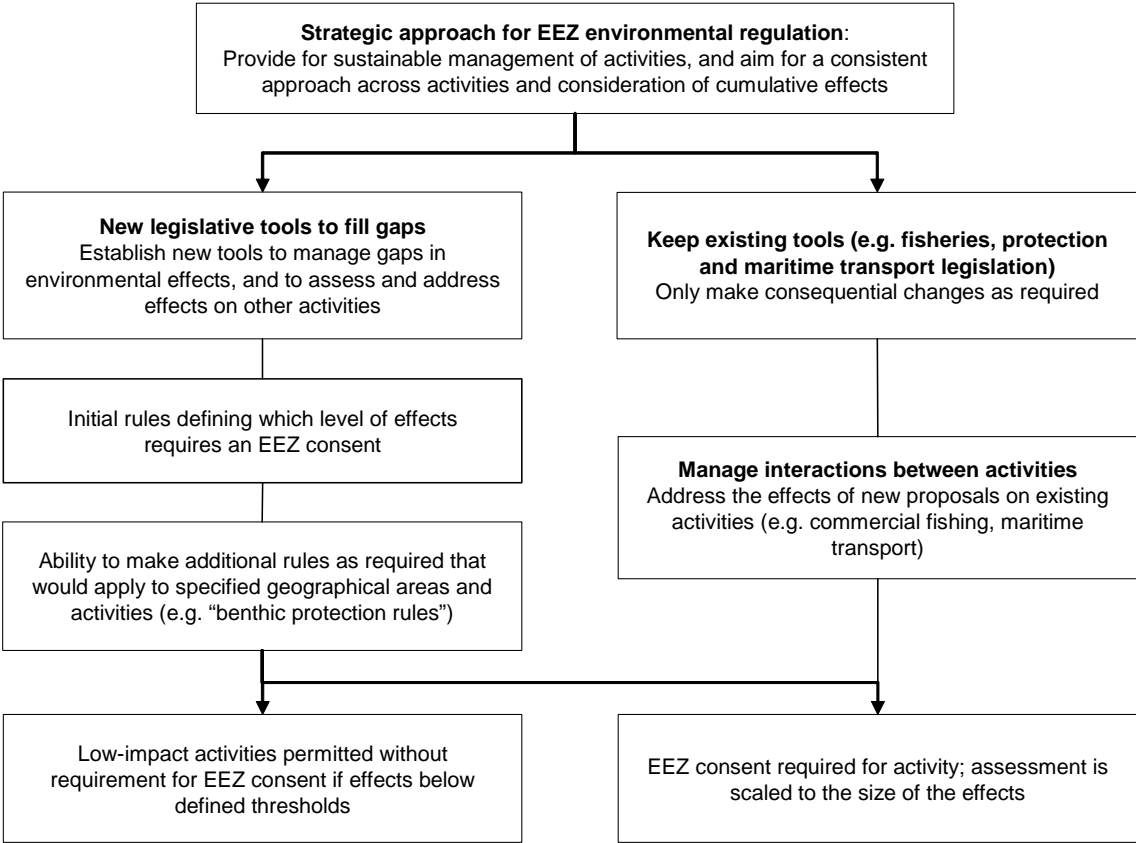
Authorisation of activities would involve limited allocation of the space or resources required to undertake the activity. The government intends that this allocation would only be necessary for the duration of the project, and only if environmental criteria are met.

This paper proposes that the effects of a proposed activity on existing activities be assessed and addressed. These could either be existing activities regulated under an existing law (e.g. fishing), or applications under this new regime for the same space or resource.

The EEZ is managed as a public commons, not as private property. Decisions on uses should be for the greatest national benefit. When one activity has a negative impact on another, efforts should be made to avoid or mitigate adverse effects when the application is considered. Your feedback is sought on whether redress should be considered when an activity may be displaced or negatively affected by the granting of an EEZ consent.

The appropriate form of legislation to deliver this regime depends on the final contents of the policy and the administrative requirements. It could involve amending existing legislation or establishing new legislation. The proposals are summarised in Figure 1.

Figure 1: Summary of proposals

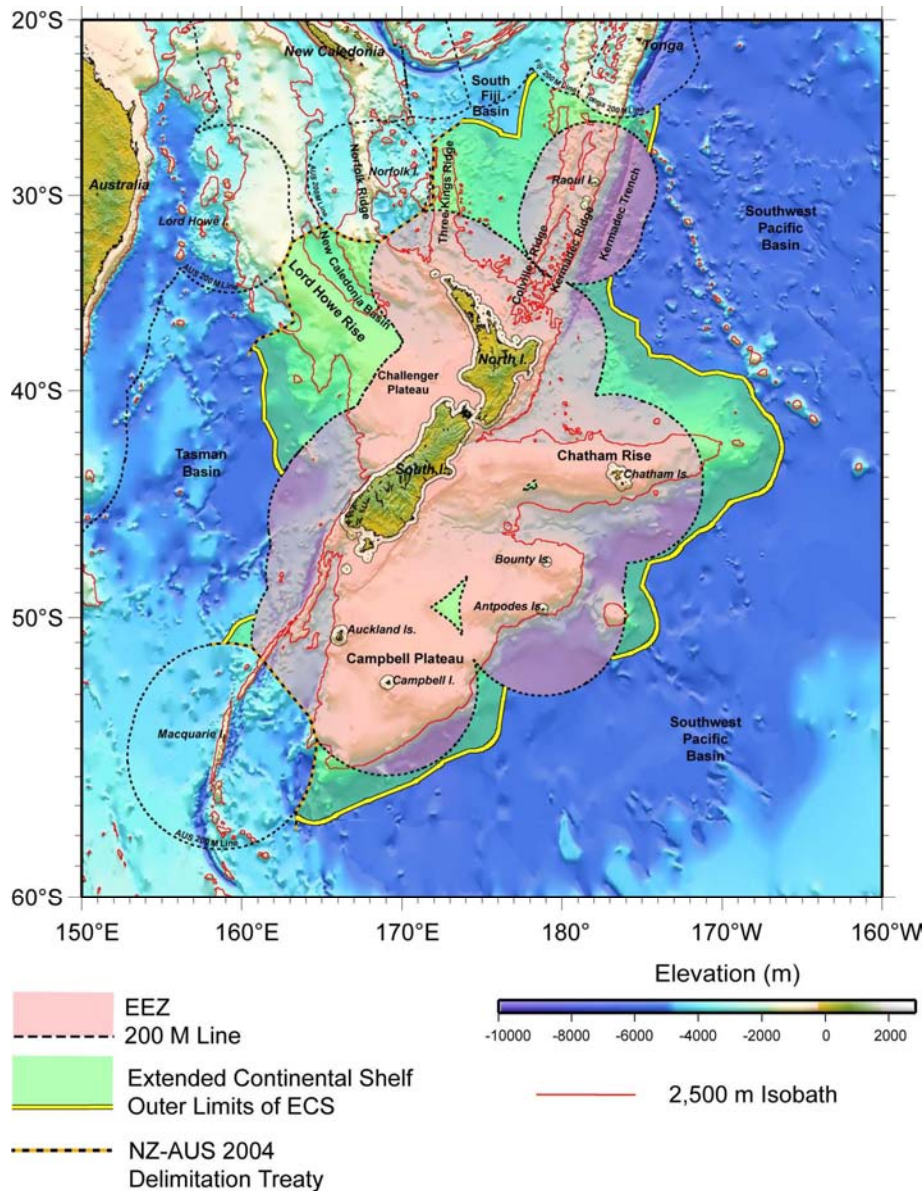


1 Introduction

What is the Exclusive Economic Zone?

- 1.1 New Zealand's Exclusive Economic Zone (EEZ) is the area of sea and seabed that extends from 12 to 200 nautical miles offshore. It is the fifth largest EEZ (approximately 430 million hectares) in the world, about 15 times the size of our land mass.
- 1.2 New Zealand has lodged with the United Nations a submission defining the limits of our Extended Continental Shelf. The proposals in this paper may, as far as possible under international law, also be applicable to this area.

Figure 2: New Zealand's Exclusive Economic Zone



- 1.3 New Zealand has full sovereignty over the territorial sea out to 12 nautical miles. The proposals in this paper do not cover this area.

Environmental, economic and cultural values

- 1.4 New Zealand's marine ecosystems and species are highly diverse. Habitats in the EEZ range from plains of mud to volcanic vents in seamounts of the deep ocean, where micro-organisms "breathe" sulphur rather than oxygen. New Zealand is visited by a number of migratory species and provides habitats that are critical to the long term viability of some of these species, particularly marine birds that breed in New Zealand.
- 1.5 Marine scientists estimate that a high proportion of New Zealand's indigenous biodiversity is found in the sea. Although many of our fish species are found elsewhere in the world, many of our benthic (bottom-dwelling) marine species are found only in New Zealand waters. Evaluating the state of New Zealand's EEZ marine biodiversity is difficult due to the very limited information we have about deep-sea species. We know far more about the nearshore marine environment.
- 1.6 New Zealand's EEZ also provides us with considerable economic opportunities. Fishing is a major export earner. However, despite the size of New Zealand's EEZ, the productivity of our fisheries is relatively low because the waters are deep (New Zealand's offshore fisheries are among the deepest in the world) and not particularly rich in nutrients.
- 1.7 Oil and gas have been discovered in several parts of New Zealand's offshore territory, although the only commercial production has been through the development of the Maui gas field, extending 35 to 50km off the Taranaki coast. Three Taranaki basin oil and gas fields are currently under commercial development in the EEZ (Kupe, Tui and Maari). With the increase in oil and gas prices as well as the decline in the Maui gas field, oil and gas exploration has increased in New Zealand's EEZ. A number of offshore oil and gas fields are being appraised and may be developed over the next few years. For example, there is high interest in oil and gas exploration in the Great South Basin, offshore Taranaki, and off the east coast of both the North and South Islands.
- 1.8 The EEZ connects us to the rest of the world through shipping and undersea telecommunication cables. Almost 85% of New Zealand exports by value (99% by volume) are carried by sea, and around 90% of international telecommunication services within New Zealand are carried on submarine cable systems. A submarine cable failure would have a serious impact on the New Zealand economy.
- 1.9 The ocean offers great potential for innovation and investment in a range of different wealth-creating activities. Although much of New Zealand's land-based resources and fisheries are already being utilised, the EEZ and continental shelf offer significant untapped space and resources for future developments.
- 1.10 There has been recent interest in exploration for seabed minerals, such as "seafloor massive sulphides" deposits on the Kermadec Ridge and gold off the west coast of the South Island. Methane hydrates may also generate interest if proven to be commercially viable. Biological prospectors search marine life for new and valuable chemical compounds.

- 1.11 In the future, new and innovative activities may be developed, such as new types of minerals exploration, marine energy generation, deep-sea aquaculture, or carbon capture and sequestration. These new kinds of activity face high cost and technological barriers.
- 1.12 The proposals in this paper focus on regulating environmental effects, but they also recognise cultural values. Maori have a close cultural relationship with the ocean, particularly inside the territorial sea. Some iwi have cultural connections with specific areas in the EEZ; for example, the Kermadec Ridge has special significance for Tuwharetoa, as it played an important role in their ancestral migrations to Aotearoa.
- 1.13 Management of shipwreck sites in the EEZ might also become of increased importance as technology allows deeper sites to be reached.

Status of the EEZ under international law

- 1.14 Under the United Nations Convention on the Law of the Sea, New Zealand has full sovereignty in the territorial sea, largely equivalent to that over the land. New Zealand has a more limited set of “sovereign rights” in the EEZ. These rights are for the purpose of exploring, exploiting, conserving and managing the living and non-living resources of the EEZ, as well as in relation to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, current and winds.
- 1.15 New Zealand also has jurisdiction in relation to artificial islands, installations and structures, marine scientific research, and the protection and preservation of the marine environment.
- 1.16 Sovereign rights are subject to various conditions and obligations, such as international controls on marine transport and pollution, the right of any state to lay submarine pipelines and cables, and freedom of navigation.
- 1.17 New Zealand also has sovereign rights for exploring and exploiting the natural resources of the continental shelf, including where it extends beyond the EEZ. New Zealand has lodged with the United Nations a submission defining the limits of our Extended Continental Shelf. As far as possible under international law, an improved EEZ regulatory regime for environmental effects could also apply to the Extended Continental Shelf seabed and subsoil resources (e.g. minerals).
- 1.18 Much of our existing legislation relating to the EEZ flows directly from international agreements. For example, rules under the Maritime Transport Act 1994 directly implement New Zealand’s obligations under the London Dumping and MARPOL¹ conventions. Regulation that is developed for the EEZ needs to be consistent with international law. We cannot assume the options are the same as those available under New Zealand’s sovereignty in the territorial sea.

¹ International Convention for the Prevention of Pollution from Ships

2 Issues for EEZ Management

2.1 This section discusses proposed policy outcomes for EEZ management, summarises the existing laws, and identifies problems and opportunities requiring government action.

Outcomes

2.2 We want to manage the EEZ and its resources sustainably. This means promoting environmentally responsible access to EEZ resources and ensuring human impacts do not threaten the integrity of oceans ecosystems.

2.3 The specific outcomes proposed for managing our EEZ are as follows.

- *Safeguard the integrity of EEZ ecosystems.* We need to ensure the EEZ has healthy and productive ecosystems. A certain level of environmental impact from human activities is inevitable, but we should ensure that environmental “bottom lines” are not breached, and that oceans ecosystems can maintain biological diversity, regenerative capacity and healthy ecological functioning.
- *Promote sustainable management of EEZ resources.* Sustainable management requires considering economic, environmental, social and cultural issues under one framework. This means encouraging the development of marine economic resources and carefully regulating the resulting environmental impacts.
- *Encourage the development of sustainable marine industries in the EEZ.* Investment is encouraged by clear and fair rules for the approval and ongoing regulation of activities.
- *Enable EEZ resources to be used or protected in a way that provides for the greatest national benefit.* National benefit includes considering economic, environmental, social and cultural factors. A robust and comprehensive management regime allows us to make better choices between different activities and uses. For example, national benefit may sometimes dictate that one activity prevail over another in the same space, or that conservation of an area is a higher priority than its development.

2.4 These outcomes are interdependent. For example, clear and effective regulation both safeguards the environment and gives investors certainty about the legislative controls on their activities.

Question 1: Do you think these outcomes are appropriate? Can you suggest others?

Current environmental regulation

- 2.5 Environmental effects in the EEZ are managed by sector-specific legislation. Fisheries and the environmental impacts of fishing are regulated by the Fisheries Act 1996; marine pollution (such as discharges from ships and offshore installations, oil spills and dumping of waste such as dredged material) is covered by rules under the Maritime Transport Act 1994; and biological prospecting is regulated under the special permits regime of the Fisheries Act. Voluntary and non-enforceable guidelines exist for the environmental impacts of petroleum and seismic activities.² The Annex to this paper summarises environmental legislation in the EEZ.
- 2.6 There is no dedicated protection tool in the EEZ. The Marine Reserves Bill (currently before select committee) would provide for comprehensive protection of biodiversity by enabling marine reserves in the EEZ. If the Bill is enacted and new marine reserves are established, there would still need to be regulation of environmental effects outside these protected areas. This paper focuses on regulating such effects and does not duplicate the issues being considered under the Marine Reserves Bill.
- 2.7 In the territorial sea, the environmental effects of fishing are managed under the Fisheries Act and the environmental effects of most other activities are managed under the Resource Management Act 1991 (RMA).

Key challenges

- 2.8 The sectoral management system means that while some environmental effects in the EEZ are managed well, there are some gaps and inconsistencies. The problem is not a complete absence of environmental controls, but rather that some activities and some effects fall outside current controls, and current controls are neither well integrated nor able to manage cumulative effects across a range of activities and regimes.
- 2.9 The key challenges to address are as follows.

1: Gaps and inconsistencies in the operational control of environmental effects

- 2.10 The key gaps are in providing consistent and full coverage of the effects on:
- the seafloor and seafloor habitats
 - habitats and biodiversity in the water and air.

² Ministry for the Environment and Maritime New Zealand 2006, *Environmental Best Practice Guidelines for the Offshore Petroleum Industry*; Department of Conservation, 2006, *Guidelines for Minimising Acoustic Disturbance to Marine Mammals from Seismic Survey Operations*.

- 2.11 In addressing these gaps we should aim for consistency with existing laws that regulate environmental effects. For example, seabed disturbance through fishing can be addressed under the Fisheries Act, but there are no provisions in the Continental Shelf Act 1964 to address seabed disturbance through mining. Direct effects on biodiversity through fishing can be addressed under fisheries or conservation legislation, but there are no legislative provisions to consider the effects of the installation and presence of an offshore structure, or the effects of seismic survey activities on marine mammals.
- 2.12 Because of these gaps there are inconsistencies between how the territorial sea and the EEZ are regulated. Key statutes covering the territorial sea, such as the RMA and Marine Reserves Act 1971, do not apply in the EEZ.
- 2.13 Inconsistency is not a problem in itself. It reflects the fact that New Zealand has a more limited set of international rights and therefore cannot extend all domestic legislation to the EEZ. However, subject to those limitations and consistent with international rights and obligations, we should as far as possible attempt to consistently manage activities that span the territorial sea and EEZ, or similar activities that occur in both zones.

2: Defining the environmental outcomes so activities and their effects can be assessed consistently

- 2.14 There is a wide range of existing environmental controls, and new controls may be established through this project. It is therefore important to promote a consistent and principled approach to environmental management across the different statutes. For example, controls under fisheries legislation on activities that affect the sea floor should ideally be aligned with controls on other activities with similar effects (e.g. mining). This provides consistent approaches to regulating environmental effects and equity between different industries.
- 2.15 There is currently no legal or policy mechanism to promote such an integrated and consistent approach. There are no statutory links between existing regulatory regimes that apply over the EEZ, and no policy instruments to guide consistent implementation across government agencies. Better integration will ensure that the cumulative effects of different activities can be managed.
- 2.16 Links can be achieved through legislative references, or non-legislative strategic planning tools. The Marine Protected Areas Policy and Implementation Plan is an example of a non-legislative strategic planning tool.³

³ The Marine Protected Areas Policy and Implementation Plan was released by the Department of Conservation and Ministry of Fisheries in January 2006. It can be viewed at http://www.biodiversity.govt.nz/seas/biodiversity/protected/mpa_policy.html

3: Effects on investment certainty

- 2.17 Lack of clarity about the environmental regulatory requirements in the EEZ creates uncertainty for investors and has the potential to hamper the development of a number of activities, including mining, electricity generation, aquaculture, carbon capture and storage, and bioprospecting.
- 2.18 Many operators in the EEZ are large international companies with well-established environmental procedures. If they are complying with best international environmental practice, they will want this practice confirmed by the domestic legal standards of the responsible state. They could also reasonably expect that similar standards would be required of any competitors.
- 2.19 Many future EEZ projects will be large-scale and expensive. Many will face investment risks associated with the application of new technologies in a “frontier” environment. Any uncertainties about the regulatory environment will increase these investment risks.

4: Managing effects on other activities

- 2.20 Activities managed under one regime may be affected or undermined by the effects of activities managed under another. There are no procedures to manage the interactions of proposed and existing activities. For example, a mining proposal may adversely affect fishing in an area of the EEZ, and vice-versa, but there are no formal mechanisms to consider and address these effects.

Question 2: Do you agree that these are the main problems for regulating environmental effects in the EEZ? Are there others?

Size and urgency of challenges

- 2.21 The greatest environmental pressures in the EEZ currently come from fishing, which can be adequately addressed through fisheries legislation and current policy initiatives such as the Strategy for Managing the Environmental Effects of Fishing.
- 2.22 An incomplete regulatory regime for managing other environmental effects in the EEZ is a problem that needs to be addressed. Environmental pressure from unregulated activities has been low in the past, but will increase in the future with greater economic activity in the EEZ and new and more intensive uses of ocean resources.
- 2.23 A lack of mechanisms to improve consistency, coordination and integration between regulatory regimes may mean that cumulative effects will over time degrade the environment or create inequities in the regulation of different activities.
- 2.24 Uncertainty about the regulatory regime may also inhibit the development of future economic opportunities, and will become more of an issue as interest in EEZ resources increases. There is a window of opportunity now to improve the regulatory regime before the need becomes urgent.

Examples of current and future management challenges

Case study 1: Neptune Resources prospecting licence application

In 2002 Neptune Resources was granted a licence under the Continental Shelf Act to prospect for minerals over several seamounts in the EEZ. The seafloor massive sulphides (SMS) deposits targeted are a potential new mining class that have not been commercially developed anywhere in the world.

At the time of application there was no formal legislative process for considering the environmental effects of prospecting activities. The Continental Shelf Act enables the Minister of Energy to grant minerals licences. The Act does not specify what, if any, environmental assessment is required on an application. The RMA did not apply because the application was outside the territorial sea.

The Ministry of Economic Development (MED) consulted with relevant departments to work out the best way forward. This was the most sensible process for good governance in the absence of any formal decision-making framework. The licence was granted approximately two years after application. It enables the MED to approve Neptune's prospecting activities on a case-by-case basis.

Around the same time as Neptune was granted prospecting permits, the Minister of Fisheries closed to fishing 19 seamounts on the Kermadec ridge. This was criticised as an inconsistent approach to environmental management by protecting the environment from fishing but allowing (albeit small-scale) prospecting activities to occur.

Case study 2: Sea disposal of wastes in the EEZ

The Ports of Auckland and marinas of the Hauraki Gulf region dispose of dredging at the Auckland Explosives Dumping Ground, east of Cuvier Island. Current national policy on the sea disposal of wastes in the EEZ stipulates an annual limit of 50,000 cubic metres of sediments at any one site in the absence of a management plan. Potential applications for use of the site could easily exceed 150,000 cubic metres per year, and the current legislative arrangement does not enable the agreed national policy to be implemented effectively.

Applicants are required to demonstrate that their material is of acceptable quality for sea disposal, that the amounts to be dumped will not have adverse effects on the marine environment, and that effects are contained within the site. Research and monitoring on the impacts of dumping are difficult and expensive.

The current legislation does not provide a clear framework for determining access to the site, and for equitable funding of this research. As a result there is potential for applicants to "free-ride" on research funded by previous users.

Hypothetical scenario 1: A seamount “hotspot”

A mining company has a licence, issued under the Continental Shelf Act, to prospect for minerals on the surface of a seamount. There is no guidance in this Act as to how environmental effects should be assessed.

A Crown Research Institute (CRI) is interested in sampling biota off the same seamount, using similar dredging techniques to the minerals prospecting. The CRI receives permission through the Fisheries Act special permits regime. Another CRI wants to sample the seamount to determine its geological composition. It uses the same technique as, and has similar impacts to, the two examples above, but does not require a special permit or mining licence.

The Minister of Fisheries then decides to close the seamounts to fishing techniques that may disturb the seamount habitat. A fishing company fishes the water column over the seamount. Use of this space is a key component in catching their quota entitlement. The closure prevents fishing but not other activities directly affecting the seamount.

This is a deliberately exaggerated example, because it is highly unlikely so many activities would concentrate in one hotspot, but it does demonstrate that activities with like effects would be treated differently.

Hypothetical scenario 2: Deep-sea aquaculture

A marine farming company proposes a large aquaculture development. The nearest point to land is 13 nautical miles offshore, outside the territorial sea and the jurisdiction of the RMA. There is uncertainty over whether the Continental Shelf Act applies to the proposal. “Natural resources” regulated by the Act are confined to those on the seabed. The Act allows regulation of structures created above the shelf, but only when such structures are in connection with exploration of the shelf or exploitation of its natural resources. By definition the marine farm does neither.

It is uncertain if or how the Fisheries Act should apply, as current aquaculture legislation applies only in the territorial sea. There is potential for regulations under the Territorial Sea, Contiguous Zone and Exclusive Economic Zone Act 1977, but none have been made due to uncertainty about their scope and the lack of legislative guidance. Some controls on discharges and safety will apply under the Maritime Transport Act but there is no formal and comprehensive way to approve the proposal and regulate its potential effects.

3 Policy Options

Overview of options

- 3.1 Section 2 identified key problems for the management of the EEZ. This section establishes the government's preferred option for managing these issues, and section 4 examines this option in detail.
- 3.2 The government considers that action needs to be taken. We want to promote opportunities and address issues before they arise, rather than reacting to problems. There are two broad options available.
- *Option 1: Establish legislative mechanisms focused on **filling key gaps** in EEZ environmental regulation and promoting a consistent approach across statutes, including the assessment of cumulative effects.* This is the preferred option. We already have effective regulation in the EEZ for fisheries, maritime transport and safety, and allocation of Crown minerals. Filling gaps and promoting consistency is the most efficient option, because it focuses only on what needs to be done.
 - *Option 2: Develop an entirely new regime for **managing all activities** in the EEZ.* This would involve a reform of existing statutes to develop a unified approach to the environmental management of all activities in the EEZ. This goes beyond the scope of addressing regulatory gaps and would involve major change to other statutes. It is considered disproportionate to the size of the problem. The government considers that it is not necessary to make major changes to existing statutes. Overhauling existing laws for the sake of consistency would involve large transaction costs and would not necessarily lead to better environmental outcomes.

Question 3: Do you agree with this assessment? Which option do you prefer, and why?

Preferred option

- 3.3 The rest of this paper details the government's preferred option (Option 1: Establish legislative mechanisms focused on filling key gaps in EEZ environmental regulation and promoting a consistent approach across statutes, including assessment of cumulative effects). This would involve a new regime for the consideration, approval and regulation of those activities not already covered by existing statutory frameworks. Consideration and approval would focus on the environmental effects of the activity.
- 3.4 This option would involve:
- requiring approval under legislation for activities that are likely to have adverse effects on the natural and physical environment
 - requiring an evaluation of the environmental effects of these activities

- considering cumulative effects across activities
- a precautionary approach to the regulation of effects
- establishing criteria for assessing the effects of activities
- rules defining the thresholds for when activities require approval from government
- providing a strategic process to determine further rules that would apply to specified geographical areas and activities as information, understanding and changing circumstances allow – these rules may prohibit or provide for certain activities in particular areas
- assessment of proposals when appropriate, requiring from the applicants information and consultation scaled to the nature and size of the potential effects
- issuing approvals (or permits or consents) for activities, containing conditions and the term of any approval
- mechanisms to ensure this new regime is coordinated with and recognises the management of activities under other laws, including the management of cumulative effects
- providing for the effects of new activities on existing uses to be taken into account
- cost recovery provisions
- enforcement and monitoring provisions.

The flow chart in the Executive Summary of this paper summarises what is proposed under this option.

Question 4: Do you think this approach is an appropriate and proportionate response to the problems?

4 Details of the Proposed Option

Scope

- 4.1 The proposed option focuses on filling gaps in existing legislation and promoting a consistent approach to environmental regulation across different statutes. It is proposed that this regime focus on environmental effects rather than prescribing the activities it will apply to. This will allow flexibility to deal with future activities in the EEZ.
- 4.2 The aim is to allow for the beneficial use of the EEZ and its resources and to regulate the environmental effects of this use. Authorisation of activities involves limited allocation of the space or resources required to undertake the activity. The government intends that this allocation only be that necessary for the duration of the project, and only if environmental criteria are met. At the end of the term of the authorisation the space and resources could be available for other uses, or be protected.
- 4.3 For example, an offshore installation may be authorised to occupy space in the EEZ for a defined time and purpose, but this space would not be owned by the occupier, nor would they have rights beyond what is reasonably required to exercise the terms of their approval. Applicants wishing to use a marine disposal site to dump dredge spoil could use sites specified as environmentally acceptable, but they would not have dumping rights in perpetuity or be able to deviate from the terms and conditions of their approval.
- 4.4 Other allocation regimes already exist for some EEZ resources (e.g. fisheries and minerals). These would remain unchanged.
- 4.5 There is no intention to amend the RMA or extend its coverage. The proposals in this paper do draw on some concepts used in the RMA, however; for example:
 - a statutory purpose of “sustainable management”
 - assessment of the environmental effects of activities on a case-by-case basis scaled to their size and significance
 - the power to make environmental rules.

Statutory purpose

- 4.6 It is proposed that the new legislation have the purpose of “sustainable management”. Sustainable management involves environmental, economic, social and cultural dimensions.
- 4.7 The statutory purpose of sustainable management would fit well with existing environmental legislation and bring some level of consistency with other management regimes. Sustainability is reflected in existing legislation such as the RMA (which does not apply in the EEZ but does in the territorial sea) and the Fisheries Act (which applies in the EEZ but is restricted to the sustainable utilisation of fisheries). It would also allow

managers to draw on experience and case law from implementing sustainable management regimes.

4.8 It is proposed that the purpose be modelled on the RMA and be defined as:

Promotion of the sustainable management of natural and physical resources in the EEZ and the Extended Continental Shelf.

*Where **sustainable management** means managing the use, development, and protection of natural and physical resources in a way, or at a rate, that provides for social, economic, and cultural wellbeing:*

- (a) sustaining the potential of the EEZ and Extended Continental Shelf's natural and physical resources to meet the reasonably foreseeable needs of future generations; and*
- (b) safeguarding the life-supporting capacity of the ocean, air, soil and seabed, and ecosystems; and*
- (c) avoiding, remedying, or mitigating any adverse effects of activities on the environment.*

Question 5: Do you have any comments on this proposed purpose?

Rules framework

4.9 Two types of rules are proposed.

Mandatory rules to determine assessment thresholds

4.10 When the legislation first comes into force, rules would be required to define the thresholds for when approval is required for an activity. These rules will be the default mechanism to determine whether an application for an EEZ consent is required. For example, rules could define the level of seabed disturbance or exclusive occupation of space that triggers the need to obtain an EEZ consent. They also could allow activities to occur without the need for approval so long as they comply with certain conditions.

Discretionary rules for specific areas or activities

4.11 It is proposed the legislation would also enable more detailed rules to be developed where required. They could be used to actively manage the effects of new activities, or to close areas to new applications for particular activities, or to specify areas where the environmental effects of particular activities would be acceptable.

4.12 This discretionary rule-making power enables a more proactive and strategic approach to regulation and would assist in regulating cumulative effects.

- 4.13 Examples of rules would be for the protection of benthic habitats across currently unregulated activities (see further comment below about rules to cover all activities), or rules for the protection of specific areas such as active seamounts. These rules would guide decisions on individual applications and would be a way to address cumulative effects by applying to an area or multiple activities.
- 4.14 Preparation of rules would include consultation with stakeholders.

Common environmental rules for all activities in the EEZ

- 4.15 Rules could be applied only to the environmental effects of activities that are currently unregulated.
- 4.16 Alternatively, rules could apply to all environmental effects in the EEZ across the different statutes. For example, common environmental rules could be used to regulate the effects of activities on seafloor habitats, regardless of whether the activity is fisheries bottom-trawling, seabed mining or scientific research, which are all regulated under different laws. Although this approach would be a more robust way to achieve consistency across different laws and to address cumulative effects, it would be more complex to design and implement compared to restricting rules to effects that are currently unregulated. It would involve making changes to existing laws.

Question 6: Do you feel the proposal for rules here is suitable? What changes to it, if any, would you like to see?

Question 7: Do you think rules should apply to all activities and their effects, or only to currently unregulated effects?

Question 8: What are the likely regulatory costs of a rules framework?

Assessment of effects and consideration of applications for EEZ consent

- 4.17 When a proposed activity is not permitted under mandatory rules, an EEZ consent would be required. A person wanting to do something in the EEZ in this situation would need to put in an application for an EEZ consent so the likely effects of the activity could be assessed. An approval by the decision-maker would be required before the activity could proceed. The assessment should enable informed decisions with sufficient understanding of the likely effects. The applicant would be responsible for providing information, or funding its collection where new environmental information is required.
- 4.18 The effects of a proposal include both adverse and beneficial effects, as well as cumulative effects arising from multiple activities in the same ecosystem. The effects of a proposal on other activities will also be considered. The effects of most interest are those where there is a high probability that they will occur and/or the impacts have the potential to be high.

4.19 Matters relevant to an evaluation include the:

- size of the proposal
- geographic area affected
- time required for the activity
- nature of the area being affected and whether this has any significant or sensitive features
- nature of the proposal and its potential for causing damage
- methods or alternatives available to avoid or reduce adverse effects
- need for servicing by vessels and aircraft
- biosecurity concerns
- duration of any effects
- possible cumulative effects.

4.20 The level of evaluation will be a continuum, from very brief assessment (for small proposals in areas that are not sensitive and where effects are well understood) to a higher threshold of assessment where the project is large, involves high-impact activities and potentially affects sensitive areas, biodiversity or resources.

4.21 The information required for assessment should be scaled to the size of the proposal's effects. For example, large-scale minerals extraction or carbon sequestration would require more information from the applicant than a decision on minerals exploration or low-impact research sampling. It may also be necessary to provide a mechanism to escalate assessment requirements in individual circumstances. Thus an activity may have low environmental effects in one situation, but much higher effects in another area or when combined cumulatively with other activities.

4.22 The level of detail required in an assessment should be specified clearly to applicants, and should be proportionate to the effects of the proposal. This approach of matching evaluation requirements to the proposal is already used in the RMA. The decision-making body should have the ability to request further information to allow feedback on how much detail is needed.

Question 9: Is this approach to considering applications appropriate for regulating the environmental effects of activities in the EEZ?

Question 10: Are there any changes you would make?

Question 11: How should thresholds for the level of evaluation be set?

Biosecurity

4.23 It is expected that the biosecurity impacts of any project would be included in the evaluation of environmental effects. This would mean, for example, that the risk posed by the release of new organisms introduced on a structure would be considered when approval is sought, and the approval could contain conditions to help manage the risk. The full scope of the activity would be considered, including cleaning and maintenance procedures, and the use of support vessels.

- 4.24 It is not expected that the regime would deal with deliberate releases of organisms into the ocean. A new organism approval regime (as provided in the Hazardous Substances and New Organisms Act 1996 on land and in territorial waters) is not planned.

Question 12: Are biosecurity issues adequately managed by the proposal?

Coordination with other environmental regulation

- 4.25 Any new environmental regulation needs to be coordinated with other regimes. For example, protection of a seamount from fishing disturbance under the Fisheries Act should mean that similar controls are considered for other activities with similar effects.
- 4.26 The impacts of proposed activities on existing activities will be included as an “effect” of the proposal and will be considered along with effects on the natural and physical environment. For example, a proposed offshore platform’s exclusion zone would be assessed for effects on fishing activities in that space.
- 4.27 Any use of rules would need to have regard to rules and area controls imposed under the other regimes in the EEZ. Fisheries benthic protection areas, for example, may be relevant to the preparation of rules about the environmental effects of seabed mining.
- 4.28 It is proposed that Ministers or agencies with decision-making powers in the EEZ be consulted when applications are being considered and when rules are developed. The aim is consistency of decision-making across statutes and to address cumulative impacts. Shared information and understanding will also help to ensure consistent decisions. As discussed earlier, rules could be developed that apply across different statutory regimes.
- 4.29 Regional councils should also be consulted on activities that cross (or go close to) the boundary between the territorial sea and the EEZ. The RMA does not apply in the EEZ, but regional councils will have an interest in how activities may have an impact on their jurisdiction, and in promoting environmental management that is consistent with their regional coastal plan.

Question 13: Do you agree that consultation between EEZ decision-makers is a practical way to achieve consistency and address cumulative effects? If not, what else would you like to see?

Question 14: What kind of mechanisms are appropriate to coordinate environmental management under different regimes?

Nature of EEZ consents

- 4.30 It is proposed that an approval under the new legislation be called an “EEZ consent”. An EEZ consent is permission to undertake a specified activity within set parameters, akin to an RMA resource consent.

- 4.31 EEZ consents will not be real or personal property. They do not give ownership of the resources or space involved in the activity, nor do they create rights beyond those specified under the legislation. It is crucial, however, to provide certainty and stability about the parameters of an EEZ consent for anyone proposing activities in the EEZ. Investment – particularly in high-risk and technologically challenging activities – requires certainty about the “rules of the game”.
- 4.32 It is proposed that an EEZ consent cover:
- who the authorisation applies to – it is proposed that consents be transferred with the approval of the EEZ consent decision-maker, so long as the effects of the activity remain unchanged (similar to the rules on transferring RMA resource consents)
 - a definition of the activity and authorised effects
 - conditions to avoid, mitigate or remedy environmental effects and effects on other activities and interests
 - the allowable effects on other activities and interests
 - the location and geographical boundaries, which provide the location of the activity – any occupation of the site would only be to the level needed for the activity and would exclude others only in so far as their use of the site precluded the authorised activity from taking place
 - the duration of the consent, up to a maximum statutory term (e.g. the RMA has a 35-year maximum); the term given will relate to the nature of the activity
 - “use it or lose it” provisions to prevent speculative or anti-competitive applications
 - monitoring and enforcement requirements
 - cost recovery provisions to cover ongoing administration, and any necessary research, monitoring and enforcement requirements
 - decommissioning/end-of-life considerations (including cost, indemnity or bond provisions for removal in the case of insolvency)
 - liability insurance and any bonds.
- 4.33 There would also need to be enforcement by the administering agency of any conditions on an EEZ consent.
- 4.34 Any continuation of the activity beyond the consent duration would be subject to a new consent. A new application for an EEZ consent could be declined if, for example, the environmental effects, or effects on other activities, were now considered to be unacceptable. Where the activity remains acceptable the existing user could apply and be considered before others for the same activity provided they have been responsible users in the past and their application involves the efficient use of resources.

Question 15: What are your views on the proposed scope of approvals?

Question 16: What matters should be covered to give certainty for sustainable commercial investment in EEZ activities?

Question 17: Are there other matters that should be covered by approvals?

Precautionary decision-making

- 4.35 Decisions should recognise uncertainty in any risks to the environment and incorporate a precautionary approach, as follows.
- Decisions to approve or not approve activities, or to mitigate or avoid damage, should be made even when there is a lack of information or when information is poor or uncertain.
 - Uncertainty about the effects of proposed activities needs to be recognised and built into decision-making. There needs to be good information about possible effects, and any approvals with adverse effects need to be within the range where the information provides confidence that the effects are understood and can be managed.
- 4.36 The first point above is most relevant to protection measures and it should form part of the rule provisions. The second applies especially at the approval stage and underpins the requirement for good information. Where information is lacking and an approval is given, the approval needs to reflect the fact that unknown adverse effects may occur. In this case, conditions may be imposed to monitor effects and to enable the decision-maker to review conditions when further information is available. Decisions with little information should therefore be more conservative.
- 4.37 It is proposed the regime recognise uncertainty and incorporate precaution in decision-making on proposed activities. There are models for managing risk and precaution. For example, the RMA includes in its definition of “effect” any potential effect of high probability, and any potential effect of low probability which has a high potential impact. This means high potential impacts are considered even where they are considered to be of low probability. The information rules in the Fisheries Act also provide for decisions to be made to ensure sustainability where there is uncertainty.

Question 18: Do you have any comment on how precaution should be incorporated into decision-making?

Question 19: What do you think is an appropriate balance between precaution and encouraging investment in new activities in the EEZ, given it is a relatively low information environment?

Existing activities and interests

- 4.38 An assessment is required of the effects of a proposed activity on existing activities and interests. These could either be existing activities regulated under other legislation (e.g. fishing), public interests in the EEZ (e.g. the effects of a proposal on marine cultural heritage values), or two or more applications under this new regime covering the same space or resource.

- 4.39 It is proposed that the effects of a proposed activity on existing activities such as fishing be considered as part of the application process. Conditions on the approval could be used to avoid or mitigate the effects of one activity on others. After these effects have been considered, decisions to approve one activity over another would include consideration of economic and cultural factors to determine which activity best provides for the greatest national benefit and the statutory purpose of sustainable management.
- 4.40 Those potentially affected by a proposal would need to be informed of the proposal and able to raise any concerns during the consideration of the application. It needs to be recognised that if the overarching criteria are net national benefit and achieving the purpose of sustainable management, then there could be some negative effects of new activities on existing ones. Alternatively, a proposed activity may not go ahead if the negative effects on the environment and existing uses and interests are greater than the benefits.
- 4.41 Conditions could be imposed on an application for EEZ consent to avoid, remedy or mitigate adverse effects of one activity on another when the application is considered. We are seeking feedback on whether redress should also be considered when one activity displaces or negatively affects another through the granting of an EEZ consent.

Question 20: What are your views on the adequacy of the proposals for managing effects on other activities and interests?

Question 21: Do you think redress should be considered when an existing activity is affected by a new activity?

Consultation on applications for EEZ consent

- 4.42 The legislation should give guidance about when and who to consult in the preparation of an application for EEZ consent.
- 4.43 The EEZ will be managed at the national scale by central government. This is appropriate because there is a strong national and international community of interest. The level and nature of the interest from the public is different to that of activities on land and in nearshore coastal environments, where people are directly or proximately affected by activities.
- 4.44 Iwi, stakeholders (such as industry with operations in the EEZ and non-government organisations with expertise in the EEZ) and some members of the public will have an interest in a proposed activity in the EEZ. While an intensive RMA-scale public consultation process is not considered appropriate for the everyday operation of an environmental effects regime in the EEZ, some consultation with affected stakeholders is necessary.
- 4.45 The process and costs of consultation should be shared by applicants and the government, depending on the nature of the activity and stakeholders. For example, the government is best placed to consult internally between agencies, but it may be appropriate for the applicant to consult with industry or other groups or persons interested in their proposal.

Question 22: What consultation provisions would you like to see?

Question 23: What interests do you or your group have in the EEZ which should be taken into account through consultation?

Question 24: How do you think the process and costs of consultation should be shared between applicants and the government?

Cost recovery

4.46 It is proposed the legislation provide for a cost recovery regime. This would include the recovery of the costs of receiving and processing applications and ongoing administration and other costs (such as monitoring and enforcement) of an EEZ consent. It would also include the costs of any additional research required to assess environmental effects.

Question 25: Do you agree that a cost recovery regime is necessary?

Question 26: On what basis should cost recovery be charged, and what level of charging is appropriate?

Rentals, royalties and other benefits

4.47 We are seeking feedback on whether it would be appropriate to charge rentals or royalties, or to capture other kinds of benefits, such as those discovered through biological prospecting activities.

4.48 To capture benefits, clear justification would be needed (e.g. to reduce the pace of resource depletion or capture otherwise unrealised benefits to New Zealand). Charging would also need to be considered in the legal context of New Zealand's international rights and obligations in the EEZ.

Question 27: Do you think rentals and royalties should be charged for use of EEZ resources, and why?

The decision-maker – Minister or separate body?

4.49 Decisions on applications and any rules could be made by a Minister, or kept at arm's length by an independent decision-making body. Both models are used in New Zealand.

4.50 Direct decision-making by the Minister of Fisheries is used in the Fisheries Act, whereby decisions are either made by the Minister following advice, or by the Chief Executive of

the Ministry of Fisheries under delegation in the Act. Criteria and process guidance (e.g. covering consultation) are given in the Act.

- 4.51 Under other legislation, decisions are delegated to a specific body. Examples include the Environmental Risk Management Authority's decision-making role under the Hazardous Substances and New Organisms Act. The Act and the regulations under the Act provide detailed process rules and set criteria for decisions made by the Authority.
- 4.52 Some other Acts, such as the RMA, have a mixture. Under the RMA, regional councils make decisions in relation to coastal permits and the Minister of Conservation makes decisions on restricted coastal activities following consideration by the relevant regional council. Regional coastal plans are prepared by regional councils but approved by the Minister of Conservation. The Minister for the Environment (and the Minister of Conservation in relation to the coastal marine area) has the power to call-in an application for resource consent. The Minister for the Environment also has the power to recommend to the Governor-General that a national environmental standard be made.
- 4.53 It is common for legislation to specifically delegate some decisions to officials. The Maritime Transport Act, Biosecurity Act 1993 and Conservation Act 1986 do this for particular decisions.
- 4.54 The decision-maker on the environmental effects of activities in the EEZ could be supported by an independent board or a cross-agency stakeholder group. For example, the Oil Pollution Advisory Committee appointed by the Minister of Transport under the Maritime Transport Act to advise Maritime New Zealand comprises both government and industry representatives. Its advice is non-binding.

Question 28: Who should make the final decisions on:

- 1. rules**
- 2. applications?**

The Minister, the administering department, or an independent agency?

Question 29: Should rights of appeal to these decisions (other than judicial review) be provided? If so, what should they be?

Administering agency

- 4.55 Responsibility for a new regime could lie with an existing agency or a new agency. Determining the best agency includes consideration of capability, cost effectiveness and conflict of interest with other functions and powers. An agency will also require appropriate resourcing.
- 4.56 The administering agency could be responsible for some or all of the following roles, depending on who the decision-maker is:
- administering and monitoring the effectiveness of the legislation to give effect to the proposals in this paper
 - receiving and assessing applications for EEZ consent, and recommending what course of action the decision-maker should take

- developing rules for approval by the decision-maker
- advising the decision-maker on other matters relating to the regulation of environmental effects
- consulting with stakeholders and the agencies administering other related environmental management legislation (such as the Fisheries Act and Maritime Transport Act)
- monitoring and enforcement.

4.57 Possible agencies (in no order of preference) include:

- Department of Conservation
- Maritime New Zealand
- Ministry for the Environment
- Ministry of Fisheries
- Ministry of Economic Development.

4.58 There are several principles that are relevant when selecting an appropriate agency.

- There should be no conflict of interest with any existing functions or statutory purpose.
- The agency has the required resources and expertise to fulfil its functions.
- Organisational arrangements should be proportionate to the size of the functions and should not create unnecessary expense or organisational complexity.

4.59 It is possible for the resources of outside agencies to be used to assist the administering agency with its functions (e.g. the current use of the National Maritime Coordination Centre and New Zealand Defence Force vessels and aircraft for monitoring and enforcement in New Zealand's territorial sea and EEZ).

<p>Question 30: Do you have a preferred administering agency, and why?</p>

5 Legislative Options

5.1 The form the legislation takes depends on the final contents of the policy and the administrative requirements. The two broad options are to amend an existing statute or create new stand-alone legislation.

Option 1: Amend an existing statute

Territorial Sea, Contiguous Zone and Exclusive Economic Zone Act 1977 (TSCZEEZ)

5.2 The primary purpose of the TSCZEEZ Act is to establish the various zones in New Zealand's marine jurisdiction. Although the Act is not designed to approve individual activities or regulate environmental effects, it does have catch-all regulation-making powers. These powers could be extended to enable regulations covering the proposals in this paper.

Maritime Transport Act 1994

5.3 Rules under the Maritime Transport Act 1994 already provide for a range of environmental controls and consultation requirements, such as control of discharges from offshore installations and sea disposal of waste.

5.4 Amendments in 2004 broadened the scope of the Act to include the objectives of "protecting and promoting public health" and "ensuring environmental sustainability". Maritime New Zealand is also now responsible for "protection of the marine environment in and beyond New Zealand". Amendments to section 36 of the Act now contemplate maritime rules relating to other matters including "assisting economic development".

5.5 An option is to establish further rules under this Act (after any required changes to the rule-making powers) to provide for the proposals in this paper.

Option 2: Stand-alone new legislation

5.6 An approval and effects management regime could be delivered through new legislation.

Question 31: Do you consider the regime should be in separate legislation or should be incorporated in existing legislation?

Transitional provisions

- 5.7 New legislation would have to provide for transferring into the proposed new regime any activities currently being undertaken that would require an EEZ consent. This can be done in a number of ways, such as through “sunset clauses” on approvals under old legislation, a period of time to obtain approval under new laws, or deemed acceptance into the new system.

Annex: Summary of Environmental Legislation in the EEZ

General class of effect or activity	Specific effect or activity	Legislation	Comments
Harvest of biological material	Catch of fisheries	Fisheries Act 1996 (QMS and associated provisions)	The Fisheries Act and associated regulations control the harvest of all fish stocks found in New Zealand's EEZ. Quota management (QMS) provisions are comprehensive in relation to the management of fish stocks.
	Collateral effects of fishing (e.g. by-catch, seabed damage)	Fisheries Act 1996 (environmental provisions)	The Fisheries regulations can be made to manage the impacts of fishing on the environment. These include tools such as closed areas, closed seasons, or fishing method restrictions. Implementation of the Strategy for Managing the Environmental Effects of Fishing (SMEEF) is intended to define environmental outcomes for implementing these controls. While implementation of the SMEEF is in the early stages, there is a wide range of environmental controls available. For example, Benthic Protection Areas have recently been created in the EEZ.
	Scientific research	Fisheries Act 1996 (special permits) UNCLOS Marine Scientific Research Provisions	The special permits regime covers matters such as investigative research (e.g. bioprospecting sampling). In considering permits, the Ministry of Fisheries must take into account environmental (and other) provisions of the Act and is able to set conditions on permit. Foreign researchers require New Zealand's permission to undertake research activities in our waters. New Zealand (through the Ministry of Foreign Affairs and Trade) can decline consent on (among others) environmental grounds.
Discharges from ships and installations into sea and air		Maritime Transport Act 1994	Rules provide for a range of controls centred on the regulation and management of discharges to water (and a lesser extent to air), and dumping from (and disposal of) offshore installations etc, largely in line with MARPOL and the London Convention, along with our indigenous oil-spill planning and response requirements. These provide good coverage of effects.
Seabed disturbance	Petroleum drilling	None – the Petroleum Accord sets out voluntary protocols	Petroleum activities in the EEZ are referred back to the Crown Minerals Act 1991 regime, which does not assess the environmental effects of mining activities on the seabed (the RMA fulfils this role in the territorial sea). Therefore there is no coverage of environmental effects.
	Installation of structures	Continental Shelf Act 1964	The Act has a regulation-making power to (among other things) regulate the construction, erection or use of installations or devices in, on or above the continental shelf in connection with the exploration of the shelf or that part thereof, or the exploitation of its natural resources. There is uncertain coverage of effects. No regulations have been made under the Act, and there is no explicit mention of environmental matters in the Act. The Minister of Energy has broad decision-making discretion, so could impose environmental conditions if he/she chooses.

General class of effect or activity	Specific effect or activity	Legislation	Comments
	Removal of seabed minerals other than petroleum	Continental Shelf Act 1964 (CSA)	Prospecting and mining for minerals other than petroleum remain under the CSA and requires a licence for either activity from the Minister of Energy. The Minister is able to attach conditions to a licence granted under this section. Other than for safety and royalties, there is no guidance in the Act on what conditions should or may be attached. As above, there is uncertain coverage of environmental effects.
Disturbance of biodiversity in water or air column	Seismic survey	None – the Department of Conservation (DoC) has produced voluntary guidelines to minimise disturbance to marine mammals	DoC guidelines set out areas of ecological importance and technical methodologies to minimise disturbance. They are voluntary with no legislative force.
	Physical presence of structures	None	Fixed or floating structures may affect biodiversity resident in or moving through an area.
	Effects on species protected by legislation	Marine Mammals Protection Act 1978	A permit is required under the Act for anyone to “take” a marine mammal. The definition of “take” includes actions that harm, harass, injure and attract. The Act does not address by-catch, but the Fisheries Act can. Instead the Act provides for the establishment of marine mammal sanctuaries, within which fishing activities can be strictly controlled by the Minister of Conservation. There are currently no sanctuaries in the EEZ.
		Wildlife Act 1953	This Act sets out levels of protection for different wildlife, listing those birds and animals that fall into each category. The Act also allows for the protection of different areas. There are currently no sanctuaries in the EEZ.

