

To Hon David Parker, Minister for the Environment			Tracking #: 2018-B-04184
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Date Submitted:	25/01/2018	Response needed by:	31/01/2018
MfE Priority:	Urgent	Action Sought:	Decision

## Recommendations to amend the EEZ Act to enable cost recovery for Board of Inquiry processes

### Key Messages

1. The Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act (EEZ Act) does not provide for costs associated with Board of Inquiry (BoI) decisions on publicly notified marine consent applications to be recovered from the applicant.
2. Without amending the EEZ Act to provide such a cost recovery power to the Minister for the Environment, a sizeable portion of the costs of a BoI will ultimately fall to the taxpayer.
3. We consider that the issue would be best addressed by adding a provision to the EEZ Act that enables the Minister to recover costs associated with a BoI appointed under the EEZ Act from the applicant of a marine consent, and that allows the Minister to delegate the power to recover costs to the EPA on his or her behalf.

### Changes to the EEZ Act introduced a Board of Inquiry process

4. In April 2017, the EEZ Act was amended as part of the broader reform of resource management legislation. One aspect of the amendment to the EEZ Act was the inclusion of a BoI process for marine consent applications that relate to publicly notifiable activities such as petroleum production and seabed mining (section 20 activities).
5. Prior to the amendment, all publicly notified marine consent applications were processed and determined by a Decision-making Committee (DMC) appointed by the EPA. The specific amendment providing for the appointment of a BoI is contained in section 52 of the EEZ Act (Appendix 1). Schedule 4 of the EEZ Act details the BoI process and provides for remuneration to be paid to members of a board. Non-notified marine consent applications are still determined by the EPA.
6. When the EEZ Act was amended to include the Ministerially appointed BoI, section 143 was not amended to provide the Minister for the Environment the ability to recover the costs of a BoI process, nor has provision been made to the Minister to delegate the power to recover costs to the EPA on his or her behalf.

### Consequences of not amending the EEZ Act to enable cost recovery for costs of a BoI convened under the EEZ Act

7. The Resource Management Act 1992 (RMA) allows the Minister to delegate the cost recovery function in relation to a BoI to the EPA.
8. The average cost recovered from an applicant for a nationally significant proposal considered by a BoI under the RMA is \$1.9 million. Examples of costs incurred by a BoI would be remuneration, travel, legal costs and any advice or reports commissioned by the BoI.

9. If the EEZ Act is not amended, it will result in a discrepancy between the publicly notified and non-notified consent application processes. Applicants for non-notified consents determined by the EPA will pay the full costs of processing and determining the application under existing cost-recovery arrangements, while applicants for notified consents determined by a Bol will only pay the costs of the EPA's support functions under the Act.
10. Additionally, it will result in a discrepancy between how costs can be recovered under Bol convened under the RMA and a Bol convened under the EEZ Act.
11. From the time the marine consent process was introduced, it was always envisaged that it would be a user-pays system. Applications were considered to be matters of private rather than public benefit and therefore subject to full cost recovery. The subject was canvassed in a Cabinet Paper of 6 December 2012 approving the policy underlying the cost recovery regulations.

**We recommend that the EEZ Act is amended to align the cost-recovery policy**

12. We consider that the issue would be best addressed by amending the EEZ Act to add a provision that enables the Minister to recover costs associated with a Bol from the applicant of a marine consent, and also that allows the Minister to delegate the power to recover costs to the EPA on his or her behalf.
13. The draft environment legislation bids prepared for the 2018 legislative programme included a bid for an *Exclusive Economic Zone and Continental Shelf (Environmental Effects) Amendment Bill* to make these changes. It was recommended that the bill be given Category 2 priority (must be passed within the year).

**There is some urgency in progressing the amendment**

14. The EPA expects to receive an application for a publicly notifiable marine consent application, for which a Bol will be convened, in early April 2018.
15. We consider that the amendment should be progressed as soon as possible (and on a faster track than that indicated in the legislation bid) in order to ensure continuity of the EPA cost-recovery model and to ensure that the cost of processing marine consent applications does not fall to taxpayers.
16. The key stakeholders impacted by the change will be those intending to undertake activities in the EEZ that are restricted by section 20 of the EEZ Act and subject to a publicly notified marine consent. Therefore you may wish to undertake targeted consultation with the seabed mining and oil and gas industry. We consider this is unlikely to be controversial or contentious as the EEZ Act already operates on a cost recovery basis for processing and determining marine consent applications. This cost recovery function is empowered by section 143 of the EEZ Act (Appendix 1).
17. If you decide to undertake targeted consultation, it need only be brief in duration (5 days maximum). Given this is a relatively minor policy matter, we do not consider it is necessary for you to seek Cabinet approval to consult.
18. The table below sets out an indicative timeframe for developing and introducing the Bill into the House including and excluding targeted consultation.

	Option 1: Targeted consultation	Option 2: No consultation undertaken
Briefing signed	31 Jan 2018	31 Jan 2018
Targeted consultation	1-7 Feb 2018	N/A
Cabinet approval of policy proposal	19 Feb 2018	12 Feb 2018
PCO drafting	5 March 2018	26 Feb 2018
LEG committee approval of draft Bill	15 March 2018	8 March 2018
Cabinet approval of draft Bill	19 March 2018	12 March 2018
Bill introduced and progressed under urgency	TBC	TBC

19. We recommend that the bill is progressed through the House under urgency and is not referred to Select Committee. We consider that this is appropriate, since the bill is not expected to be complex or contentious and will align the legislation with existing cost-recovery policy.

## Recommendations

1. We recommend that you:

- a. **Note** that officials recommend that the EEZ Act is amended to ensure that the costs of a BoI convened to determine publically notifiable marine consent applications (for section 20 activities) are in line with the EPA's cost recovery powers in section 143 of the EEZ Act as well as enabling the Minister to delegate the cost recovery function to the EPA
- b. **Agree** that the EEZ Act should be amended urgently to include a provision that enables the Minister for the Environment to recover costs of a BoI appointed under the EEZ Act as well as enabling the Minister to delegate the cost recovery function to the EPA

Yes/~~No~~

\* c. **Agree to** undertake targeted consultation on the proposed amendment to the EEZ Act

Yes/No  Yes

d. **Agree to** progress the Bill through the House under urgency without referral to Select Committee.

Yes/No  Yes

**Signature**

Glenn Wigley  
Director  
Marine, Environmental Risk and Science

25/1/18

Hon David Parker  
Minister for the Environment

Date 29/1/18

\* I would like to discuss

**Ministry for the Environment contacts**

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Cost control principles. Some of the costs in these cases are, on their face, high. This should be reflected in the consultation document



## Appendix 1: Relevant provisions of existing legislation

### Section 52 of the EEZ Act now reads—

- (1) As soon as practicable on being notified in accordance with section 46(1)(a), the Minister must appoint a board of inquiry to—
  - (a) decide an application for a section 20 activity; and
  - (b) complete the performance or exercise of the functions, duties, and powers prescribed in this Part, in relation to the application (including any appeals in relation to the matter that are filed in any court).
- (2) The Minister may, as the Minister sees fit, set terms of reference about administrative matters relating to the inquiry.
- (3) The Minister must appoint 3 to 5 suitable persons to be members of the board of inquiry.
- (4) The Minister may, if he or she considers it appropriate,—
  - (a) invite the EPA to nominate persons to be members of the board;
  - (b) appoint a member of the EPA board to be a member of the board of inquiry.
- (5) In appointing a person to the board, the Minister must consider the need for the board to available to it from its members, knowledge, skill, and experience relating to—
  - (a) this Act; and
  - (b) the activity or type of activities that the board will be considering; and
  - (c) tikanga Māori; and
  - (d) legal expertise; and
  - (e) relevant technical expertise.
- (6) The Minister must appoint a chairperson.
- (7) The chairperson may (but need not) be a current, former, or retired Environment Court Judge or a retired High Court Judge.
- (8) Schedule 4 applies to boards of inquiry and applications considered by a board of inquiry.
- (9) A member of a board of inquiry is not liable for anything the member does, or omits to do, in good faith in performing or exercising the functions, duties, and powers of the board.

**Schedule 4 of the EEZ Act** provides for the EPA to provide information, support and advice to the board of inquiry, describes how a board must carry out its duties, sets out the hearings process, and provides that the board is to produce a report. **Clause 14** of the Schedule also sets out remuneration provisions for a board of inquiry thus:

- (1) The Fees and Travelling Allowances Act 1951 (the 1951 Act) applies to a board of inquiry appointed under section 52 as if the board were a statutory board within the meaning of the 1951 Act.
- (2) The Minister may direct that a member of a board of inquiry be paid the following out of money appropriated by Parliament for the purpose:
  - (a) remuneration by way of fees, salary, or allowances under the 1951 Act; and
  - (b) travelling allowances and travelling expenses under the 1951 Act for time spent travelling in the service of the board.

**Section 149ZD of the RMA, *Costs of processes under this Part recoverable from applicant,*** provides that—

- (1) A local authority may recover from an applicant the actual and reasonable costs incurred by the local authority in complying with this Part.
- (2) The EPA may recover from a person the actual and reasonable costs incurred by the EPA in providing assistance to the person prior to a matter being lodged with the EPA (whether or not the matter is subsequently lodged).
- (3) The EPA may recover from an applicant the actual and reasonable costs incurred by the EPA in exercising its functions and powers under this Part (including the costs in respect of secretarial and support services provided to a board of inquiry by the EPA).
- (4) The Minister may recover from an applicant the actual and reasonable costs incurred in relation to a board of inquiry appointed under this Part.
- (5) The local authority, EPA, or Minister must, upon request by an applicant, provide an estimate of the costs likely to be recovered under this section.
- (6) When recovering costs under this section, the local authority, EPA, or Minister must have regard to the following criteria:
  - (a) the sole purpose is to recover the reasonable costs incurred in respect of the matter to which the costs relate:
  - (b) the applicant should be required to pay for costs only to the extent that the benefit of the actions of the local authority, EPA, or Minister (as the case may be) to which the costs relate is obtained by the applicant as distinct from the community as a whole:
  - (c) the extent to which any activity by the applicant reduces the cost to the local authority, EPA, or Minister (as the case may be) of carrying out any of its functions, powers, and duties.
- (7) A person may object under section 357B to a requirement to pay costs under any of subsections (1) to (4).

**Section 143 of the EEZ Act, *Principles of cost recovery*, provides that—**

- (1) The Environmental Protection Authority must take all reasonable steps to recover so much of the direct and indirect costs incurred in performing its functions and providing services under this Act as are not provided for by money appropriated by Parliament for the purpose.
- (2) The functions and services include (but are not limited to) those performed in relation to—
  - (a) assisting a person in the preparation of an application for a marine consent, whether or not the application is made;
  - (b) receiving, processing, and deciding applications for marine consents;
  - (c) receiving impact assessments provided under section 22, 161, or 166;
  - (d) administering, monitoring, and supervising marine consents;
  - (e) certifying that an activity complies with regulations;
  - (f) advising a person proposing to undertake a permitted activity;
  - (g) processing information that regulations require a person undertaking a permitted activity to provide, and monitoring a permitted activity if the monitoring is required by regulations;
  - (h) reviewing the conditions or duration of a marine consent.
- (3) In determining the most appropriate method of cost recovery under section 144, and its level, in any particular case, the Minister must have regard, as far as is reasonably practicable, to the following criteria:
  - (a) equity, in that funding for a particular function or service or a particular class of function or service should generally, and to the extent practicable, be recovered from—
    - (i) the person, or class of persons, who benefits from the performance of the function or service and at a level proportional to the person's or class of persons' benefit from the function or service; or
    - (ii) the person, or class of persons, whose action or inaction gives rise to the exercise of the function at a level proportional to that person's or class of persons' contribution to the cost of performing the function;
  - (b) efficiency, in that costs should generally be allocated and recovered in order to ensure that maximum benefits are delivered at minimum cost;
  - (c) justification, in that costs should be collected only to meet the actual and reasonable costs (including indirect costs) of the performance of the relevant function or service;
  - (d) transparency, in that costs should be identified and allocated as closely as practicable in relation to a function or service for the recovery period in which the function or service is performed.
- (4) Nothing in this section requires a strict apportionment of the costs to be recovered for a particular function or service based on usage, and, without limiting the way in which charges may be set, a charge may be set at a level or in a way that—
  - (a) is determined by calculations that involve an averaging of costs or potential costs;
  - (b) takes into account costs or potential costs of functions or services that do not directly benefit the person who pays the charge, but which an indirect or potential cost arising from the performance of the function or service in question to a class of persons.

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