

Regulatory Impact Statement

Resource Legislation Amendment Bill 2015: Alignment of the Decision-making Processes for Nationally Significant Proposals and Notified Discretionary Marine Consents

Agency Disclosure Statement

This Regulatory Impact Statement has been prepared by the Ministry for the Environment. It is intended to accompany the Regulatory Impact Statement on the Resource Legislation Amendment Bill 2015 and the Regulatory Impact Statement on Policy Decisions for an EEZ Amendment Bill 2015.

It provides an analysis of options to align the decision-making processes for Nationally Significant Proposals (NSPs) under the Resource Management Act 1991 RMA and notified discretionary marine consents under the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 (EEZ Act).

This RIS identifies the options that have been proposed to Cabinet for consideration. The proposed options will mostly require changes to the current process under the EEZ Act, and will bring the notified discretionary marine consent process closer to the NSP process.

The EEZ Act regime is new and there have been a limited number of marine consent applications. Given this constraint, there is some uncertainty about the scale, nature and urgency of a number of the issues identified in this RIS.

The analysis is also informed by ongoing conversations with the Environmental Protection Authority (EPA), other Government agencies, industry representatives and other stakeholders. There is uncertainty about specific impacts of the proposed changes, and decisions about how options perform against the policy objectives are qualitative and subjective.

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Background

Status quo and problem definition

Precis of problem definition

1. The Government wishes to align two decision-making processes that deal with activities of national significance, one process under the RMA and the other under the EEZ Act. Both processes are administered by the Environmental Protection Authority (EPA). The differences between the two processes are creating confusion for applicants and inefficient process for the EPA.

Decision-making for Nationally Significant Proposals

2. The Resource Management Act 1991 (RMA) is New Zealand's primary environmental statute, covering environmental protection, natural resource management and our urban planning regime. The overarching purpose of the RMA is to promote the sustainable management of New Zealand's natural and physical resources.
3. The Minister for the Environment and the Minister of Conservation can deem a proposal to be nationally significant under the RMA if they consider it to have national importance or effect in some way. The Minister for the Environment considers land-based proposals, while the Minister of Conservation considers coastal proposals. The Ministers work together to consider proposals containing both land and coastal matters.
4. Decisions on Nationally Significant Proposals (NSPs) under the RMA are currently made by a Board of Inquiry (BOI) appointed by the Minister for the Environment or the Minister of Conservation. The BOI is responsible for setting its own procedures for hearing the matter, with the EPA providing secretarial and support services to the BOI. BOIs have made decisions on 13 applications since 2009.

Marine Consents

5. The Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 (EEZ Act) is the primary tool for environmental regulation of certain activities in New Zealand's Exclusive Economic Zone (EEZ) and continental shelf¹. The EEZ Act's purpose is to promote the sustainable management of the natural resources of New Zealand's EEZ and continental shelf.
6. To achieve this purpose, the EEZ Act provides for regulations to be made classifying activities as permitted, notified discretionary, non-notified discretionary (NND) or prohibited. Activities can only be undertaken if they are classified as permitted, or if they are authorised by a marine consent. The Environmental Protection Authority (EPA) is responsible for considering and making decisions on marine consent applications and enforcing the regime.
7. The marine consent process under the EEZ Act for activities classified as notified discretionary and non-notified discretionary has been in force since June 2013, and was

¹ Regulated activities include petroleum exploration and production, seabed mining, laying submarine cables and marine scientific research, but not fishing or shipping.

designed as a simplified and streamlined version of the consenting regime under the RMA (see process diagram in Appendix 1). There are defined statutory timeframes, and the EPA is responsible for all stages of the process, including making decisions on applications, monitoring compliance, and enforcing the EEZ Act's requirements. In practice, the EPA has exercised a legislated authority to delegate decision-making to decision-making committees (DMCs). The EPA has made four notified marine consent decisions to date.

8. The decision-making process under the EEZ Act for non-notified discretionary activities follows the same format as that for notified discretionary activities, but does not include public notification or submissions, and only includes a hearing at an applicant's request. The EPA has made decisions on two non-notified discretionary applications to date.
9. During the development of the EEZ Act, an explicit decision was made not to fully align its provisions with the RMA because of New Zealand's international obligations², the different environment and regulatory context, and the relatively low number of activities likely to be carried out in the Exclusive Economic Zone and continental shelf (EEZ/CS). There is less competition for space in the EEZ/CS than on land, and a large number of new operations were not expected in this area in the short term given commercial and technical viability acting as a barrier to developing resources. As such, the Government considered that the planning framework, jurisdiction, and roles and responsibilities of local authorities which underpin the RMA were not applicable in the EEZ/CS.

Similarities between the two processes

10. The decision-making models for NSPs under the RMA and for notified marine consent applications under the EEZ Act share a number of features. In particular, they both:
 - deal with proposals that are of national significance
 - have similar process steps (see Appendix 1)
 - are time-bound
 - have appeal rights on points of law only
 - have the same hearing powers under the Commission of Inquiries Act 1908, and the same provisions for management of hearings
 - experience the same tension in balancing 'natural justice' and public participation with expediency and efficiency, and
 - share an adversarial and litigious decision-making culture.

Comparison of process costs

11. The costs of the decision-making processes for NSPs and notified marine consents are difficult to compare due to a number of key process differences, including how decision-makers are appointed, public notification, and the provision of technical support. The average costs recovered from the applicant for NSPs considered by BOIs are \$1.9 million, while average costs under the EEZ regime are \$1.7 million, but the sample size

² Specifically the United Nations Convention on the Law of the Sea (UNCLOS), which grants New Zealand limited sovereign rights and sets limits on what the Crown can regulate.

for NSPs (13) is larger than for notified marine consents (3). The main differences between the processes are:

- The process for appointing a BOI currently takes two to three months and costs between \$15,000 and \$40,000 of EPA staff time, plus costs to the Ministry for the Environment (MfE) associated with the Appointment and Honours Cabinet Committee process. Appointing decision-making committees for notified marine consents has taken one to three months, with EPA staff time costs ranging from \$9,000 to \$31,000 and minimal involvement from MfE.
- Public notice costs (including the costs of processing submissions) are more expensive for NSPs, ranging from \$130,000 to \$330,000 as opposed to \$55,000 to \$70,000 for notified marine consents³.
- The costs of external technical and legal consultants for the three marine consents heard to date range from \$105,000 to \$465,000. This is higher than for NSPs, where costs have ranged from \$100,000 to \$310,000, with the exception of the Basin Bridge application for which external technical and legal consultants costs were approximately \$520,000.

Problem definition

12. The Government wants to align the decision-making processes for notified discretionary marine consents under the EEZ Act and for NSPs under the RMA. The Government is concerned by the cost and complexity associated with these processes. Following early experiences with the EEZ Act, it is concerned that having two different decision-making processes for activities of a similar scale is creating confusion for applicants and submitters used to the consenting model under the RMA. The EPA has also expressed concern that there is public confusion around the EPA's role under each process, particularly given the decision-making models are broadly similar and the primary consideration for determining which process is used is the location where activities take place.
13. While the different regulatory context for the two Acts has not changed, there have been four notified marine consent applications since the EEZ Act came into force on 28 June 2013⁴, which is equal to the number of NSP applications referred to a BOI in the same period⁵. Early experience with the EEZ Act has also shown that there are opportunities to create efficiencies through greater process standardisation, given that the EPA is responsible for administering the decision-making process for both NSPs and marine consents.

³ The costs of public notices are being addressed through the current RMA reform proposals.

⁴ Two applications were for seabed mining (Trans-Tasman Resources and Chatham Rock Phosphate), and two for petroleum production activities (OMV NZ and Shell Todd Oil Services).

⁵ The proposals are: Tukituki Catchment (Hawke's Bay Regional Investment Company), the Basin Bridge (New Zealand Transport Agency), Ruakura Development Plan Change (Tainui Group Holdings Limited and Chedworth Properties Limited), and Ara Tūhono: Pūhoi to Warkworth (New Zealand Transport Agency).

Previous decisions

14. Cabinet has previously agreed to a suite of technical amendments to the RMA to reduce the cost and complexity of Board of Inquiry processes, which includes making greater use of IT, and removing unnecessary process steps.
15. The Government is proposing to extend the following agreed technical amendments to the RMA to the marine consenting process under the EEZ Act:
 - a. improving the ability for electronic provision of information and access to information related to nationally significant proposals
 - b. enabling BOIs to request the EPA to provide planning advice (technical advice in the case of the EEZ Act)
 - c. enabling the EPA to pursue commercial avenues for unpaid debts
 - d. providing the EPA discretion to suspend processing of a proposal where there are outstanding debts, provided the EPA has made written demand for payment of the amount outstanding and provided the applicant 20 working days' notice of its intention to suspend processing if payment is not made
 - e. introducing a requirement for BOIs to have regard to cost effective processes when carrying out their duties
 - f. enabling the EPA to make decisions on administrative matters incidental to the conduct of an inquiry (such as accommodation, venue and catering) for the purpose of minimising costs
 - g. enabling the EPA to fix the place and the commencement date and time of a hearing on an application
 - h. requiring that the Minister for the Environment consider including legal expertise when appointing a BOI, and
 - i. requiring that BOIs must have specific regard to the estimated level of processing funding set by the EPA for the consideration of an application.
16. Further details on these changes are available in the Regulatory Impact Statement for the Resource Legislation Amendment Bill 2015. The focus of this RIS is on proposals for aligning the decision-making processes for NSPs and notified marine consents that have not been addressed elsewhere.

Objectives

17. The Government's overarching objective in aligning the decision-making processes for notified discretionary activities under the EEZ Act and NSPs under the RMA is to ensure decision-making processes are more efficient, cost effective and transparent.
18. The following broad policy objectives have been used to assess the proposals in this Regulatory Impact Statement (RIS):
 - increasing ease of use and certainty of New Zealand's resource management system both on land and in the marine space,⁶ and

⁶ Including New Zealand's coastal marine area, territorial sea, Exclusive Economic Zone and continental shelf.

- reducing costs of the system and ensuring costs are proportionate to the level of environmental effects addressed.

Options and regulatory impact analysis

19. This section sets out the status quo and problem for each part of the package in more detail, and includes an analysis of proposed options against the objectives, as follows:
- Decision-making model
 - Board membership and appointment criteria
 - Timeframes; and
 - Appeals

Decision-making Model

Status quo and problem:

20. Under the RMA, independent BOIs make decisions on proposals deemed to be of national significance, with secretarial and support services provided by the EPA. The Minister for the Environment or the Minister for Conservation appoint the BOI through the Cabinet Appointments and Honours Committee process. Under the EEZ Act, the EPA makes decisions on marine consent applications for activities classified as discretionary and non-notified discretionary under the EEZ Act. Once the Exclusive Economic Zone and Continental Shelf (Environmental Effects – Discharge and Dumping) Regulations are promulgated, the EPA will also be responsible for regulating discharge and dumping activities under the EEZ Act.⁷
21. In practice, the EPA has chosen to delegate its decision-making powers under the EEZ Act to decision-making committees (DMCs) appointed under Schedule 5 of the Crown Entities Act 2004 (in accordance with section 16 of the EEZ Act), which must include a member of the EPA Board. The EPA's delegation has included the ability for DMCs to set their own procedures and direct hearings for notified applications, so in practice the EPA's role has been limited to providing technical and administrative support to DMCs.
22. The Government is concerned that having two different decision-making models for activities of a similar scale is creating confusion for applicants and submitters used to the consenting model under the RMA. There is also public confusion around the EPA's role under each model.
23. The Government wants to ensure all parties involved in consenting processes under both the RMA and EEZ Act can approach applications in a more consistent manner. It also wants to reduce costs and provide greater certainty of process for applicants and submitters participating in consenting processes under both Acts.

⁷ The Exclusive Economic Zone and Continental Shelf (Environmental Effects) Amendment Act 2013 transfers regulation of the discharge of harmful substances and the dumping of waste from the Maritime Transport Act 1994 to the EEZ Act. This change will take effect when regulations classifying the discharge and dumping activities are in force. Final decisions on the regulations are yet to be made by Cabinet.

Options considered

- a) Adopt the RMA BOI model for notified discretionary activities under the EEZ Act; and retain the EPA as the decision-maker for non-notified discretionary activities and discharge and dumping activities (option proposed for Cabinet consideration).
- b) Adopt the RMA BOI model for all activities under the EEZ Act, including non-notified discretionary activities and discharge and dumping activities.
- c) Adopt the EEZ Act model and make the EPA the decision-maker for NSPs under the RMA.

| Option analysis – Decision-making model | | |
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| Options | Impacts | Net impact and assessment against objectives |
| <p>a) Adopt the RMA BOI model for notified discretionary activities under the EEZ Act, and retain the EPA as decision-maker for non-notified discretionary and discharge and dumping activities (option proposed for Cabinet consideration).</p> | <p>Benefits</p> <ul style="list-style-type: none"> • Achieves process alignment for consideration of NSPs and notified discretionary activities. • Enables the EPA to standardise business processes leading to efficiency gains. • Ministers have a direct role in appointing decision-makers under both regimes, sending a signal to applicants that the Government recognises the national significance of the application. • Greater certainty for parties taking part in consent processes under both regimes, although this would be limited to certain submitters and legal experts given there is little applicant overlap across regimes. • Maintains consistency of process under the RMA. <p>Costs</p> <ul style="list-style-type: none"> • Increased costs and uncertainty for EEZ applicants who would need to go through different processes depending on whether an activity is classified as notified or non-notified. • Increased time and costs in the notified marine consent process as the Minister will be involved in the appointments process. The process for appointing decision-makers is estimated to take 2-3 months at a cost of \$15,000-\$40,000 of EPA staff time (plus costs to MfE to undertake the Cabinet Appointments process). This is opposed to 1-3 months currently at a cost of \$9,000-\$31,000 of EPA staff time under the DMC model. • Increased administrative burden for the EPA and MfE. • Legislative and structural changes to the EEZ regime. • Increased costs of legal counsel as BOIs considering marine consents will no longer have access to the EPA's in-house legal counsel and only be able to contract this out at higher hourly rates (DMCs have been using both in-house and external legal advice to date). <p>Risks and opportunities</p> <ul style="list-style-type: none"> • Increased complexity and greater duplication in the EEZ regime as different decision-makers would make decisions on notified and non-notified activities, which could outweigh any efficiency gains from alignment. • Diminished perception of the EPA's independence and associated reputational risks. • Risk to the EPA's technical capability and ability to retain staff if its role changes from making decisions to providing support. • The level of Ministerial involvement may lead parties (other than applicants) to perceive that the Government is seeking to influence the outcome of an independent decision-making process. | <p>Increased costs compared with the status quo.</p> <p>This option will better align processes across the RMA and EEZ Act. However, it does not meet the objectives of increased ease of use or certainty and reduced costs for applicants operating solely within the EEZ Act regime due to greater complexity within the EEZ Act.</p> |
| <p>b) Adopt the RMA BOI model for all activities under the EEZ Act, including non-notified discretionary activities and discharge and</p> | <p>Benefits</p> <ul style="list-style-type: none"> • As per option a). • All activities requiring a marine consent would have the same decision-making model, providing clarity for applicants. <p>Costs</p> | <p>Worse than status quo.</p> <p>This option will better align processes across the RMA and EEZ Act. However, it does not meet the objectives of</p> |

| Option analysis – Decision-making model | | |
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| Options | Impacts | Net impact and assessment against objectives |
| dumping activities | <ul style="list-style-type: none"> The costs and status associated with the BOI model are disproportionate to the effects of activities classified as non-notified discretionary, and discharge and dumping activities. Greater delays and increased costs in all marine consent processes as a result of introducing an additional step in the current appointments process, leading to greater uncertainty for applicants. The process for appointing decision-makers would take 2-3 months at a cost of \$15,000-\$40,000 of EPA staff time, as opposed to 1-3 months at a cost of \$9,000-\$31,000 of EPA staff time under the current DMC model. Increased administrative burden for the EPA and MfE. Significant legislative and structural changes to the EEZ regime. Change to the EPA's role from decision-maker to providing support. <p>Risks and opportunities</p> <ul style="list-style-type: none"> Reputational risks for the EPA. Risk to the EPA's technical capability and ability to retain staff if its role changes from making decisions to providing support. The level of Ministerial involvement may lead parties (other than applicants) to perceive that the Government is seeking to influence the outcome of an independent decision-making process. | increased ease of use or certainty and reduced costs for applicants operating solely within the EEZ Act regime, particularly those wishing to undertake non-notified activities. |
| c) Adopt the EEZ Act model and make the EPA the decision-maker for NSPs under the RMA | <p>Benefits</p> <ul style="list-style-type: none"> Clear lines of accountability, as the EPA would manage the entire decision-making process. Allows the EPA to standardise business processes. Improved accessibility for applicants and the public, as they would interact with a single regulator from pre-lodgement discussions on an application through to a decision being made. Greater clarity of EPA's role under both the RMA and EEZ Act. Reduced costs and time of the appointments process, as the Appointments and Honours Committee process would be removed. The process for appointing decision-makers would take 1-3 months at a cost of \$9,000-\$31,000 of EPA staff time, as opposed to 2-3 months at a cost of \$15,000-\$40,000 of EPA staff time. Reduced administrative burden on the EPA and MfE. Maintains consistency of process under the EEZ Act. Requires the least legislative and structural change of the proposed options. <p>Costs</p> <ul style="list-style-type: none"> Ministers would no longer have a role in appointing a BOI, which could create a perception of diminishing the nationally significant status of a proposal. Changed requirements would create uncertainty for participants in the NSP process, which is a more established process compared with the EEZ Act model. Legislative and structural changes to the RMA regime. <p>Risks and opportunities</p> | Better than status quo. This option will better align processes across the RMA and EEZ Act. It meets the objectives of increased ease of use and certainty, and reduced costs for applicants and submitters. |

| Option analysis – Decision-making model | | |
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| Options | Impacts | Net impact and assessment against objectives |
| | <ul style="list-style-type: none"> This will result in a significant expansion to the EPA's responsibilities, with resourcing implications for the EPA | |

Conclusion

24. A single decision-making model will enable the EPA to make efficiency gains by standardising business processes. It will also enable decision-makers to approach applications under both the RMA and EEZ Act in a more consistent manner, and provide greater certainty for submitters taking part in consenting processes under both Acts. Greater consistency could in turn provide greater certainty and cost savings for all applicants involved.

Board membership and appointment criteria

Status quo and problem:

25. The Minister for the Environment appoints BOIs that decide on applications for NSPs through the Appointment and Honours Cabinet Committee process. The RMA requires a BOI to be made up of three to five members, with a current, former, or retired Environment Judge or a retired High Court Judge as Chairperson. In appointing the BOI, the Minister for the Environment must consider the need for the board members to have knowledge, skill, and experience relating to:
- a. the RMA;
 - b. the matter or type of matter that the board will be considering;
 - c. tikanga Māori; and
 - d. the local community.
26. In addition, Cabinet has agreed to the following changes to the composition of BOIs:
- a. making it optional that a BOI be chaired by a current, former or retired Environment Judge or retired High Court Judge; and
 - b. requiring the Minister for the Environment to consider including legal expertise when appointing a BOI.
27. The EPA appoints decision-makers to consider marine consent applications under the EEZ Act. There are no specific requirements for decision-makers under the EEZ Act, but an EPA Board member must sit on any committees appointed under Schedule 5 of the Crown Entities Act 2004 to whom the EPA delegates its decision-making authority.
28. The process for appointing a BOI currently takes two to three months and costs between \$15,000 and \$40,000 of EPA staff time (cost-recovered from the applicant). Costs increase according to the number of iterations between the EPA and the Minister in determining the appointees. There are also costs to MfE associated with the Appointment and Honours Cabinet Committee process, although to date these have not been cost-recovered. The requirement to undertake a Cabinet process means a BOI cannot be appointed until an application has been lodged.
29. The process for appointing the decision-making committees for the four notified marine consent applications lodged with the EPA to date has taken one to three months, with EPA staff time costs ranging from \$9,000 to \$31,000 of EPA staff time (cost-recovered

from the applicant). MfE has minimal involvement in this process. The EPA can appoint decision-makers during pre-lodgement discussions.

30. In order to ensure high quality decision-making, the Government wants to ensure people with the appropriate skills, knowledge and expertise are appointed to consider NSP and marine consent applications. It also wants to ensure relevant technical skills are taken into account when appointing decision-makers, as well as legal skills to ensure that evidence is thoroughly tested. At the same time, the Government wants to provide for greater consistency across decision-making processes and continue to build on the EPA's capability and experience.

Options considered

- a) Align with RMA: Extend the current and agreed RMA criteria for appointing NSP decision-makers to decision-makers on notified marine consents under the EEZ Act, and add a discretionary requirement for decision-makers to have relevant technical expertise (option proposed for Cabinet consideration);
- b) Align with EEZ Act: Remove the current RMA criteria for appointing NSP decision-makers and replace this with a requirement for an EPA Board member to sit on a BOI; and
- c) Hybrid: Remove the current RMA criteria for NSP decision makers, and replace it with a requirement under both the RMA and EEZ Act that a committee must consist of persons who i) collectively have particular knowledge of, and expertise in, the subject matter of the application before the committee; and ii) can ensure that evidence is thoroughly tested.

| Option analysis – Board membership and appointment criteria | | |
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| Options | Impacts | Net impact and assessment against objectives |
| <p>a) Align with RMA: Extend the current and agreed RMA criteria for appointing NSP decision-makers to decision-makers on notified marine consents under the EEZ Act, and add a discretionary requirement for decision-makers to have relevant technical expertise (option proposed for Cabinet consideration)</p> | <p>Costs</p> <ul style="list-style-type: none"> • May increase costs of appointing decision-makers under the EEZ Act regime as a result of decreased flexibility in appointments criteria. • May also reduce costs of contracting external expertise as the need for this could be reduced. <p>Benefits</p> <ul style="list-style-type: none"> • Increased transparency around the appointment of decision-makers under the EEZ Act, which may lead to greater public confidence in the competence of decision-makers. • Will reduce the number of marine consent applications requiring an EPA Board member as a decision-maker, increasing the availability of EPA Board members for other responsibilities. <p>Risks and opportunities</p> <ul style="list-style-type: none"> • Decreased flexibility for appointing decision-makers for marine consent applications in what is already a small pool of qualified people. | <p>Better than status quo.</p> <p>This option will decrease ease of use under the EEZ Act by introducing additional requirements and making it harder to find qualified decision-makers. However, it will increase certainty that they have the right skills and expertise, and could result in higher-quality decisions.</p> <p>It is uncertain whether overall costs would change.</p> |
| <p>b) Align with EEZ Act: Remove the current RMA criteria for appointing NSP decision-makers and replace this with a requirement for an EPA Board Member to sit on a BOI</p> | <p>Costs</p> <ul style="list-style-type: none"> • Could increase costs as may result in a BOI needing to contract more external expertise. <p>Benefits</p> <ul style="list-style-type: none"> • Greater flexibility for appointing decision-makers in light of the small pool of potential candidates, which could reduce costs. • Presence of an EPA Board member may provide continuity of decision-making, consistency in the process and help build the EPA's capability and experience. <p>Risks and opportunities</p> <ul style="list-style-type: none"> • Decreased public confidence in the capability and independence of decision-makers as the basis of their appointment will not be clear. • The EPA Board has a maximum of eight members with varying availability, so requiring an EPA Board member to sit on BOIs could limit the number of decision-making bodies operating at any one time and will change the incentives to join the EPA Board. | <p>Better than status quo.</p> <p>This option is likely to increase ease of use as there will be greater flexibility when appointing decision-makers, but may decrease certainty that BOIs have the right skills. Impact would also depend on the availability of EPA Board members and the number of decisions being considered at the same time.</p> <p>It is uncertain whether overall costs would change.</p> |

| Option analysis – Board membership and appointment criteria | | |
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| Options | Impacts | Net impact and assessment against objectives |
| <p>c) Hybrid: Remove the the current RMA criteria for NSP decision makers, and replace it with a requirement under both the RMA and EEZ Act that a committee must consist of persons who i) collectively have particular knowledge of, and expertise in, the subject matter of the application before the committee; and ii) can ensure that evidence is thoroughly tested</p> | <p>Costs</p> <ul style="list-style-type: none"> As per option (b). <p>Benefits</p> <ul style="list-style-type: none"> Allows for greater flexibility in board appointment (including size of the BOI. representation of experience and skills) while ensuring that the relevant expertise is included. <p>Risks and opportunities</p> <ul style="list-style-type: none"> Greater uncertainty around what constitutes relevant expertise for a particular application, though similar wording is used for decision-making committees under the Hazardous Substances and New Organisms Act and for appointing the EPA Board. Retaining some criteria for BOI appointments should mitigate opposition to repealing s149K of the RMA. | <p>Better than status quo.</p> <p>This option will increase ease of use under the RMA by providing greater flexibility for appointments. It will also provide greater certainty than the status quo that decision-makers under the EEZ Act have the right skills and expertise, and could result in higher-quality decisions.</p> <p>It is uncertain whether overall costs would change.</p> |

Conclusion

31. It is important to ensure decision-makers for both NSPs and marine consents have relevant knowledge, skills and experience for the matters being considered, including technical skills and legal expertise. Standardised criteria for appointing decision-makers could increase the quality and consistency of decision-making across both regimes, but will also reduce flexibility and make it more difficult to secure qualified decision-makers in what is already a small pool of suitable people.

Timeframes

Status quo and problem:

32. Under the status quo, BOIs have nine calendar months to decide on an NSP, starting from public notification of the proposal (see Appendix 1). The Minister for the Environment can grant an extension only if the time period as extended does not exceed 18 months, or longer if the applicant agrees. Some but not all BOI stages have statutory timeframes (such as the submission period of 20 days). This provides flexibility for decision-makers to scale the decision-making process according to the circumstances of each application.
33. The marine consent process has no overall timeframe, but each stage is subject to a separate statutory timeframe (see Appendix 1). The process for notified activities adds up to 135 working days for notified activities, from notification of an application through to any minor corrections of decisions. The EPA can double the timeframes for each stage, or can extend the timeframes for longer if the applicant agrees. This model provides less flexibility but gives applicants and submitters greater certainty of process.
34. The NSP process includes a 20 working day draft report stage which allows for minor and technical corrections and omissions before a BOI issues its final decision. The RMA then provides a further 20 working day period for correcting minor mistakes or defects once the decision has been issued. The EEZ Act provides for 15 working days for minor corrections after a consent has been granted.
35. Industry applicants, submitters and decision-makers have expressed concerns that the current timeframes for notified discretionary activities under the EEZ Act do not allow for adequate consideration of a large amount of information.
36. In particular, the 20 working day timeframe for making submissions risks incomplete submissions, with submitters providing the additional information through the hearing process. The 40 working day timeframe between the close of submissions and the start of a hearing does not allow sufficient time for applicants to provide further information, or for submitters and decision-makers to consider it. In addition, decision-makers have expressed concern that the 20 working day timeframe for deliberation is not sufficient, and have extended timeframes for two out of the three consent processes the EPA has heard to date to allow more time for deliberation.
37. The Government wants to align timeframes for NSPs and notified marine consents to provide greater certainty of process for applicants and submitters, while ensuring decision-makers are able to tailor the decision-making process according to the size and complexity of both NSP and notified marine consent applications.

Options considered (not mutually exclusive)

- a) Introduce a maximum timeframe of 9 months for notified marine consent applications under the EEZ Act, in line with current provisions for NSPs:
 - a. Begin maximum timeframe at notification of an application
 - b. Remove the 40 working day timeframe for a hearing and the 20 working day timeframe for deliberation in the EEZ Act (option proposed for Cabinet consideration)
- b) Introduce predetermined working day timeframes into the NSP process under the RMA, in line with current provisions for notified marine consent processes in the EEZ Act
- c) Extend the submission period from 20 to 30 working days, and remove the statutory timeframes of 40 working days from the close of submissions to the start of the hearing for both NSPs and notified marine consents (option proposed for Cabinet consideration)
- d) Remove the draft report stage for NSPs, align the 15 working day timeframe for minor corrections in the EEZ Act with the 20 working day timeframe for minor corrections once a BOI issues its final decision under the RMA, and amend s149RA of the RMA and s84 of the EEZ Act to include omissions (option proposed for Cabinet consideration).

| Option analysis – Timeframes | | |
|---|---|--|
| Options | Impacts | Net impact and assessment against objectives |
| a) Introduce a maximum timeframe of 9 months for notified marine consent applications under the EEZ Act, and remove the working day timeframes for hearings and deliberation (option proposed for Cabinet consideration) | <p>Benefits</p> <ul style="list-style-type: none"> Addresses concerns expressed by decision-makers, applicants and submitters that the current timeframes under the EEZ Act do not allow for adequate consideration of a large amount of information. Provides additional time for expert conferencing prior to the hearing. Greater flexibility for decision-makers to scale the process according to the circumstances of each application. <p>Costs</p> <ul style="list-style-type: none"> Will increase the maximum time provided for a notified marine consent decision from 120 working days from notification to a decision to 9 calendar months (approximately 190 working days depending on public holidays). Increased costs for applicants under the EEZ Act as a result of a longer overall process. <p>Risks and opportunities</p> <ul style="list-style-type: none"> Could lead to decision-making processes being longer than necessary if not appropriately managed. Reduced certainty of process for applicants under the EEZ Act. | <p>Equivalent to status quo.</p> <p>This option meets the objective to increase ease of use by providing greater time and flexibility for considering an application, but reduces certainty and increases costs for applicants.</p> |
| b) Introduce predetermined working day timeframes into the NSP process | <p>Benefits</p> <ul style="list-style-type: none"> Greater certainty of process for applicants undertaking an NSP application process. Reduced timeframes for decision-making, potentially reducing costs for applicants. <p>Risks and opportunities</p> <ul style="list-style-type: none"> Decreased flexibility to scale the decision-making process according to the circumstances of each application. Will not provide enough time to adequately consider information for complex applications. Does not address concerns expressed by decision-makers, applicants and submitters than the current timeframes under the EEZ Act do not allow for adequate consideration of a large amount of information. | <p>Equivalent to status quo.</p> <p>This option meets the objective to increase certainty and reduce costs, but reduces ease of use and could impact the quality of decision-making.</p> |
| c) Extend the submission period for notified marine consents and NSPs from 20 to 30 working days, and remove the statutory timeframes of 40 working days from the close of submissions to the start of the hearing (option proposed for | <p>Benefits</p> <ul style="list-style-type: none"> Increased time for submitters to make comprehensive submissions and for applicants to respond to further information requests. More time for decision-makers and submitters under the EEZ Act to consider further information as part of their submissions and/or prior to the hearing, reducing hearing time. Would allow more time for expert conferencing under the EEZ Act, reducing the need for expert evidence to be provided at the hearing. More comprehensive written submissions could reduce the time needed for oral submissions during the hearing, which could reduce hearing length and therefore overall costs to applicants. | <p>Better than status quo.</p> <p>Will increase ease of use and certainty of process for submitters. Providing greater opportunities to more fully address matters in the pre-hearing stage is likely to reduce overall costs for applicants, although a greater number of</p> |

| Option analysis – Timeframes | | |
|--|--|---|
| Options | Impacts | Net impact and assessment against objectives |
| Cabinet consideration) | <p>Costs</p> <ul style="list-style-type: none"> Providing additional time could lead to a greater number of submissions and increased costs for applicants. <p>Risks and opportunities</p> <ul style="list-style-type: none"> Additional time may not lead to more comprehensive submissions, or could result in submissions that are unduly long and contain material of varying relevance increasing the costs of processing or analysis. Wider benefits of reducing the time required for a hearing would only occur if decision-makers tightly manage oral submissions, as otherwise longer timeframes could simply result in a longer overall process. | <p>submissions could also increase costs.</p> <p>Will have greatest impact in conjunction with other proposed changes to align the decision-making process for NSPs and notified marine consents.</p> |
| d) Remove the draft report stage for NSPs, align the 15 working day timeframe for minor corrections in the EEZ Act with the 20 working day timeframe for minor corrections on resource consents once a BOI issues its final decision under the RMA, and amend RMA s149RA and EEZ s84 to include omissions (as well as minor mistakes or defects) (option proposed for Cabinet consideration) | <p>Benefits</p> <ul style="list-style-type: none"> Savings of approximately 2% of total costs for NSP applicants (tens of thousands of dollars) if draft report stage is removed (although this cost may be reduced if documents are distributed electronically). Provides additional time for minor and technical corrections to consents under the EEZ Act. Reduces some process duplication for making minor and technical corrections to RMA consents. <p>Costs</p> <ul style="list-style-type: none"> Applicants and submitters will no longer have a formal opportunity to provide minor and technical comments on a decision. <p>Risks and opportunities</p> <ul style="list-style-type: none"> The NSP draft report and comments period is a useful process step for engaging process participants in detecting minor and technical issues (e.g. whether draft consent conditions are correct), and omissions (e.g. whether there are material omissions in the weighting of evidence). Removing it may increase the risk of appeals, though the applicant and opponents already have an incentive to check for these. BOIs may decide to do a draft report anyway. There is a provision in the RMA that Boards may make minor corrections of decisions at any time during its appointment so this would fulfil the role of the draft decision stage. Will require s149RA in the RMA to be amended to include omissions as well as minor mistakes and defects, so that the same issues are captured as per the draft decision stage. The NSP draft report stage takes up about 2 months of the 9 month timeframe: removing it may free up time for deliberation, or time to be spent at the front end of the process, though this cannot be guaranteed. | <p>Equivalent to the status quo.</p> <p>This option meets the objective of increasing ease of use for the EPA, but not for applicants and submitters as they will still need to scrutinise the final report but will not have a formal opportunity to comment.</p> <p>Decreased costs will only be realised if the report is scrutinised as effectively as occurs with the draft report</p> |

Conclusion

38. Greater alignment of timeframes for NSPs and notified marine consents aims to provide an appropriate balance between providing certainty of process for applicants and submitters, while retaining flexibility for decision-makers to scale the time and process needed to consider widely variable applications. Aligning the timeframes (option c and d) would allow industry applicants, submitters and decision-makers additional time to consider and respond to information, which reflects feedback received from all of these parties on early marine consent processes.
39. In conjunction with other reforms of the resource management system, these changes also aim to reduce the time and costs associated with the hearing process by enabling some matters to be more fully addressed in the pre-hearing stage and encouraging hearings to focus on points of contention.

Appeals

Status quo and problem:

40. Decisions on marine consent and NSP applications may be appealed on points of law to the High Court. The EEZ Act has a conventional appeal track from High Court, to Court of Appeal, and then leave to appeal is sought of the Supreme Court.
41. However, under the BOI process, no appeal may be made to the Court of Appeal from a determination of the High Court, but a party may apply to the Supreme Court for leave to bring an appeal to that court. The Supreme Court can grant or deny leave, or remit the appeal to the Court of Appeal. Cabinet designed this track in 2009, with the aim of reducing the time required to reach a final decision on a NSP. The new track has not deterred parties from appealing, with two thirds of NSP decisions having been appealed since 2009.
42. The Government wants to increase certainty and reduce costs for applicants and investors under both the EEZ Act and the RMA. It wants to ensure that appeals beyond the High Court can only be taken when there are clear grounds justifying the further appeal, and that the time taken to reach the final decision is minimised.

Options considered

- a) Adopt the two tier appeals process for NSPs for appeals on notified marine consent decisions (option proposed for Cabinet consideration)
- b) Adopt the three tier appeals process under the EEZ Act for appeals on NSPs

| Option analysis – Appeals | | |
|---|---|--|
| Options | Impacts | Net impact and assessment against objectives |
| a) Adopt the two tier appeals process for NSPs for appeals on notified marine consent decisions (option proposed for Cabinet consideration) | <p>Benefits</p> <ul style="list-style-type: none"> • Will reduce the time taken to achieve certainty on matters of national significance. • Will decrease the costs associated with a longer appeals track. <p>Risks and opportunities</p> <ul style="list-style-type: none"> • Will need to ensure evidence is thoroughly tested during the consent process by providing for decision-makers to have relevant legal experience. • May discourage parties from appealing a decision due to the high costs associated with taking an appeal to the Supreme Court . | <p>Better than status quo</p> <p>This option increases certainty and ease of use for applicants, and will result in reduced time and costs when going through an appeals process.</p> |
| b) Adopt the three tier appeals process under the EEZ Act for appeals on NSPs | <p>Benefits</p> <ul style="list-style-type: none"> • Will provide more opportunities for parties to revisit an appeal decision. <p>Costs</p> <ul style="list-style-type: none"> • Will increase the time taken to achieve certainty on matters of national significance under the RMA. • Will increase the current costs for appealing a decision on an NSP as there will be an additional step in the appeals process. | <p>Worse than status quo.</p> <p>This option will reduce certainty and ease of use for applicants. It will also result in increased time and costs when going through an appeals process, which does not meet the Government's objectives.</p> |

Conclusion

43. Aligning the appeals process for marine consents with the process for NSPs meets the Government's objectives of increasing certainty and ease of use, and reducing costs of the system. This appeals process will ensure that appeals beyond the High Court can only be taken when there are clear grounds justifying the further appeal, and will ultimately reduce the time taken to achieve certainty on matters of national significance. This change will need to be reflected in the proposals to introduce criteria for appointing decision-makers under the EEZ Act outlined above, to ensure evidence is thoroughly tested.

Consultation

44. MfE has discussed the proposals to amend the EEZ Act with the EPA and industry users of the regime, including Straterra, and the Petroleum Exploration and Production Association of New Zealand (PEPANZ). The work to align the decision-making process has been part of these discussions. No other public consultation has occurred.

45. The timeframe available to prepare the RIS has allowed some consultation with Government agencies. These are: Department of Conservation, Ministry of Business, Innovation and Employment, Ministry for Primary Industries, Ministry of Transport, the Treasury, Environmental Protection Authority and Maritime New Zealand. The Department of the Prime Minister and Cabinet have been informed of the proposals in this paper.

46. This timeframe has been driven by the Resource Legislation Amendment Bill 2015, with which amendments to the EEZ Act are proposed to be incorporated as an omnibus bill.

Conclusions

47. Given the limited evidence available on the performance of the decision-making process for notified marine consents to date, there is some uncertainty about the scale, nature and urgency of a number of the issues identified in this RIS.

48. Broadly, the package of proposals analysed in this RIS are considered viable options for aligning the decision-making process for NSPs and notified marine consents, consistent with the intention of both the RMA and the EEZ Act and the policy objectives outlined in this RIS.

49. The options that have been proposed to Cabinet for consideration will largely require changes to the EEZ Act. Adopting the BOI model for notified discretionary marine consents under the EEZ Act will achieve greater alignment between the NSP process under the RMA and the notified marine consent process under the EEZ Act. Overall, this will lead to greater certainty and ease of use for participants in decision-making processes across the two regimes, and will allow the EPA to standardise some business processes.

50. However, adopting the BOI model for notified marine consents will add complexity and require structural and legislative change to the EEZ Act. This will increase costs for applicants operating solely within the EEZ Act regime.

Implementation plan

51. This package will be implemented through the Resource Legislation Amendment Bill 2015 and non-statutory guidance. The EPA is responsible for the primary implementation of the changes. MfE may also have an additional support and Ministerial liaison role in the EEZ decision-making process that it previously only had for NSPs.
52. The package of changes will only apply to proposals where applications are lodged on or after the date on which the Resource Legislation Amendment Bill receives Royal Assent.
53. Non-statutory guidance includes new and updated Quality Planning guidance notes, factsheets, the delivery of nationwide seminars on RMA and EEZ Act reform, and updating relevant sections of MfE's and the EPA's websites.

Monitoring, evaluation and review

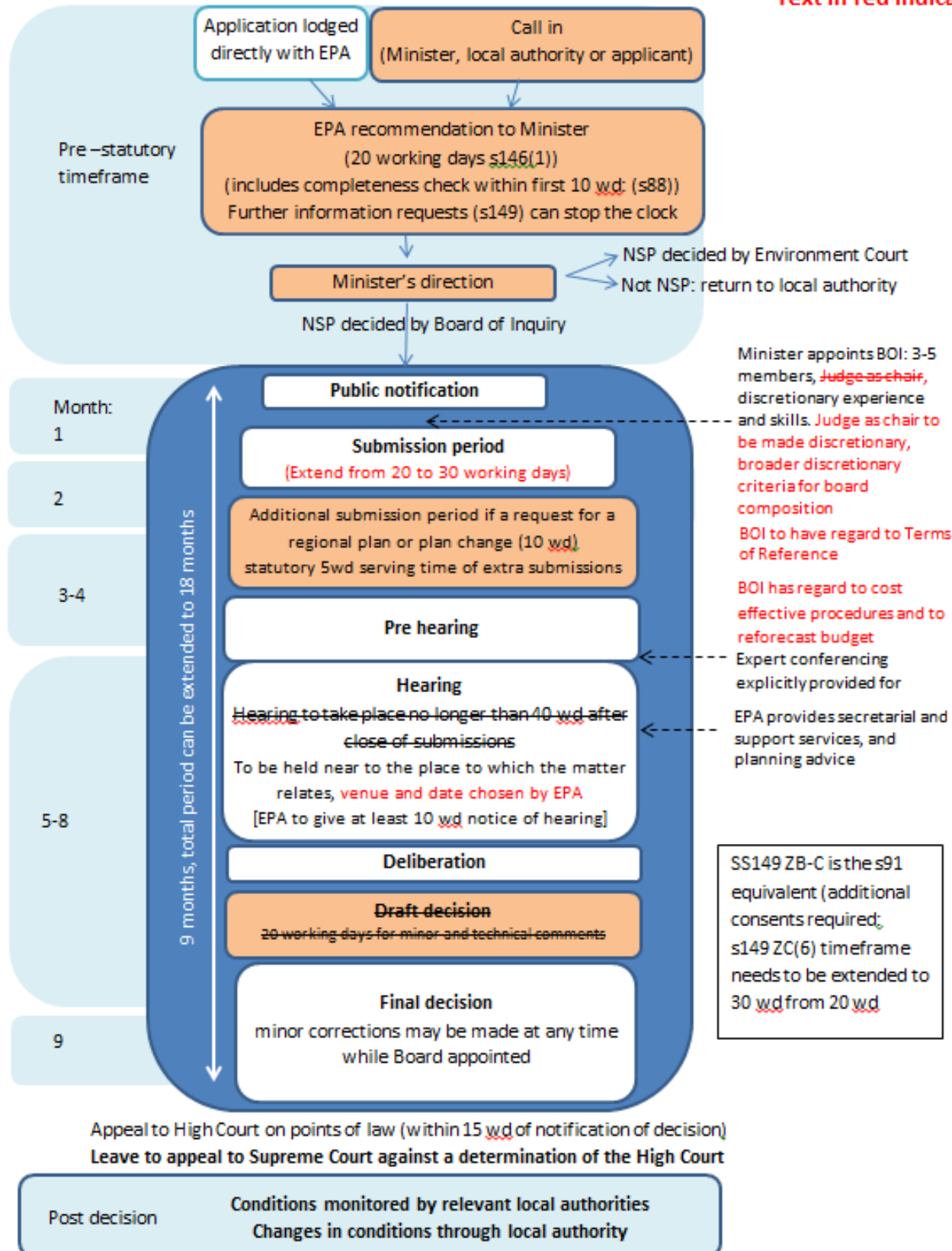
54. MfE will adopt a developmental evaluation approach, and track the progress of applications under the new regimes. Monitoring data will include:
 - Number of applications (notified marine consents and NSPs)
 - Duration (overall, by stage, type [e.g. EPA staff, consultants]) (collected by EPA)
 - Cost (overall, by stage, contracted) (Collected by EPA)
 - Appeals (number, judgment, cost incurred by EPA)
55. The EPA will continue to undertake 'lessons learnt' post process evaluations.
56. MfE and the EPA will meet regularly to track progress and discuss implementation and any emerging issues.
57. MfE will develop criteria to monitor the implementation of the changes, which may include: higher than expected costs, prolonged hearing time due to process issues, and number and reasons for appeals.
58. The EPA is responsible for monitoring compliance with the EEZ Act. Under s13 of the Environmental Protection Authority Act 2011⁸, the EPA must provide technical advice on any matter related to its functions under an environmental Act at the Minister for the Environment's request, which includes the environmental effects of activities restricted by the EEZ Act. It is envisaged that economic impact assessments will also be required, but this is more likely to be undertaken at the sector-level rather than application by application.
59. The Ministry for the Environment will keep the Minister for the Environment informed on implementation progress once the changes come into force. The reporting arrangements for economic and environmental monitoring will be determined in consultation with the EPA.

⁸ Section 13 sets out the functions of the EPA.

Appendix 1: Proposed changes to the decision-making processes for Nationally Significant Proposals and Notified Discretionary Marine Consents

Nationally Significant Proposals under the RMA

For resource consents, changes to consent conditions, notices of requirement, plan changes, requests for plan changes, requests for the preparation of a regional plan under the RMA 1991. Fifteen NSP applications since 2009, 13 decided by Board of Inquiry.



Notified Discretionary Marine Consents under the EEZ Act

For activities classified as discretionary in the EEZ Act. Three hearings since the EEZ Act came into force in June 2013. Two decisions released so far (TTR and OMV), one other expected in January 2015 (CRP).

Text in red indicates proposed changes

