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Title of Consultation: New Marine Protected Areas Act

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SUMMARY OF SUBMISSION

EDS supports the proposal to develop a new Marine Protected Areas Act. However the current proposals fail to meet New Zealand's international obligations and they fall short of international best practice. We encourage the government to rectify these matters in the manner outlined below before a Bill is drafted:

- The legislation should apply to the EEZ as well as the territorial sea
- The prime purpose of the legislation should be the conservation and protection of marine biodiversity through the establishment of a comprehensive, effectively managed, and ecologically representative system of marine protected areas.
- The legislation should set out principles to address obligations under the Treaty of Waitangi and matters that decision-makers need to address.
- The legislation should provide for the preparation of policy statements which provide greater guidance on the identification of candidate sites for protection as well as on good process issues.
- The retention of the marine reserve category is supported but with the inclusion of restoration in its purpose alongside preservation and protection. Provision should be made for marine reserves to overlap recreational fishing parks.
- The provision for species-specific sanctuaries is only supported if the new legislation applies to the EEZ. Any rules provided to protect species within the sanctuaries should be promulgated under the marine protected areas legislation not under the Fisheries Act or other legislation.
- The provision for 'seabed reserves' should be widened to refer to 'habitat reserves' to provide a flexible tool for effective management of threats to important habitats. Flexibility should be retained to promulgate appropriate rules in each case.
- The recreational fishing park provisions should be relocated to the Fisheries Act 1996 where they are consistent with the overall purpose of that legislation.
- Environmental, economic and social impacts should be fully considered in decisions to establish marine protected areas.
- EDS supports the provision of two potential tracks to consider marine protected area proposals, the collaborative process and the board of inquiry process.

- The legislation needs to provide for the proactive development of prospective marine protected area networks based on robust systematic conservation planning approaches.
- The legislation should make a consequential amendment to the RMA requiring councils to pay particular regard to the need to avoid adverse impacts on marine protected areas, particularly addressing the impacts of sediment.
- The legislation should make a direct linkage to marine spatial planning processes.
- The legislation should make provision for regular review of the marine protected area network based on bio-geographic regions to assess its adequacy in meeting the objectives of the Act.
- EDS supports the proposal to provide for improvement iwi/Māori involvement in marine protected area creation and management.
- The recreational fishing parks should allow the creation of all other forms of marine protected areas within their boundaries.
- Compensation funding should be utilised to buy up and retire commercial quota.
- A wider range of management tools should be deployed within the recreational fishing parks including mandatory reporting of catch. Environmental representatives should be included on their advisory bodies.
- EDS generally supports transitioning existing marine protected areas into the new system.
- The new legislation should provide for mandatory regular monitoring and reporting at a marine bioregion and individual marine protected area level
- Streamlined enforcement mechanisms should be provided including instant fines.
- The proposal to establish a concession system is supported but with proceeds being directed back into the management of the affected marine protected area.

1. INTRODUCTION

The Environmental Defence Society (EDS) is a not-for-profit environmental organisation comprised of resource management professionals who are committed to improving environmental outcomes. EDS was first established in 1971 and operates as an environmental think tank on environmental management and litigator on environmental matters of national importance.

EDS has a long interest in the management of New Zealand's marine space. We have produce a number of policy reports on relevant topics including oceans policy, the establishment of an Environmental Protection Authority, the development of new legislation for the Exclusive Economic Zone (EEZ) and marine protection. Of most relevance to the Consultation Document is our 2012 publication *Safeguarding Our Oceans: Strengthening Marine Protection in New Zealand*. This report reviews the evolution of international thinking on marine protection, elements of international best practice and New Zealand's performance. It also assesses design considerations for new legislation in New Zealand and concludes with a series of recommendations.

2. INTERNATIONAL CONTEXT

International thinking, commitments and practice have moved shifted considerably since the Marine Reserves Act was promulgated in 1971. The focus of marine protection has moved from the protection of individual sites to the consideration of the marine system as a whole. This brought about the concept of establishing 'ecologically representative' networks of marine protected areas. More recently it has been recognised that the establishment of marine protected areas on their own is not sufficient and that they should be nested within broader marine spatial planning processes

This change in thinking is reflected in a series of international obligations that New Zealand has signed up to in relation to the management of our marine realm:

- Under the *United National Convention on the Law of the Sea,* ratified by New Zealand in 1996, the country has a general obligation to 'protect and preserve the marine environment' under its jurisdiction which includes the territorial sea and EEZ.[1] This includes taking all measures necessary to 'to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life'.[2]
- Under the *Convention on Biological Diversity,* ratified by New Zealand in 1993, the country is required to establish a system of protected areas and to regulate where necessary for the protection of threatened species and populations.[3]
- Under the outcomes of the seventh meeting of the Conference of the Parties to the Convention on Biological Diversity (2004) New Zealand committed to the establishment of '*comprehensive, effectively managed, and ecologically representative national and regional systems of protected areas'*.

Many countries have updated their legal frameworks to take account of these international obligations. For example:

- Australia provided for the creation of a network of marine protected areas throughout its Federally-managed waters (generally from 3 miles to 200 miles from shore) under the Environmental Protection and Biodiversity Conservation Act 1999.
- The United Kingdom provided for the creation of marine conservation zones throughout its coastal and offshore waters (the UK doesn't have a declared EEZ) under the Marine and Coastal Access Act 2009.
- Canada passed the National Marine Conservation Areas Act in 2002 which provides for the creation of marine conservation areas within the country's EEZ

It is widely acknowledged that New Zealand's current marine protected area legislation does not enable the country to meet its international obligations and that it is long overdue for reform. EDS therefore welcomes the current initiative to reform the Marine Reserves Act 1971.

3. SCOPE OF LEGISLATION

3.1 The legislation should apply to the EEZ as well as the territorial sea

It is widely recognised that marine protection is required throughout the ocean space and not just within the territorial sea. This is emphasised by the international obligations set out above and the commensurate legislation passed in other comparable jurisdictions. A comprehensive and ecologically representative network requires the protection of areas within the EEZ.

The necessity to include the EEZ in any marine protected area legislative reform has long been acknowledged including in the Marine Reserves Bill introduced into Parliament in 2002 and in the National Party Conservation Policy issued prior to the 2014 election. Failure to address marine protection in 95 per cent of New Zealand's marine area is an entirely unsatisfactory outcome of a reform process which has been underway for more than 15 years.

The reasons why the new legislation should apply to the EEZ include:

- It is required to meet New Zealand's international obligations. Providing for resource exploitation within the EEZ without commensurate protection being in place is in contravention of those obligations. The objective in the legislation, as proposed on page 16 of the discussion document, that 'New Zealand's international obligations in relation to the marine environment are met' could not be achieved.

- Providing for marine protected areas within the EEZ is the accepted approach to marine management within the international community at large including in comparator countries. Failure to address this issue will put New Zealand at the back rather than at the forefront of contemporary marine management. This will affect New Zealand's credibility and standing within the international community. This in turn may affect the value branding of marine-related industries in New Zealand.

- The bulk of New Zealand's biodiversity is contained within the EEZ and needs a credible framework for its protection.

- Leaving the management of the EEZ to special legislation will result in a reactive ad hoc management approach. This does not represent wise management of one of New Zealand's most valuable resources.

- We have the opportunity to provide for carefully planned marine conservation within the EEZ in advance of minerals development which is a much more ecologically robust and cost-effective approach than attempting to retrofit later on.

- The boundary between the territorial sea and the EEZ is arbitrary and does not relate to any environmental or ecological features of the two areas. It does not, for

example, align with the continental shelf, water depths or particular species aggregations. It therefore does not make good management sense to confine the legislation within these arbitrary boundaries. It would make it extremely difficult to adequately protect species that span the boundary including marine mammals and seabirds (which can currently be protected by sanctuaries which span the territorial sea and EEZ).

- Failure to include the EEZ will perpetuate the uncertainty and lack of decisive management currently evident within the EEZ which has resulted in significant commercial costs and uncertainty for the environment (such as with the Chatham Rock Phosphate application).

Not applying the legislation to the EEZ is a fundamental flaw in the proposals that needs to be remedied before a bill is introduced into Parliament.

4. PURPOSE, PRINCIPLES AND POLICY

4.1 The prime purpose of the legislation should be the conservation and protection of marine biodiversity through the establishment of a comprehensive, effectively managed, and ecologically representative system of marine protected areas.

4.2 The legislation should set out principles to address obligations under the Treaty of Waitangi and matters that decision-makers need to address.

4.3 The legislation should provide for the preparation of policy statements which provide greater guidance on the identification of candidate sites for protection as well as on good process issues.

The new legislation requires a clear purpose. This should focus on the conservation and protection of marine biodiversity through the establishment of a 'comprehensive, effectively managed, and ecologically representative system of marine protected areas' through New Zealand's territorial sea and EEZ reflecting what was agreed at the seventh meeting of the Conference of the Parties to the Convention on Biological Diversity.

The legislation should provide for other secondary purposes where they can be met within the overall purpose. These could include providing opportunities for customary use, recreation, education, tourism, scientific study and, where appropriate, sustainable use.

As well as a clear purpose the new legislation should set out a set of principles to be applied when decisions affecting marine protected areas are made. Objectives 2 to 5 as set out on pages 15 and 16 of the Discussion Document, which address a range of different types of matters, should be included where necessary in a principles section.

A principles section could address two main issues:

- Enshrine the importance of meeting the obligations under the Treaty of Waitangi
- Set out the important matters which should be taken into account by decision makers

The legislation should also make provision for the preparation of policy documents which provide further guidance for decision-making. These could be similar in nature to National Policy Statements under the Resource Management Act 1991. They could address substantive issues such as marine protected area and network design, as well as process issues.

For example greater guidance on design and process is currently provided in the *Marine Protected Areas Policy and Implementation Plan* released in 2005. This document needs to be clarified and updated and could be promulgated as a policy statement under the new legislation. This could be prepared through a collaborative process involving key stakeholders. Providing additional guidance through policy, which could be amended as required, would greatly assist the effectiveness of the new legislation and the success of processes undertaken to identify prospective protected areas.

Such policy guidance should draw on the developed field of systematic conservation planning to assess the most prospective locations for new marine protected areas which maximise biodiversity and longer term public benefits whilst minimising economic and social impacts in the shorter term.

5. CATEGORIES OF MARINE PROTECTION

5.1 The retention of the marine reserve category is supported but with the inclusion of restoration in its purpose alongside preservation and protection. Provision should be made for marine reserves to overlap recreational fishing parks.

5.2 The provision for species-specific sanctuaries is only supported if the new legislation applies to the EEZ. Any rules provided to protect species within the sanctuaries should be promulgated under the marine protected areas legislation not under the Fisheries Act or other legislation.

5.3 The provision for 'seabed reserves' should be widened to refer to 'habitat reserves' to provide a flexible tool for effective management of threats to important habitats. Flexibility should be retained to promulgate appropriate rules in each case.

5.4 The recreational fishing park provisions should be relocated to the Fisheries Act 1996 where they are consistent with the overall purpose of that legislation.

EDS supports the proposal to expand the categories of marine protection provided for. Effective marine management is challenging and managers need a greater array of tools in their toolbox to address the different pressures. We comment on the proposals for each category below and then on the overall adequacy of the package of categories provided for.

Marine reserve

EDS supports the retention of the marine reserve category with the purpose of preserving and protecting areas in their natural state for the conservation of marine biodiversity. However, many areas have already been impacted on by human activity so restoration should be included as part of the purpose.

Provision should be made for overlapping marine reserves with recreational fishing parks. This is because the proposed spatial extent of the parks extends over large areas of coastal inshore waters which are currently under pressure from fishing and other activities and which are lacking in adequate marine protection. For example the Hauraki Gulf only has 0.3% of its marine area in marine reserves, has the highest recreational fishing pressure in the country, and the recent State of the Gulf Report 2014 highlighted the ongoing degradation of the area.

Although it might be technically possible to create a marine reserve in the recreational fishing park area by first extinguishing the park designation and then imposing the marine reserve designation this is very cumbersome and clunky and may well create the impression amongst recreational fishers that something is being taken away from them. Such an approach is likely to increase the already high conflict around marine protection area proposals in these regions.

Species-specific sanctuary

This category only really makes sense if the legislation also applies to the EEZ as many of the species which are currently able to be protected under the Wildlife Act and Marine Mammals Protection Act (which apply to the EEZ and territorial sea), such as marine mammals and seabirds, range across the territorial sea and EEZ. It would be a retrograde step if the existing provisions for sanctuaries were removed in favour of the current proposals as this would make it difficult to provide adequate spatial protection for these species. If the new legislation is extended to the EEZ then it makes sense to draw in the existing provisions for species sanctuaries.

Flexibility should be retained to enable different rules to apply to different parts of the sanctuary if required. The implied proposal that restrictions on fishing activity within species-specific sanctuaries be promulgated under the Fisheries Act 1996 is opposed at it will create undesirable legislative confusion and uncertainty which is in turn likely to lead to frequent and costly litigation. In short, it constitutes very poor legislative design. This is because the purposes of the new Marine Protected Area Act and the Fisheries Act are different and creating rules under the Fisheries Act to achieve a purpose under the Marine Protected Area Act will open the Minister of Fisheries up to judicial review proceedings. This risk has already been demonstrated with the lengthy litigation over protection of the Hector's and Maui's dolphins when the rules were promulgated under the Fisheries Act. Conversely when the rules were promulgated under the Marine Mammals Protection Act

which was the case with the recent extension of the North Island West Coast sanctuary, there was no litigation resulting.

Seabed reserve

This category appears to be unnecessarily restrictive and could be more usefully labelled habitat reserve so it could be applied more generally where important habitat and associated species are at risk. This would provide flexibility to address the risk factors in each instance. For example if soft sediment habitat is at risk, all activities which impact the seabed may need to be excluded, including seabed mining, bottom trawling, dredging and Danish seining. However if rocky reef habitat is at risk and needs to be protected other activities may be affected. Such a wider category could be deployed where protection is important but does not require the fully no-take approach applied in marine reserves. An example would be excluding set netting and/or spear fishing from some important reefs to protect vulnerable reef species. Flexibility should be retained to enable different rules to apply to different parts of the reserve if required.

Restrictions imposed on fishing activity to meet the objectives of the reserves need to be` promulgated under the new legislation rather than under the Fisheries Act to reduce the legislative confusion and litigation risk outlined above.

As protecting habitat is to achieve the biodiversity conservation purpose of the legislation it would seem more appropriate that the Department of Conservation manage these areas. The Department has operational capacity and numerous regional offices which the Ministry for the Environment currently lacks.

Recreational fishing park

This category is focused on spatially separating recreational and commercial fishing in order to enhance the recreational fishing experience. As such, it does not fit within the overall purpose of the new legislation and would be much better placed under the Fisheries Act where it fits well within the purpose to 'provide for the utilisation of fisheries resources whilst ensuring sustainability.'

If recreational fishing parks are proceeded with under this legislation then they need to be accompanied by much stronger management measures over recreational fishing include mandatory reporting of catch.

6 ADDRESSING EXISTING ECONOMIC USERS

6.1 Environmental, economic and social impacts should be fully considered in decisions to establish marine protected areas.

Because New Zealand has been slow to create a comprehensive and representative network of marine protected areas, other economic activities have established in the marine space

without consideration of biodiversity conservation needs. This means that marine protection needs to be retrofitted into areas which may already be heavily utilised.

It is important that economic and social costs are evaluated and considered when identifying candidate areas. However, these need to be considered against the long-term benefits of effective biodiversity conservation and provision of ecosystem services.

One way to address the potential impacts of the development of a marine protected area network on existing activities within the EEZ would be for the government, subject to good science-based criteria, to prepare a marine spatial plan for the EEZ which identifies where marine protected areas would be appropriate. These areas could then be further considered under a finer grained collaborative process to follow.

7 PROCESS FOR CREATING MARINE PROTECTED AREAS

7.1 EDS supports the provision of two potential tracks to consider marine protected area proposals, the collaborative process and the board of inquiry process.

7.2 The legislation needs to provide for the proactive development of prospective marine protected area networks based on robust systematic conservation planning approaches.

EDS supports the development of new and more flexible processes for the identification and proposal of marine protected areas. The current process provided for in the Marine Reserves Act 1971 lacks effective conflict resolution processes. EDS supports the identification of two tracks for decision-making processes: the collaborative process and the board of inquiry.

In our experience collaborative processes can work well, but they need to be expertly chaired, to be well-supported with technical and Mātauranga Māori expertise and to be carefully designed and managed with clear terms of reference. It will be important to draw on the growing body of experience with collaborative processes when developing up the detailed provisions. These could usefully be provided in policy documents proposed earlier, rather than in the legislation, to enable them to be updated as experience grows in this field.

If the legislation is to succeed in developing a comprehensive and representative network of marine protected areas there will need to be a proactive programme of identifying proposed networks, rather than a reliance on an ad hoc approach. It is not clear how this will be achieved through the current proposals. The new legislation could require the Department of Conservation to regularly (say every 5 years) assess the current network as to its comprehensiveness and representativeness and to identify priorities for additional candidate areas to address gaps.

8 INTERFACE WITH OTHER LEGISLATION

8.1 The legislation should make a consequential amendment to the RMA requiring councils to pay particular regard to the need to avoid adverse impacts on marine protected areas, particularly addressing the impacts of sediment.

8.2 The legislation should make a direct linkage to marine spatial planning processes

The creation of a network of marine protected areas will not achieve its goals of biodiversity conservation if external pressures on these areas are not adequately managed. One of the greatest pressures on the marine environment alongside fishing activity is sediment. The new legislation needs to provide an effective mechanism to link the creation of marine protected areas with catchment management. This could be achieved through a consequential amendment to the Resource Management Act 1991 to require councils through their policy and planning documents and resource consenting to pay particular regard to the need to avoid adverse impacts on marine protected areas.

One of the most effective methods of managing all the pressures on the marine environment in an integrated manner is through undertaking marine spatial planning. This enables candidate marine protected areas to be identified within the context of a broader management approach. The first marine spatial planning process in New Zealand is currently underway in the Hauraki Gulf (Seachange Tai Timu Tai Pari) and provision needs to be made for the implementation of the provisions of the resultant plan which will include recommended marine protected areas. Similar processes are likely to be undertaken around the country once the Hauraki Gulf process has concluded.

9 REVIEW

9.1 The legislation should make provision for regular review of the marine protected area network based on bio-geographic regions to assess its adequacy in meeting the objectives of the Act.

EDS supports the proposal to provide for the periodic review of new marine protected areas. However, such a review should not be focused on single marine protected areas, but on the performance of the network overall. Such an assessment could be based on bio-geographic regions. This will then enable an assessment of the adequacy of the network and its components and the identification of any changes required. This could result in the identification of gaps and any poorly performing marine protected areas which may need better management or relocation.

10 IMPROVING IWI/MĀORI INVOLVEMENT

10.1 EDS supports the proposal to provide for improvement iwi/Māori involvement in marine protected area creation and management.

It has been well recognised that the Marine Reserves Act 1971 fails to give adequate recognition to Treaty obligations and to the integral role of mana whenua in marine management through the application of Mātauranga Māori and exercise of kaitiakitanga. EDS supports the proposals to include a Treaty clause in the new legislation and to provide a meaningful role for iwi/Māori in the creation and management of marine protected areas. How such a 'meaningful role' can best be provided for will require careful consideration in light of potential co-governance arrangements over marine space.

11 RECREATIONAL FISHING PARKS

11.1 The recreational fishing parks should allow the creation of all other forms of marine protected areas within their boundaries.

11.2 Compensation funding should be utilised to buy up and retire commercial quota.

11.3 A wider range of management tools should be deployed within the recreational fishing parks including mandatory reporting of catch. Environmental representatives should be included on their advisory bodies.

As indicated above, EDS considers that the creation of recreational fishing parks to improve the fishing experience of recreational fishers is not in alignment with the biodiversity conservation purpose of the new legislation and that these provisions should be relocated to the Fisheries Act 1996.

It is important that the creation of recreational fishing parks does not exclude the creation of the 3 other proposed categories of marine protected areas, and in particular marine reserves. This is because the parks are proposed to extend over large areas of marine space which do not currently have sufficient marine protection to ensure that effective biodiversity conservation is achieved.

If funds are available to pay compensation to quota owners consideration should be given to deploying this in buying out and retiring commercial quota so that the overall allowable catch is reduced. This would result in a greater share of the catch being allocated to the recreational fishing sector and it could also help to replenish stocks. Failure to reduce the total overall catch on already depleted stocks such as snapper and blue cod, will mean that the objectives of the parks are unlikely to be achieved.

The parks need to be designed with care to ensure that commercial methods which have less impact on the environment and produce higher quality and value fish, such as long-

lining, are not excluded in favour of methods with greater environmental impacts such as trawling.

The creation of spatially defined recreational fishing parks will create the opportunity to design more effective management approaches for recreational fishing. In the Hauraki Gulf, in particular, the pressure from recreational fishing is enormous and current approaches such as bag limits are insufficient to effectively deal with the extent of the management challenge. The legislation should provide for the development of novel management approaches. In particular, it should require mandatory reporting of catch as a first step.

If an advisory group is to be appointed by the Minister responsible for fisheries to provide advice on management if the park, it needs to include all interests in the area including environmental representatives.

12 TRANSITIONING EXISTING MPAS

12.1 EDS generally supports transitioning existing marine protected areas into the new system.

EDS generally supports the proposals to transition existing marine protected areas into the new legislation where they meet the objectives of the Act. However, as indicated earlier, species sanctuaries can currently extend across the territorial sea and the EEZ under the Marine Mammals Protection Act and the Wildlife Act. Introducing new legislation which establishes an artificial line at the border of the territorial sea for species sanctuaries would be a retrograde step and is opposed. If the new legislation fails to extend into the EEZ, then the current provisions should be retained, and the proposals for species specific reserves removed.

13 ONGOING MANAGEMENT

13.1 The new legislation should provide for mandatory regular monitoring and reporting at a marine bioregion and individual marine protected area level.

13.2 Streamlined enforcement mechanisms should be provided including instant fines.

13.3 The proposal to establish a concession system is supported but with proceeds being directed back into the management of the affected marine protected area.

In our experience, marine reserves do not currently receive adequate funding and management attention. Enforcement is patchy as is monitoring , reporting and responsive management to issues identified. The legislation should improve this situation through:

- Providing for a concession system for commercial activities undertaken within the marine protected areas, with fees paid by concession holders directed back into the management of the relevant marine protected area.

- Making provision for instant fines to deal with offending.
- Requiring the development of regularly updated management plans for each marine bioregion and for each marine protected area.
- Requiring regular monitoring and public reporting of the state of each bioregion and each marine protected area

CONCLUSION

EDS supports the proposal to develop a new Marine Protected Areas Act. However the current proposals fail to meet New Zealand's international obligations and they fall short of international best practice. We encourage the government to rectify these matters in the manner outlined above before a Bill is drafted.

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[1] Article 192, Law of the Sea

[2] Article 194, Law of the Sea

[3] Articles 7, 8 and 14, Biodiversity Convention