



Designing the Strategic Planning Act to better address the marine environment

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1 Introduction

The purpose of this paper is to assist the Ministry for the Environment in its detailed policy work to develop the proposed Strategic Planning Act (SPA) alongside the proposed Natural and Built Environments Act (NBA). In this paper we adopt an explicit ‘oceans lens’ to the proposals for the SPA set out in the Resource Management Review Panel’s (RMR Panel) report. We use this to scrutinise the proposals and provide a series of specific recommendations on how the SPA could be designed to better support effective marine planning and management.

This paper has been developed within the context of the Environmental Defence Society’s (EDS) Oceans System Reform project which is taking a first principles look at the country’s oceans management system and developing options for reform. This project is well advanced and will produce a final report at the end of 2021. It has long been acknowledged that Aotearoa New Zealand’s ocean management system is dated, fragmented and not producing optimal outcomes. Any future reform of the system will have implications for the NBA and SPA as these are currently proposed to apply to the territorial sea. It is not possible at this stage to have any certainty as to what future reforms to the oceans management system may look like. However, it is important that the design of the SPA (and NBA) does not preclude future options in this arena.

This paper is structured around the following sections:

Section 2: Considers the purpose and principles of the SPA
Section 3: Examines mechanisms to achieve better integration
Section 4: Focuses on the planning approach
Section 5: Considers the role of environmental limits
Section 6: Considers allocation mechanisms
Section 7: Considers funding mechanisms
Section 8: Considers the implications of potential future oceans reforms
Section 9: Provides a summary of our key recommendations

2. Purpose and principles

The RMR Panel provided indicative drafting for the purpose of the SPA (set out below), but not for any principles that might also be included in the legislation. It was also not made explicit whether a Te Tiriti o Waitangi clause should be incorporated into the SPA, and if so, how it would be expressed. The indicative purpose of the SPA is focused on the four wellbeings as set out in the purpose of the Local Government Act and the “strategic integration” of statutory functions.¹ The RMR Panel explained that the legislation has been broadly framed so that it can apply to a range of circumstances and localities.² This makes sense.

Purpose

The purpose of this Act is to promote the social, economic, environmental and cultural **wellbeing** of present and future generations through the long-term **strategic integration of functions** exercised under specific legislation in relation to:

- (a) The use, development, protection and enhancement of the natural and built environments;
- (b) The provision of infrastructure and services and associated funding and investment;
- (c) The relationship of iwi, hapū and whanau and their culture and traditions with natural and built environments; and
- (d) Responses to climate change including the reduction of greenhouse gas emissions, reduction of risks from natural hazards and the use of adaptation measures.

Special legislation means enactments specified in Schedule 1.

There is no primacy given to the protection and enhancement of the natural environment in the indicative purpose of the SPA. This is why the *setting of environmental limits and national direction under the NBA for the marine environment will be extremely important if the SPA is to result in positive environmental outcomes for the marine area* (see Section 5: Environmental limits).

We argued in 'Reform of the Resource Management System: A model for the Future' (RM Synthesis Report) that legislation such as the SPA should include a set of common decision-making principles that apply across the resource management system.³ We still hold this view.

*When considering management of the marine environment, a very important principle to include is ecosystem-based management, which has been widely acknowledged as a more effective way to address complex environmental challenges through shifting the focus from sector specific management to a wider range of interrelated ecological, environmental and human factors.*⁴ The underpinning goal of ecosystem-based management is to maintain ecosystems in a healthy, productive and resilient condition so they can provide the goods and services humans want and need.⁵ Its importance has recently been acknowledged by government in the 'Aotearoa New Zealand Biodiversity Strategy 2020' where a goal for 2025 is "A framework has been established to promote ecosystem-based management, protect and enhance the health of marine and coastal ecosystems, and manage them within clear environmental limits".⁶ While ecosystem based management is important for the whole resource management system, it is a particularly relevant governing principle in the marine space where things are closely interconnected and where the development imperatives of land (eg housing, transport, most infrastructure) are not as relevant.

Other general principles that should be included in the SPA are precaution (although the wording will need to be carefully thought through), inter-generational equity (with a strong focus on the natural environment being needed to underpin future human wellbeing), and environmental justice (that the costs of resource use should be equitably distributed and not unduly impact the poor and vulnerable). It is becoming apparent that simply including a Te Tiriti clause in legislation is not sufficient to discharge obligations to Māori, or to reflect the Māori worldview (eg meaningful partnership in decision-making and a degree of control of taonga resources may be needed), but it is important that careful thought be given to the wording of references to Te Tiriti in the SPA given its legal influence across multiple other statutes. That is relevant, for example, in determining what will be a complex relationship between the NBA, SPA and Marine and Coastal Area (Takutai Moana) Act,

and in determining allocative questions (for example, rights to occupy coastal space will be determined under the NBA, and broad areas suitable for particular forms of occupation, like aquaculture, may be identified under the SPA if it is applied in the marine environment).

It should be made clear in the SPA that these principles are to be applied when making decisions. In other words, the broad purpose of the Act will be coloured by such principles (eg in determining what wellbeing looks like in particular places), even if they do not form part of the purpose itself.

3. Achieving integration

The RMR Panel proposed that the SPA would be “the key mechanism for improving strategic integration across the resource management system”. It is intended to help improve strategic integration at a regional level across multiple statutes, functions, outcomes and agencies.⁷ The key mechanism for integration within the proposed SPA is the development of regional spatial strategies.

Spatial extent of integration

Regional spatial strategies are proposed to generally cover the same spatial area as regional policy statements prepared under the RMA, thereby including both catchments and the coastal marine area (but not beyond). The reasoning given by the RMR Panel for including the coastal marine area within the scope of regional spatial strategies was that this would promote integration between land use, the coastal environment and water quality.⁸ We support this reasoning. *Including both catchments and the sea in regional strategic/spatial planning is essential for achieving positive marine outcomes, as catchment-based activities have significant impacts on the coastal marine area, and are the main driver of ecological degradation in many inshore areas.*⁹ However, for this to work effectively, it is important that resource management is conceptually driven from the marine area as a starting point (which is the final sink for many catchment-derived discharges and pollutants) up into the catchments rather than vice versa (see Section 4: Planning approach).

Drawing jurisdictional lines in the marine environment is inherently somewhat arbitrary due to the interconnected nature of the sea. It can be difficult to draw hard lines that align management effort with ecological systems in the same way that freshwater catchments can be defined on land. The 12 nautical mile boundary for the territorial sea/coastal marine area is arbitrary in an ecological sense but it is a recognised boundary in international law (United Nations Convention on the Law of the Sea). In our RM Synthesis Report we raised the issue of whether councils should continue to manage out to the 12 nautical mile limit, and this raises a related question of whether regional spatial strategies under the SPA should extend out this far. In that report we stated:¹⁰

... should regional councils be tasked with managing out to 12 nautical miles? Such a distance from shore raises practical issues. Marine management is a specialised and expensive task, requiring the deployment of marine scientists and significant investment in marine science. Research and enforcement at sea requires operating costly vessels. Councils have, as yet, no direct source of funding for this work, apart from when they can piggyback on science undertaken by resource consent applicants and monitoring undertaken by

consent holders ... As a result, not many councils have sea-going vessels and have largely left the bulk of their vast marine environments to look after themselves. Even where a marine scientist is employed by a council, this does not enable the build-up of a critical mass of expertise within the organisation. The main exception is in areas where a significant aquaculture industry has established, and so the focus of the councils has been drawn into the marine space. Both the Marlborough District Council and Waikato Regional Council have invested in modelling in order to better understand the cumulative effects of aquaculture, and in the Marlborough Sounds the council has also undertaken work to identify important biogenic habitats and to protect them from further degradation. In Auckland, despite the large size and capacity of the unitary council (6,120 employees and a rates revenue of \$1.8 billion), the bulk of its marine area is yet to be mapped and many significant ecological areas in need of protection are yet to be identified, with such designations outside harbours being largely confined to inshore areas within a few of kilometres of land. This begs the question: if Auckland Council has been unable to effectively map and manage its extended marine domain, what hope is there for other much smaller and less well-resourced councils?

We canvassed the option of regional councils only managing out to three nautical miles or managing a reduced marine area which is directly affected by catchments and runoff from them, and which could be mapped in ecological or geological terms (to retain the important catchment to the sea connection within the management system). This could help focus council efforts on issues they are better equipped to deal with, ie those directly related to catchments.

It would also help to support a stronger focus on estuaries, “places where freshwater and saltwater mix with the ebb and flow of tides” and “where the terrestrial and marine environments converge”.¹¹ Estuaries are at the ‘front line’ of the marine environment, receiving pollution and contaminants from land before they flow into the broader marine environment. They also often receive stormwater and wastewater overflows. They are therefore amongst the country’s natural systems most impacted by human activities, but can often be overlooked by environmental managers as they are neither fully freshwater nor fully marine.

The New Zealand Coastal Policy Statement (NZCPS) specifically includes estuaries as part of the coastal environment, being areas where “coastal processes, influences or qualities are significant” (Policy 1(c)). The NZCPS requires that *significant adverse effects on estuaries be avoided* (Policy 11(b)(iii)) thereby establishing an environmental bottom line for these systems. In addition, the Parliamentary Commissioner for the Environment has recommended that the NPS on Freshwater Management require the mandatory inclusion of estuaries as part of freshwater management units. This would mean that the National Objectives Framework, which includes setting attributes and monitoring, would apply to estuaries in a similar manner to rivers and lakes. This would provide a more robust limits framework and is supported. However, what is missing is a linkage between the NZCPS and the NPS for Freshwater Management, which hopefully could be addressed when national direction is brought together as a single National Planning Framework under the new NBA, as proposed in our National Direction paper.

The marine jurisdiction of regional councils is still a live question and something that future oceans reform, along with any local government reform, will need to grapple with. If the jurisdiction of

regional councils is reduced, this begs the question, who should manage the balance of the terrestrial sea in their place? This is not something we can resolve here, as it has far reaching institutional implications beyond just the SPA. But it makes sense, in the interim, for regional councils to continue to manage the entire coastal marine area under the NBA and for regional spatial strategies prepared under the SPA to align with this jurisdiction.

Councils will need much more resourcing and support than has been forthcoming to date if they are to successfully undertake this task. *We suggest that a national hub with expertise in marine mapping, planning and monitoring should be established at a national level and be deployed to assist councils with the development and implementation of regional spatial strategies (and associated combined plans under the NBA).* This reflects a more general point we have stressed in the past – central government (or a central authority in some form) needs to be more active in how (and whether) national direction and plans are implemented on the ground (see our National Direction paper). A national level hub would not necessarily need to be a formal or statutory body, but could later evolve and expand into one (with broader, independent, roles under the wider system – as we have suggested previously in the notion of a Resource Management and Tikanga Commission).

The RMR Panel left open the option for inter-regional spatial planning, particularly where the two regions cut across a single marine area such as in the Kaipara Harbour and the Hauraki Gulf. In addition, some regional councils only manage a part of a marine system, such as Horizons Regional Council which manages a small sliver of the south-east coast of the North Island. *The ability to undertake inter-regional planning will be important because the boundaries of regional councils do not generally align with the extent of biologically connected marine areas (bio-regions).* The Panel dismissed the opportunity to prepare sub-regional spatial plans but suggested that not all parts of a region need to be considered in the same detail. However, *flexibility in the detail of planning applied to parts of a region should not be able to be used to reduce the amount of focus placed on the coastal marine area versus the terrestrial environment. Wording should be incorporated into the SPA to ensure that the coastal marine area receives considered attention in each region (just as regional coastal plans must be prepared under the RMA).*

Regional spatial strategies are not proposed to extend to the exclusive economic zone (EEZ), with this part of the marine area expressly out of the scope of the RMR Panels' review.¹² We agree that regional spatial strategies prepared jointly by councils and others should not extend to the EEZ where developing plans based on regional council jurisdiction does not make sense. However *it would be possible for the SPA to make separate provision for the development of regional spatial strategies applying to the EEZ, which could then apply to the Fisheries Act, Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act (EEZ Act) and Maritime Transport Act amongst others.* Such spatial strategies could be discretionary rather than mandatory and could be provided for in a separate part of the new Act. This would usefully provide a planning mechanism to integrate across the various management agencies operating within the EEZ. It could also provide iwi with a seat around the table when planning decisions in this area are made. Alternatively, spatially planning for the EEZ could be addressed in future oceans reform, when a more developed system for marine spatial planning applicable to Aotearoa New Zealand's entire ocean realm could be put in place (see Section 8: Future oceans reform). That may be preferable, given that oceans need to be viewed as a

whole. For example, it may create perverse outcomes if spatial strategies applied to fishing in the EEZ but not to fishing in the coastal marine area.

Enactments to be integrated

The prime mechanism through which regional spatial strategies integrate across parts of the resource management system is through their interface with plans developed under other pieces of legislation, which largely serve as the implementation vehicles. The scope of the RMR Panel's terms of reference included a prime focus on the RMA and the interface of that legislation with the Local Government Act, Land Transport Management Act and Climate Change Response Act¹³ and it is only these pieces of legislation (including the NBA as replacement for the RMA) that are proposed to be subject to the SPA. This is through listing the legislation in a schedule to the SPA.

The RMR Panel noted that the EEZ Act and Fisheries Act were specifically excluded from the scope of the Panel's Review and that "providing a legislative framework for regional spatial planning that includes limited marine spatial planning for the CMA [coastal marine area] would not preclude the introduction of a fully integrated marine spatial planning framework in the future."¹⁴

This makes sense when considering strategic planning for future development and environmental protection on land (although even then the scope of legislation included could be expanded as suggested in our Landscape and Resource Management Reform paper). However, within the marine environment, the main resource management integration challenge is not between these pieces of legislation but between the RMA, the EEZ Act and legislation which applies to fisheries and marine protection (both spatial and species-focused). For the SPA to achieve strategic spatial integration across the marine resource management system it would ideally need to also apply to the Fisheries Act (wild harvest of marine species) and Conservation Act (conservation of the marine area and species more generally).¹⁵ If the SPA were to be expanded to include the EEZ it would also need to interface with the EEZ Act and potentially others. *Additional marine-relevant legislation should be listed within the SPA schedule including the Conservation Act and Fisheries Act.* Omitting to do this risks further entrenching the legislative and administrative fragmentation within the marine area.

Including this broader legislation within the ambit of the SPA would allow it to develop as a framework for marine spatial planning, and it would be well positioned to grow into this role in an iterative way as deeper oceans reform progresses. That is particularly important for the EEZ, where the policy and spatial protection framework is underdeveloped compared to the RMA (eg policy statements are non-existent, plans do not have to be created, regulations are ad hoc, and most decisions are made on a consent by consent basis).

Integration through a planning hierarchy

The main mechanism through which regional spatial strategies are to integrate across other legislation is the requirement that plans and strategies developed under the scheduled enactments be "consistent with" the regional spatial strategies.¹⁶ It is not proposed that other decision-making under the scheduled legislation, such as consenting, be directly linked to the regional spatial strategy

in this way. It relies on plans being developed under the various pieces of legislation which in turn influence statutory decisions at a more granular level.

Outside the RMA (and proposed NBA), the prime planning mechanism applying to the marine environment operates under the Conservation Act with the preparation of conservation management strategies at a regional level. Their statutory purpose is to implement general policies and establish objectives for the integrated management of natural and historic resources (including any species) managed by the Department of Conservation under a range of legislation applicable to the marine environment including the Wildlife Act, Marine Reserves Act, Marine Mammals Protection Act and Hauraki Gulf Marine Park Act.¹⁷ They are mandatory documents which are intended to guide the Department's operations including the management of marine reserves and protected marine species. *For marine biodiversity management to be effective, it is therefore important that conservation management strategies are well linked to combined regional plans (which apply to the territorial sea) and the SPA could assist with this.* We note the government's intention to reform the Conservation Law System more broadly, and these reforms will need to carefully consider the interface with the resource management system including the SPA. For example, there could be a direction that regional spatial strategies be consistent with conservation management strategies.

The integration mechanism is not so clear cut within the fisheries management regime where there is not such a developed planning framework. Under the Fisheries Act there is provision for the development of fisheries plans but they have no explicit purpose, are not mandatory, are generally high level and are not binding on decision-making.¹⁸ Fisheries plans do not therefore provide a reliable mechanism to ensure that the intent of the regional spatial strategy within the marine area is carried through into decision-making. However, to the extent fisheries plans are developed, they should be consistent with the overall strategic intent provided for under regional spatial strategies.

Consideration should also be given to providing for a more developed planning framework within the Fisheries Act, with a mandatory requirement for fisheries plans to be developed for the country's marine space, to provide an effective mechanism to interface with the SPA and through this better integrate with other marine management regimes. But in the absence of such changes, there is a strong case for linking regional spatial strategies directly to decision-making under the Fisheries Act, for example by requiring sustainability measures developed under Part 3 to be consistent with the provisions of the applicable regional spatial strategy prepared under the SPA.

There is an overlap between the marine jurisdiction under the Fisheries Act and the RMA and this was recently highlighted in the *Motiti* Court of Appeal decision.¹⁹ The case focused on whether it was possible for a regional council to spatially protect parts of the marine environment from the impacts of fishing activity through provisions in its regional coastal plan. The Court of Appeal held that councils may control fisheries resources provided they do not manage them for Fisheries Act purposes. The Court noted that government had assigned regional councils the primary governance role for biodiversity in giving effect to New Zealand's international obligations under the Convention on Biological Diversity.²⁰ The Court also identified five indicia: necessity, type, scope, scale and location to provide some objective guidance as to whether any particular control was lawful.²¹

This Court decision effectively means that provisions in a regional spatial strategy addressing the impacts of fishing activity on the marine environment could be implemented through combined plans under the NBA rather than through the Fisheries Act. In this way, the planning regime under the NBA could be expanded to, at least partly, fill the current planning gap within the Fisheries Act. We also note that regional spatial strategies will need to be consistent with environmental limits set under the NBA, which (assuming the *Motiti* jurisprudence stands) will need to include minimum indicators with respect to marine ecosystem health and marine habitats of importance to fish. In other words, the direction of influence may be upwards (limits set under the NBA would be reflected in spatial protections under the SPA), rather than downwards (relying on the SPA to set spatial protections that are then implemented through the NBA and/or Fisheries Act). A lot depends on what exactly we mean by “environmental limits” in the marine context. That is explored further below.

There are no planning mechanisms under the Marine Reserves Act, Marine Mammals Protection Act or Wildlife Act which could easily interface with the SPA. It would therefore be difficult, for example, to directly implement the spatial identification of marine protected areas in a regional spatial strategy with implementation on the ground through the Marine Reserves Act (which, among other things, are limited by a very narrow purpose relating to scientific research). This has been a difficulty with implementing the Hauraki Gulf marine spatial plan and the reason why special legislation is being contemplated.

We note that there are current proposals to reform marine protected area legislation and consideration should be given to providing a mechanism through which the spatial identification of prospective marine protected areas (including networks) through regional spatial planning could be directly implemented through the new legislation. It would also be possible to include a framework for more integrated marine spatial planning applying across the country’s entire ocean realm within this new legislation. A subsequent process of oceans reform could use this as a springboard and, for example, consider whether spatial protections via marine protected areas could be better achieved through the NBA and reformed EEZ Act processes (or an integrated Oceans Act) rather than entirely through separate conservation legislation. That would be a consideration for later, and for now we simply note that MPA legislation will be a key tool through which regional spatial strategies are implemented. Without that link to protected areas, the marine component of spatial planning will be hamstrung, and a placeholder should be reserved for that relationship.

The EEZ Act also does not obviously incorporate planning mechanisms for regional spatial strategies under the SPA to connect to, but it does provide for the development of EEZ policy statements (which have yet to be prepared) and the promulgation of regulations which can apply to specific activities and/or areas. *If the SPA were to be extended to apply to the EEZ, tailored mechanisms to interface with these decision-making tools under the EEZ would need to be developed.* Again, a placeholder could be included in the SPA so that link was easier to make in the future, and containing relevant legislation in a schedule to the SPA is a good start.

4. Planning approach

National priorities statement

The RMR Panel proposed that provision be made in the SPA for a ‘national priorities statement’ as a “tool for central government to signal its intention to address certain nationally significant issues through regional processes”. It would be important for the national priorities statement to have a section specifically focused on spatial planning in the coastal marine area, particularly given the strong public interest (and general lack of private property rights) in the sea, and the need for strong government support for regional councils within the 12 nautical mile limit. *The SPA should specifically reference this requirement.* This national priorities statement should also be clearly linked to criteria in the Act (to determine what those priorities are) – including the principles referred to earlier (eg ecosystem based management, precaution etc).

Content of plans

The RMR Panel proposed that regional spatial strategies should provide a long term view, setting a strategic direction for at least the next 30 years and focused on setting out:

long-term objectives to improve the quality of the natural and built environments, provide sufficient development capacity, promote Māori interests and values, promote the sustainable use of rural land, protect historic heritage, address natural hazards and climate change.²²

The RMR Panel further elaborated that regional spatial strategies would include a range of environmental matters (alongside identifying the location of future development capacity and infrastructure) such as “regionally significant ecological areas, landscapes and recreational space that should be protected or enhanced”, “areas of historic heritage values and areas of significance to mana whenua that should be protected and enhanced”, “areas where significant change in land use is required to reduce impacts of land use and development in lakes, rivers, wetlands and the marine environment”, “areas for enhancement and restoration, such as wetlands and green corridors” and “areas that may be affected by climate change or other natural hazards, and measures that might be necessary to address such issues”.²³

Many of these matters are relevant to the marine area but the list should be expanded to include matters of priority when a stronger marine lens is applied such as habitats of importance to protected or endangered species, habitats of importance to fisheries (such as nursery areas and habitats), areas suitable for marine uses (such as aquaculture), marine areas suitable for restoration (including passive restoration through establishing marine protected areas and active restoration such as restoring shellfish beds and kelp forests), and marine areas susceptible to catchment impacts such as sediment and nutrients (and for which limits will need to be set). *The SPA should explicitly include a requirement for regional spatial strategies to identify these types of areas.* We also note that the Minister will, under the NBA, be required to identify and map various areas, and some of these could apply to the coastal marine area. Presumably these are to be contained in an actual tool

like an NPS or NES, rather than just being a separate obligation to create maps, and therefore regional spatial strategies will have to be consistent with them. Consideration should therefore be given to exactly what that ministerial obligation requires in the marine area, as that will influence what happens under the NBA and SPA.

Approach to planning

It is apparent from the RMR Panel's report, that poor alignment of land use and infrastructure plans (and associated impacts on housing provision) is a major issue that the SPA was designed to address.²⁴ In contrast, the major impetus for applying spatial planning in the marine area has been to reverse evident environmental degradation in coastal areas, address conflicts between uses (aquaculture versus wild fishing; aquaculture and wild fishing versus marine protection etc) and better reflect Māori values and aspirations.²⁵ For this reason, terrestrial spatial planning is likely to place a stronger focus on achieving better integration to provide for future growth whereas marine spatial planning has a stronger focus on achieving healthy functioning ecosystems through applying ecosystems-based approaches (along with those consistent with tikanga). This is because the marine area is very much still 'wild' compared to the 'developed' and well-demarcated land environment which is the focus of terrestrially-based planning. As outlined above, this is why it is important for the SPA to set out strong biophysically focused principles to underpin the planning process.

The complex and interconnected nature of the marine environment also requires consideration in designing the SPA. In terrestrial spatial planning we have a better understanding of where the boundaries of activities start and stop, and of the scale at which their impacts may occur. Marine environments do not react to development pressures based on the traditional notions of 'sites' and 'boundaries'. Understanding impacts in marine environments requires spatial planning approaches that consider chains of causation and an understanding of the complexity and fluidity of marine environments.²⁶ These differences are likely to require different approaches to be applied to the development of spatial planning provisions for the ocean than for land.

It is important that these differences are recognised and provided for in the SPA. If the provisions are drafted from a terrestrial focus they are unlikely to be adequate when applied to the coastal marine area. *Consideration should be given to including tailored provisions in the SPA that apply to the development of the coastal marine area portion of regional spatial strategies.*

There is also the sequencing of the planning process to consider. Marine areas are the final sink for many contaminants that are derived from catchments. It is therefore important that catchments are managed within the marine area front of mind. This means that strategic decisions about development within catchments need to be taken within the framing of what is sought to be achieved within the marine environment over the planning period. Consequently, *spatial planning needs to be undertaken from the sea up to into the mountains rather than from the mountains to the sea.* That has tangible repercussions – for example, it means that at least some parts of the marine environment (estuaries and areas impacted by catchments) need to fall within the scope of detailed spatial plans (eg habitat mapping), rather than being just a general demarcation of zones focused on resolving conflict between competing human uses.

Planning process

Regional spatial strategies themselves are to be developed jointly by central government, local government and mana whenua through consensus decision-making. The RMR Panel has not specified which governmental bodies should be represented on the joint planning committee but *they would need to include the Department of Conservation, Ministry for the Environment and Ministry for Primary Industries which have a significant role in managing the marine environment.* In certain regions they may also need to include other statutory bodies such as the Hauraki Gulf Forum for planning impacting the Hauraki Gulf and the Guardians of Fiordland and Kaikoura Marine Guardians in their respective regions.

The proposals, importantly, enable mana whenua to participate in spatial planning as partners and “to better reflect Te Tiriti partnerships and incorporate mātauranga Māori knowledge”.²⁷ Such a government-Māori planning body would help ensure that relationships between mana whenua and the marine environment are better acknowledged and supported, that important values are protected, and also that there is cross-government consistency in approach.

Role of information

The ability to plan well is reliant on access to robust information about the resources being managed, and current and future pressures on them, along with future needs of the community. The information on the marine environment is thin, patchy and far less comprehensive than that for land. Even basic data such as benthic maps of the seabed can be unavailable. The Prime Minister’s Chief Science Advisor’s recent report ‘The Future of Commercial Fishing in Aotearoa New Zealand’ highlights the data and knowledge gaps for the marine environment through a narrower lens of just commercial fishing, but this serves to highlight the information challenge that will face marine spatial planning exercises. In the report, she highlights the lack of knowledge about the impacts of climate change and plastics on fisheries (and by implication the marine environment more generally, including through food webs); lack of knowledge about land-based impacts, including sedimentation, and cumulative effects; lack of knowledge about species and habitats; and lack of knowledge about the environmental impacts of fishing.²⁸ On the positive side she identified a range of new technology which is making it easier to monitor the marine environment while highlighting the importance of putting in place an integrated ocean observing system.²⁹

For effective regional spatial planning of the marine area it is important that a targeted marine information gathering process is commenced and resourced well in advance of the planning process (and that we avoid simply rolling over the historical unsatisfactory planning information for the marine area on the basis that there is ‘no time to collect new information’). It would make sense for this to be coordinated by central government given the economies of scale of rolling out such an information gathering process nationally. This could be undertaken through the establishment of a national marine hub as proposed earlier. A core of resource may already be found within central government (eg LINZ), Crown Research Institutes (eg NIWA), universities and regional councils.

Such a process would need to be sequenced in tandem with the development of the regional spatial strategies. It would need to bring together current information held by different agencies and

parties onto a single spatial platform. It would also require the collection of additional information in many areas. Such a process and sequence could be signalled in the national priorities statement, which could have a statutory influence on budget processes. *The SPA could provide a framework for the process of collecting information to support marine spatial planning.* The Prime Minister's Chief Science Advisor highlighted the need to develop an improved data management system for the marine environment,³⁰ and an information initiative designed to support marine spatial planning could usefully be part of this.

5. Role of environmental limits

We have explored the role of environmental limits in regional spatial planning in our earlier paper. We emphasise here the importance of robust environmental limits for the marine environment being set before regional spatial strategies are prepared, to ensure that key strategic decisions and spatial delineation of areas will not risk such limits being breached (at the very least). In the marine environment, limits should address matters such as robust sediment and nutrient limits for embayments, estuaries and harbours; the protection of important habitats (including areas such as shellfish beds, kelp forest, seagrass beds, sponge gardens, other biogenic habitats and fish nursery areas); and the protection of habitats for protected/endangered species, which will need to include important nesting (for seabirds), nursery and foraging areas. This is a big exercise, because such limits are highly localised and there is an absence of both information and understanding of cumulative impacts. Precaution is therefore essential.

The RMR Panel recommended that regional spatial strategies should be consistent with national direction including National Policy Statements (NPS) and National Environmental Standards (NES), amongst others. This would mean that the regional spatial strategies would need to be consistent with the NZCPS. The NZCPS already provides some environmental limits for the coastal environment as confirmed by the Supreme Court in the *EDS v New Zealand King Salmon* decision.³¹ *It is important that the requirement for regional spatial strategies to be consistent with the NZCPS (and other national direction, such as that for freshwater amended to include estuaries) is retained and that these limits are upheld.*

Environmental limits are, under the NBA, to be mandatory for particular domains. One such domain is the coastal marine environment. What that means in practice is unclear, however. It seems that limits, set through NESs, are conceived of as being either tightly defined numerical measurements or at least specific quantitative regulations. There is no provision for limits to be set in NPSs.

We have made a number of other recommendations in our Environmental Limits paper, and these are to do with the system of limits as a whole. They are therefore relevant to the marine area, and we refer you to that paper. For example, it will be important for environmental limits to include not only regulations – these are unlikely to have adequate coverage or specificity at a national level – but also policy provisions. Almost all provisions that can be said to be national level “limits” for the oceans can be found in the NZCPS (although there are also some regulations, as for marine pollution).

Limits in the NBA should also be linked to a much tighter range of specific minimum outcomes – bottom lines – that are being defended. In the marine environment, further thought is needed as to what those things would be, but they would include the integrity of ecosystems, the protection of threatened species, the safeguarding of habitat for fishing, and so forth. These limits need to be – not just a set of measurements of the state of an environment – but requirements that clearly flow through to actual regulatory restrictions on activities that could threaten those minimum states.

The relationship between the NBA and the SPA in the marine context may also need to be rethought. Environmental limits expressed as policies – as some provisions under the NZCPS can be perceived – may require spatial expression to be effective. For example, a minimum level of biodiversity – a limit – may require implementation not just through rules expressing maximum concentrations of contaminants or prohibiting activities like mining, but also through the establishment of coherent networks of protected areas or identifying the spatial distribution of activities likely to have adverse effects on biodiversity. It may therefore be appropriate for marine elements of regional spatial strategies to ‘give effect to’ limits set under the NBA through the identification of, and strategic planning for, the development of such areas. That would address concerns that spatial planning becomes something of a ‘horse trading’ exercise between those with direct interests in the marine environment.

Regional spatial strategies also provide a useful vehicle to outline how those limits are to be achieved through different mechanisms – regional combined plans, fisheries plans and sustainability measures, marine protected areas and so forth – because they would influence multiple frameworks. For example, it may be a useful way to ensure that the protection of marine fisheries habitats does not fall between the cracks that exist between the NBA and the Fisheries Act, and ensuring that everyone is well aware of their respective roles in delivering through their legislative silos.

6. Allocation

Marine spatial planning plays a much stronger role in allocating (notionally) common space for private uses than land based planning (where we have transferrable titles to both private and public parcels of land). Although such plans do not allocate specific rights to space to individual parties (which is a process that would be undertaken under other legislation such as the NBA), regional spatial strategies can effectively allocate space for different types of uses such as aquaculture, marine protection and marine infrastructure such as ports, marinas and moorings. It provides predictability and a future direction for allocative decisions without determining who specifically gets what.

It is therefore important that the SPA makes clear how such allocation is undertaken and the process for identifying candidate areas. Constraints mapping has been an approach that historically has been used to identify areas for potential future uses such as aquaculture. This involves mapping available information on values (including environmental and cultural) and uses of the marine space. Areas which are left ‘blank’ are then identified as candidate areas for future uses such as aquaculture.

The problem with this approach is that there is often poor information about areas of ecological importance in the marine area (and often also for cultural and other values) and therefore an area showing up as 'blank' in a constraints mapping exercise does not necessarily signify that there are not values there meriting protection. In addition, such an approach is generally static and fails to identify potential synergies where a particular location of an activity may help to improve the environmental quality of an area, or where a degraded area should be rehabilitated.

The rights, needs and aspirations of mana whenua will also need to be front and centre of any deliberations around allocation. This will include aspirations for customary harvesting, the deployment of customary management tools under fisheries regulations (eg mātaītai and taiāpure), for aquaculture space, use of settlement fisheries quota, claims under the Marine and Coastal Areas (Takutai Moana) Act, and marine tourism initiatives. There is a need to grapple with hard questions around what Te Tiriti means when referenced in legislation in different ways, which is a process that has been catalysed by the Ngāi Tai Supreme Court decision³² and judicial comments in marine mining applications.³³

It is therefore important that more nuanced approaches are utilised to identify potential areas for allocation and this is where collaborative planning groups (involving mana whenua and stakeholders), such as utilised for the Hauraki Gulf marine spatial planning process, can be useful in eliciting the full range of values at stake and identifying potential synergies between future activities (including marine protection).

With the marine environment particularly susceptible to change in the future, with a changing climate and warming seas, it will be important that any allocation of space or resources within the marine area is flexible and can be adjusted in the future, including through shifting the location of specific activities (such as aquaculture) or scaling back activities. It is therefore critical that any allocation is timebound and subject to regular review, while providing some certainty of rights and investment.

The SPA should include principles to guide the spatial allocation of the coastal marine area to different uses and, as earlier proposed, provide a framework for collaborative planning for the marine area.

9 Funding

Regional spatial strategies are to be accompanied by 'implementation agreements' which will include more detailed planning for "certain infrastructure or environmental remediation projects" and apportion funding responsibility between central and local government. These could then be linked to the budgeting process for each government body, thereby helping to ensure that funding is made available to implement the regional spatial strategies. *Such implementation agreements would serve as a useful implementation tool for proactive actions identified for the marine area, such as establishing marine monitoring systems and coastal restoration initiatives.*

The funding of marine planning and management, more generally, has always been a fraught topic. Unlike the case on land, where a rates-based system and user charging funds much local

government activity, there is not a similar charging system applied to the marine area. *In the absence of any more comprehensive charging system for marine users and those discharging into the marine environment, considerably more central government funding, sourced from taxpayers, will be required to finance the development and implementation of regional spatial strategies in the coastal marine area.*

Dedicated consideration should be given to developing a more comprehensive financing system for the marine area which could include tendering of marine space, rating of seabed occupation, licensing fees for vessels (including recreational vessels above a certain size) and royalties on the extraction of resources such as minerals, gravel, sand and marine life. Funds raised should be channelled back into marine management activities include marine spatial planning, information collection and monitoring.

More ambitious charging regimes could be considered which also act as an economic incentive to reduce marine pollution such as charging for the discharge of contaminants into the marine area (including sewage) and sediment flows. For example, if councils were charged for each wastewater overflow into the marine area this could incentivise investment in upgraded infrastructure while also generating funds for marine management.

Such charging mechanisms are likely outside the scope of the SPA but would need to be considered for incorporation into the NBA, Local Government (Rating) Act and the like.

10 Potential future oceans reform

As already indicated, EDS is currently undertaking a dedicated project looking at future options for reform of the oceans management system. We will shortly be finalising an issues and options paper with a final report due at the end of 2021. The final report will not include recommendations but will describe three or more possible options for a future oceans system. The relevance of the possibility of future oceans reform to the drafting of the SPA is the need to ensure that any arrangements development now, and in the interim period before oceans reform is implemented, do not preclude future options.

Matters that we are considering in the oceans reform project of relevance to the SPA include the jurisdiction of regional councils in the marine area (as discussed above), other institutional arrangements (ie the pros and cons of establishing a Ministry of Oceans, Oceans Agency or Oceans/Tikanga Commission), the best statutory vehicle for marine spatial planning, how to apply Te Tiriti to oceans management, the merits of a national oceans policy, whether to merge the RMA and EEZ Act, and how scientific inputs into the system might be managed.

At this stage, we don't see the proposals for the SPA precluding any of the options that we are developing for future oceans reform. Clearly the SPA itself might need amendment in the event of future reform, and this is likely either to reduce its scope (ie to catchments and their interface with the sea) or expand it (to include the EEZ and extended continental shelf). This would likely be mirrored by similar reductions or extensions to the scope of the NBA. At the stage oceans reforms

were implemented any necessary adjustments could be made. And regional spatial strategies that had been prepared at that point could be carried over as transitional documents into the new system. The important thing is to approach reform with ongoing evolution of marine management in mind. All indications are that the bones of a future system proposed by the RMR Panel will be appropriate, and provide a good springboard for reforms that will build on this core to go further into the marine space.

9. Summary of key recommendations

1. The setting of environmental limits and national direction under the NBA for the marine environment will be extremely important if the SPA is to result in positive marine environmental outcomes and this needs to occur before any regional spatial strategies are prepared.
2. The SPA should set out principles to underpin the planning process and these should include applying ecosystems-based management and te ao Māori approaches. It should also be made clear in the SPA that these principles are to be applied when making decisions.
3. Including both catchments and the sea in regional spatial strategies is essential for achieving positive marine outcomes as catchment-based activities have significant impacts on the coastal marine area, and are the main driver of ecological degradation in many inshore areas.
4. Until broader oceans reform is undertaken, regional councils should continue to manage the entire coastal marine area under the NBA and regional spatial strategies prepared under the SPA should align with this jurisdiction.
5. A national hub with expertise in marine information, mapping and planning should be established at a national level and be deployed to assist councils with the development and implementation of regional spatial strategies.
6. There should be an ability to undertake inter-regional planning because the boundaries of regional councils do not generally align with the extent of biologically connected marine areas (bio-regions).
7. Flexibility in the detail of planning applied to parts of a region should not be used to reduce the amount of focus placed on the coastal marine area versus the terrestrial environment and the SPA should be drafted to ensure that the coastal marine area received considered attention in each region.
8. The SPA could make separate provision for the development of regional spatial strategies applying to the EEZ, which could then apply to the Fisheries Act, Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act and Maritime Transport Act amongst others.
9. Additional marine-relevant legislation should be listed within the SPA schedule including at least the Conservation Act and Fisheries Act. Omitting to do so risks further entrenching the legislative and administrative fragmentation within the marine area.
10. Conservation management strategies prepared under the Conservation Act need to be well linked to combined regional plans prepared under the NBA in order to integrate marine biodiversity management.
11. We note the government's intention to reform the Conservation Law System more broadly, and these reforms will need to carefully consider the interface between conservation legislation and the resource management system including the SPA.
12. A more developed planning framework needs to be provided for within the Fisheries Act to provide an effective mechanism to interface with the SPA and through this better integrate with

- other marine management regimes. In the interim, sustainability measures taken under the Fisheries Act should be required to be consistent with regional spatial strategies under the SPA.
13. There are current proposals to reform marine protected area legislation and consideration should be given to providing a mechanism through which the spatial identification of prospective marine protected areas (including networks) through regional spatial strategies could be directly implemented through the new legislation.
 14. If the SPA is extended to apply to the EEZ, tailored mechanisms to interface with these decision-making tools under the EEZ would need to be developed. A placeholder should be included in the SPA to make that link easier in the future.
 15. The national priorities statement under the SPA should have a section specifically focused on spatial planning in the coastal marine area, particularly given the strong public interest (and general lack of private property rights) in the area.
 16. The SPA should explicitly include reference to regional spatial strategies identifying important ecological areas in the marine environment types including habitats of importance to protected or endangered species, habitats of importance to fisheries, areas suitable for marine uses, marine areas suitable for restoration and marine areas susceptible to catchment impacts such as sediment and nutrients (and for which limits will need to be set).
 17. Consideration should be given to including tailored provisions within the SPA that apply to the development of the coastal marine area portion of regional spatial strategies.
 18. Regional spatial planning needs to be undertaken from the sea up into the mountains rather than from the mountains into the sea.
 19. Joint planning committees under the SPA would need to include representatives from the Department of Conservation, Ministry for the Environment and Ministry for Primary Industries due to their significant role in managing the marine environment.
 20. A targeted marine information gathering process should be resourced and commenced well in advance of the planning process. The SPA could provide a framework for the process of collecting information to support marine spatial planning.
 21. The NZCPS already provides some environmental limits for the coastal environment as confirmed by the Supreme Court in the *EDS v New Zealand King Salmon* decision. It is important that the requirement for regional spatial strategies to be consistent with the NZCPS is retained and that these limits are upheld.
 22. Collaborative planning groups (involving mana whenua and stakeholders), such as utilised for the Hauraki Gulf marine spatial planning process, can be very useful in eliciting the full range of values at stake when allocating areas of marine space to particular uses.
 23. The SPA should include principles to guide spatial allocation of the coastal marine area to different uses. The rights, needs and aspirations of mana whenua will need to be at the forefront of any deliberations around allocation.
 24. Implementation agreements would serve as a useful implementation tool for proactive actions identified for the marine area, such as marine monitoring initiatives and coastal restoration initiatives and this should be included in their scope.
 25. In the absence of any more comprehensive charging system for marine users, considerably more central government funding, sourced from taxpayers, will be required to finance the development and implementation of regional spatial strategies in the coastal marine area.
 26. Dedicated consideration should be given to developing a more comprehensive financing system for marine management.

27. At this stage, we don't see the proposals for the SPA precluding any of the options that we are developing for future oceans reform.

¹ Local Government Act 2002, section 3(d)

² Resource Management Review Panel, 2020, *New directions for resource management in New Zealand*, 132

³ Severinsen G, 2019, *Reform of the resource management system: A model for the future, Synthesis report*, Environmental Defence Society, Auckland, 158

⁴ Curtin R and R Prellezo, 2010, 'Understanding marine ecosystem based management: A literature review', *Marine Policy*, 34, at 821

⁵ Ehler C and F Douvère, 2009, *Marine spatial planning: A step-by-step approach toward ecosystem-based management*, UNESCO, Paris

⁶ New Zealand Government, 2020, *Te mana o te taiao – Aotearoa New Zealand biodiversity strategy 2020*, Department of Conservation, Wellington, 53

⁷ Resource Management Review Panel, 2020, *New directions for resource management in New Zealand*, 129

⁸ Resource Management Review Panel, 2020, *New directions for resource management in New Zealand*, 137

⁹ See Issue 2: Our activities on land are polluting our marine environment, in *Our marine environment 2019* at <https://environment.govt.nz/publications/our-marine-environment-2019/issue-2-our-activities-on-land-are-polluting-our-marine-environment/>

¹⁰ Severinsen G, 2019, *Reform of the resource management system: A model for the future, Synthesis report*, Environmental Defence Society, Auckland, 230

¹¹ Parliamentary Commissioner for the Environment, 2020, *Managing our estuaries*, PCE, Wellington, 21

¹² Resource Management Review Panel, 2020, *New directions for resource management in New Zealand*, Appendix 6, paragraph 20

¹³ See Resource Management Review Panel, 2020, *New directions for resource management in New Zealand*, Appendix 6, paragraph 10

¹⁴ Resource Management Review Panel, 2020, *New directions for resource management in New Zealand*, 138

¹⁵ Other legislation is also pertinent including the Marine Reserves Act (spatial marine protection), Marine Mammals Protection Act (protection of marine mammals), Wildlife Act (for protected marine species), Maritime Transport Act (shipping) and Biosecurity Act (marine biosecurity).

¹⁶ Resource Management Review Panel, 2020, *New directions for resource management in New Zealand*, 139-140

¹⁷ Conservation Act 1987, section 17D

¹⁸ Peart R, 2018, *Voices from the sea: Managing New Zealand's fisheries*, Environmental Defence Society, Auckland, 129-132

¹⁹ *Attorney-General v The Trustees of the Motiti Rohe Moana Trust* [2019] NZCA 532

²⁰ *Attorney-General v Motiti Rohe Moana Trust and Ors* [2019] NZCA 532 at [53] and [54].

²¹ *Attorney-General v Motiti Rohe Moana Trust and Ors* [2019] NZCA 532 at [64] and [65].

²² Resource Management Review Panel, *New directions for resource management in New Zealand*, 2020, 142

²³ Resource Management Review Panel, 2020, *New directions for resource management in New Zealand*, 142-143

²⁴ Resource Management Review Panel, 2020, *New directions for resource management in New Zealand*, 118

²⁵ Peart R, 2017, 'A Seachange: Marine Spatial Planning in New Zealand', in D Kitsiou and M Karydis, *Marine Spatial Planning: Methodologies, Environmental Issues and Current Trends*, Nova Science Publishers, New York

²⁶ Gazzola P, M Roe and P Cowie, 2015, 'Marine spatial planning and terrestrial spatial planning: Reflecting on new agendas', *Environment and Planning C: Government and Policy*, 33(5), 1156-1172

²⁷ Resource Management Review Panel, 2020, *New directions for resource management in New Zealand*, 146-147

²⁸ Prime Minister's Chief Science Advisor, 2021, *The future of commercial fishing in Aotearoa New Zealand*, Office of the Prime Minister's Chief Science Advisor, Auckland, 108-109

²⁹ Prime Minister's Chief Science Advisor, 2021, *The future of commercial fishing in Aotearoa New Zealand*, Office of the Prime Minister's Chief Science Advisor, Auckland, 306-313

³⁰ Prime Minister's Chief Science Advisor, 2021, *The future of commercial fishing in Aotearoa New Zealand*, Office of the Prime Minister's Chief Science Advisor, Auckland, 212

³¹ *Environmental Defence Society v New Zealand King Salmon Co* [2014] NZSC 38, [2014] 1 NZLR 593

³² *Ngāi Tai ki Tāmaki Tribal Trust v Minister of Conservation* [2018] NZSC 122

³³ For example, *Trans-Tasman Resources Limited v Taranaki-Whanganui Conservation Board* [2020] NZCA 86