



26 April 2010

Foreshore and Seabed Review
Ministry of Justice
C/- P O Box 180
WELLINGTON 6140

REVIEWING THE FORESHORE AND SEABED ACT 2004: CONSULTATION DOCUMENT

The Environmental Defence Society (EDS) welcomes the opportunity to comment on the government's proposals to amend foreshore and seabed law. EDS has for many years been promoting the need for improved environmental management of New Zealand's coasts and oceans.

The focus of EDS's work is on achieving good environment outcomes through improving the quality of New Zealand's legal and policy frameworks and statutory decision making processes. EDS does not have expertise in customary rights issues. Our submission therefore focuses on the likely impacts of the government proposals on environmental management of the coastal marine area.

SUMMARY OF EDS SUBMISSIONS

A summary of our submissions is included in the list below. These points are expanded on in the sections following.

1. Comprehensive reform of coastal and marine legislation is urgently required. A New Zealand Coastal Commission should be established and could oversee the law reform process.
2. As a matter of principle all activities, including customary activities, should be subject to environmental controls and environmental bottom lines prescribed under the RMA.
3. Coastal hapū/iwi could be given the ability to place rāhui over the harvesting of marine resources.
4. Planning documents prepared by coastal hapū/iwi should only have legal weight under the RMA to the extent that they are consistent with Part 2 of the RMA and any applicable national policy statements.

5. The requirement to obtain a property right consent from coastal hapū/iwi should be kept separate from RMA consenting processes.
6. Coastal hapū/iwi should not be given the right to veto marine reserve proposals. The Marine Reserves Act 1971 should be updated and revised. Such a revision should include consideration of appropriate mechanisms to incorporate a stronger role for coastal hapū/iwi in marine conservation decisions, while still protecting the broader public interest in marine conservation.
7. Existing processes for allocation of space in the coastal marine area should be retained but should be strengthened by a nationally-led initiative to implement regional marine spatial planning.
8. All structures placed in the coastal marine area should be open to public access, irrespective of ownership, unless there are strong public safety reasons for restricting such access.
9. A universal and equitable system of coastal occupation charging should be implemented and the proceeds used to help fund management of the coastal marine area under the RMA.

EDS EXPERTISE IN COASTAL AND MARINE ISSUES

EDS is a public interest environmental law group, formed in 1971. It is Auckland-based and has a membership that consists largely of resource management professionals. It operates by litigating on environmentally important matters and as an environmental think tank.

EDS has had a long interest in the management of New Zealand's coast and marine areas. In 2005 EDS published a report on oceans governance titled *Looking out to sea: New Zealand as a model for ocean governance*. In 2007 EDS published a report investigating integrated coastal management titled *Beyond the tide: Integrating the management of New Zealand's coasts*. The report was reprinted in 2009 with support from the Hauraki Gulf Forum.

Last year, EDS released a policy paper on the establishment of an Environmental Protection Authority (EPA) titled *Improving environmental governance: the role of an Environmental Protection Authority*. This paper canvassed gaps in current marine management (amongst other things) and proposed a role for the EPA which would include oversight of coastal and marine management. It also proposed the establishment of a Coastal Commission. EDS also launched a comprehensive book on coastal management titled *Castles in the Sand: What's happening to the New Zealand coast?*

Earlier this month EDS launched a comprehensive guide to how the New Zealand's marine area is currently managed titled *Managing the Marine Environment*. EDS is involved in ongoing work on coastal and marine conservation and management issues.

THE NEED FOR COMPREHENSIVE REFORM AND A NEW ZEALAND COASTAL COMMISSION

The current proposal is an attempt to add yet another reform onto the current legal framework for the marine area which is already highly complex, fragmented and outdated in many respects. A similar approach has been applied to aquaculture over many years with poor results. EDS would urge the government to consider comprehensive reform in this area.

The consultation document highlights the current complexity in the system on page 26 by referring to the need for any new legislation 'to fit with the more than 40 pieces of legislation that apply in the foreshore and seabed ...'. The Ministerial Review Panel established to review the Foreshore and Seabed Act 2004 also highlighted the current complexity of the law and need for reform. The Panel stated at page 158 of its 30 June 2009 report:

We have observed elsewhere in this report, and the point has been made repeatedly to us in submission, that the existing law relating to the coastal marine area is too complex. We believe that coastal marine law needs to be reconsidered as a whole, and that the development of final legislation on the foreshore and seabed should be integrated into such a review process.

When considering submissions lodged with it, the Panel noted that 'there was strong support for a comprehensive overview of the coastal management regime.' For example, the New Zealand Institute of Surveyors argued that the Foreshore and Seabed Act 2004 should be repealed and replaced with 'overarching maritime planning and resource legislation'. The Treaty Tribes Coalition submission expressed support for 'a comprehensive review of management of the marine area ... to improve integrated management and co-ordination of decision makers to deliver improved environmental outcomes and efficiencies for users' (pages 55-56).

The Ministerial Review Panel specifically recommended the establishment of a national body (Working Group or Commission), comprised of representatives of central and local government, Māori, and public interest groups to oversee the coastal marine area and to develop specific proposals by which the matter can be progressed after further consultation.

This recommendation is consistent with EDS's proposal to establish a New Zealand Coastal Commission to provide greater oversight of coastal management in the long term public interest. The Coastal Commission could be attached to, and serviced by, the Environmental Protection Authority. It could oversee the process of reforming coastal and marine legislation amongst other functions. EDS will be releasing a policy paper in May 2010 fleshing out the need for and potential functions of a Coastal Commission.

EDS would urge the government to treat the current proposals for replacing the Foreshore and Seabed Act 2004 as interim only and subject to a more comprehensive law reform process.

4.6.2 PROPOSED AWARDS FOR PROVEN NON-TERRITORIAL INTERESTS - CUSTOMARY USES, ACTIVITIES AND PRACTICES

Customary activities to have a protected status

The proposal is that customary activities would not be subject to sections 9-17 of the RMA or rules in plans and proposed plans. Third party coastal permits could not be granted if they would adversely affect the customary activity. The Minister of Conservation would have the ability to impose controls if the activity was having significant adverse effects on the environment, but only after consultation with the Minister of Māori Affairs and taking into account the views of the relevant coastal hapū/iwi.

EDS considers that, as a matter of principle, all activities should be subject to the environmental controls and environmental bottom lines prescribed under the RMA. Therefore, customary activities should not be specifically exempted from RMA provisions.

However, if customary activities are exempted from sections 9-17 of the RMA and rules in plans, the Minister of Conservation needs to have the power to impose controls where the customary activity 'may have' a significant adverse effect on the environment. As some adverse environment effects are irreversible or very difficult and/or costly to remedy, it is important that the Minister is able to act before they occur if necessary.

Placement of rāhui over wāhi tapu areas

The proposal is that coastal hapū/iwi could restrict or prohibit access to wāhi tapu areas.

This proposal could also include the ability of coastal hapū/iwi to place rāhui over the harvesting of marine resources.

Planning document

The proposal is that coastal hapū/iwi could develop a planning document in accordance with Part 2 of the RMA. The local authority would need to 'take into account' the planning document when reviewing its policy and planning documents. Prior to this review being undertaken, the local authority would need to attach the planning document to its relevant policies and plans, and would need to have 'particular regard' to the matters in the planning document when considering a coastal permit application.

The document would also need to be paid 'particular regard to' by the New Zealand Historic Places Trust when considering archaeological site authorities; local authorities would need 'to consider' the document when decisions are made under the Local Government Act 2002; the Department of Conservation would need 'to consider' the document when preparing conservation management strategies; and the Minister of Fisheries would need 'to consider' the document when approving fisheries plans.

If hapū/iwi planning documents are to have legal weight under the RMA it is important that they are consistent with Part 2 of the RMA and with any relevant national policy statements. Although the proposal states that these planning documents should be developed in accordance with Part 2 of the RMA there is no mechanism proposed to ensure this is the case. EDS submits that the wording of any new legal provisions should make it clear that

local authorities are only required to take the hapū/iwi planning documents into account, or pay them particular regard, to the extent that they are consistent with Part 2 of the RMA and with any applicable national policy statements.

Where there is any doubt as to whether provisions of a hapū/iwi planning document are in accordance with a Part 2 of the RMA, any party should have the ability to seek a declaration from the Environmental Court to clarify the issue. The RMA may need to be amended to make it clear that the Environment Court has the jurisdiction to make a declaration on this point.

4.6.4 PROPOSED AWARD FOR PROVEN TERRITORIAL INTERESTS ('CUSTOMARY TITLE')

Right to permit activities

The proposal is that coastal hapū/iwi would have an effective right to veto any activity requiring a coastal permit (but not activities permitted under the regional coastal plan) by their written permission being required before the consent authority can process the application. The consent authority would be unable to grant a coastal permit beyond the scope of the application that was permitted by the coastal hapū/iwi.

The proposal essentially seeks to combine the property right holder consent which is required to use the area for a specific purpose with the process under the RMA to obtain an environmental consent.

In EDS's experience applications can evolve and change considerably through the resource consent process. Conditions are often designed when the consenting process is well advanced to mitigate environmental impacts as well as to provide offsetting environmental benefits. Mediation between parties can result in innovative solutions to environmental concerns.

The current proposal could result in the applicant having to go back to the coastal hapū/iwi multiple times for consent during the RMA process as the proposal evolves, causing delays and uncertainties in the RMA process. The applicant would need to obtain consent before the council could process the application, and also before the council could grant the consent if the scope of the application had changed during the process. Further consent would need to be potentially obtained if the proposal was modified as a result of appeals being lodged with the Environment Court, as a result of mediation between the parties and also before the Environment Court could reach a decision. There could also be legal uncertainty as to whether an amended proposal was still within the scope of coastal hapū/iwi consent and consent authorities would need to resolve this before they could grant consent, potentially requiring costly legal services.

In EDS's view it would be far better to keep the property rights consent and the RMA processes separate, requiring the applicant to obtain consent from the coastal hapū/iwi before the proposal could be undertaken, but leaving it up to the applicant as to when to obtain that consent. This would enable the RMA process to operate in an efficient and timely manner.

Participation in conservation processes

The proposal is that coastal hapū/iwi would have the effective right to veto 'conservation proposals' including applications to establish or extend marine reserves, conservation protected areas or applications for concessions by their written permission being required before an application could be processed.

The title is a misnomer because what is proposed is not rights to participation in conservation processes, but a right to veto all conservation proposals 'subject to the government's ability to achieve essential conservation outcomes'. There is no indication of what 'essential conservation outcomes' would include.

The proposals appear to be endeavouring to equate territorial interests in the foreshore and seabed with land interests, and to be applying landowner-type approaches to control over sea water and marine life within it. However, it is important to recognise that the marine area is very different to land. It is much more dynamic and inter-connected, with seawater and marine life moving large distances, and the life cycles of marine organisms spanning expansive areas. Conservation mechanisms need the ability to address impacts on the marine area in an integrated manner.

The environmental legal frameworks applying to land and the marine area are also very different. The protection of biodiversity on private land is primarily undertaken through the RMA, through such mechanisms as restricting the removal of indigenous vegetation. In the coastal marine area, similar protection of biodiversity is primarily achieved through the establishment of marine reserves. The key difference here is that most significant activities impacting on terrestrial biodiversity are managed under the RMA, but in the coastal marine area, one of the major activities impacting on marine biodiversity, fishing, is controlled under separate legislation, the Fisheries Act 1996.

Under the Marine Reserves Act 1971, iwi or hapū with tangata whenua status over the area can make an application for a marine reserve. However, giving coastal hapū/iwi the right to veto the establishment of marine reserves, without providing an alternative effective mechanism to reflect the strong public interest in the protection of marine biodiversity in areas where there are private property rights, is providing a much stronger right than landowners currently have and is inappropriate.

The proposal is of particular concern given the strong and growing financial interest that many coastal hapū/iwi have in activities which can have significant environmental impacts on the marine area including aquaculture and commercial fishing.

EDS considers the current Marine Reserves Act 1971 to be outdated and in urgent need of revision. Such a revision should include consideration of appropriate mechanisms to incorporate a stronger role for coastal hapū/iwi in marine conservation decisions, while still protecting the broader public interest in marine conservation. The current proposals do not achieve this balance.

Planning document

The proposal is that coastal hapū/iwi could develop a planning document in accordance with Part 2 of the RMA. The local authority would need to 'recognise and provide for' the

planning document when reviewing its policy and planning documents. Prior to this review being undertaken, the local authority would need to attach the planning document to its relevant policies and plans, and would need to 'recognise and provide for' the matters in the planning document when considering a coastal permit application.

As described above, if the hapū/iwi planning documents are to have legal weight under the RMA it is important that they are consistent with Part 2 of the RMA and with any relevant national policy statements. The wording of any new legal provisions should make it clear that local authorities are only be required to take the hapū/iwi planning documents into account, or pay them particular regard, to the extent that they are consistent with Part 2 of the RMA and with any applicable national policy statements.

5.1 WHO CAN USE AREAS OF FORESHORE AND SEABED

Allocation of coastal space

The proposal is that existing processes for allocation of space would be retained and space would continue to be allocated by regional councils.

EDS supports the proposal that space in the coastal marine areas should continue to be allocated by regional councils. However, we consider that the system for allocating space needs to be considerably improved. The consultation document states on page 43 that 'Having a clear and well-defined system for allocating space in the foreshore and seabed is important for economic development and prosperity. It provides a way to address potential conflicts arising from the range of interests in the foreshore and seabed.' EDS agrees with this statement.

Unfortunately a clear and well-defined system for allocating space does not currently exist. Space in the coastal marine area is currently allocated on an ad hoc, case-by-case, first-in-first-served basis which does not ensure the best use of space, address conflicts or manage cumulative environmental impacts. The problems with the current system have been exemplified with the ongoing issues around the allocation of space for aquaculture.

This situation would be addressed by the implementation of a robust system of marine spatial planning. This does not require legal reform, as spatial planning in the marine area is provided for under the RMA in the form of regional coastal plans. Unfortunately such planning has not eventuated in practice. What it does require is a nationally-led programme to implement spatial marine planning, including the provision of data and technical support to regional councils involved in the development of regional coastal plans. An expanded Environmental Protection Authority could provide the lead for such a programme.

Marine spatial planning would provide an effective mechanism for hapū/iwi interests in the marine area to be recognised and provided for. It would also provide a mechanism for co-management arrangements to be realised in practice.

Ownership of structures

The proposal is that new structures will be owned by those who own the material in the structures. They will therefore be able to be privately owned and the owners will be able to lease and licence them.

EDS considers that it is a very important principle that irrespective of who owns them, public access should be provided to all structures which are built over the public foreshore and seabed domain, unless there are strong public safety reasons to restrict such access.

The Ministerial Review Panel highlighted the development of ‘a national culture that sees the coastal marine area as not just a shipping lane but as a public recreational ground that is the birthright of every New Zealander’ (page 12). The Panel noted that many submitters strongly urged that ‘government should embark on a concerted effort to improve and secure public access to and along the coast’ (page 158).

Maintaining and enhancing public access to and along the coastal marine area is identified as a matter of national importance in the RMA. Other provisions in the RMA need to reflect this important principle.

As well as reducing public access to the marine area, enabling owners to restrict access to structures is likely to lead to their proliferation in the coastal marine area, as more structures will be required to provide for other users. This in turn will result in the inefficient use of marine space and greater cumulative negative environmental impacts.

5.6 OTHER MATTERS

Coastal occupation charges

EDS supports the adoption of a nation-wide coastal occupation charging system which is applied in an equitable way to all occupiers of the foreshore and seabed. This should help promote the more efficient use of the seabed. If the revenue was used to help fund the costs of managing the marine area under the RMA, this would provide a more equitable means of funding these costs, which are currently largely paid for by land-owning ratepayers. There is also currently a severe shortage of funds for marine management which coastal occupation charges could help alleviate.

CONCLUSION

EDS would welcome the opportunity to discuss our submissions further with you.

Yours sincerely



Raewyn Peart
Senior Policy Analyst
Environmental Defence Society

Contact details

Environmental Defence Society

P O Box 95 152

Swanson

Waitakere City 0653

Phone: 09 8156082

Cell: 021 613 379

Email: raewyn@eds.org.nz

Website: www.eds.org.nz