

Briefing for the Incoming Minister of Conservation

Environmental Defence Society | June 2022



**Environmental
Defence
Society**

1. Introduction to EDS

The Environmental Defence Society (EDS) is a charitable, not-for-profit environmental NGO which was established in 1971. It is comprised of lawyers, scientists and other professionals who use their skills to seek better environmental outcomes in Aotearoa New Zealand. EDS is on the moderate end of the green spectrum and is focused on working within the system to achieve positive change. We works in three main areas: environmental policy, litigation and events.

1.1 Policy

EDS acts as a thought leader in environmental policy, bringing together innovative ideas with on-the-ground experience to develop practical options for reform as well as identifying pathways for implementation.

A recent example of EDS's policy work is our Resource Management Reform Project (2017-2020) which helped build the momentum for change, developed options for reform, and then presented a detailed preferred option that was considered by the Ministerially-appointed Resource Management Review Panel. EDS partnered with business interests (Business NZ, Property Council, Infrastructure NZ and Employers and Manufacturers Association) to successfully promote the reform which is now well underway. Our current policy projects relevant to your Conservation Portfolio are described below.

1.2 Litigation

Although EDS works constructively with government, business and others to achieve positive environmental change, we also litigate as a last resort to protect important parts of Aotearoa New Zealand's natural environment or to set important precedents. One of our most notable cases is the *EDS v King Salmon* 2014 decision of the Supreme Court which reset how the Resource Management Act was applied and, in particular, enabled the setting of environmental bottom lines.

1.3 Events

EDS convenes events including (since 2003) an annual EDS conference which takes the form of a high-level environmental policy dialogue. The conferences help generate solutions to key environmental challenges facing the country with, for example, EDS's 2008 conference prompting the inception of the Land and Water Forum. EDS also convenes an annual Australia-New Zealand Climate Change and Business Conference which is now in its 14th year. This is focused on engaging with business on the threats and opportunities arising from climate change.

1.4 Internal Organisation

EDS has an Auckland office and a staff complement of 10. The Society's operations are overseen by a board of directors. We are funded from a mix of government, private sector and philanthropic sources.

2 Current EDS law reform projects

EDS is currently undertaking work on conservation and oceans law reform as follows.

2.1 Vanishing Nature

In 2015, EDS set out for the first time in *Vanishing Nature: Facing New Zealand's Biodiversity Crisis*¹, a comprehensive analysis of Aotearoa New Zealand's biodiversity loss, the drivers behind the loss and practical solutions to addressing those drivers. The report served to highlight the extent of the challenge facing the country, to preserve its biodiversity, and the need for significant change. We have sent a hard copy of the report to your office.

Part of the problem identified was the legislative framework for conservation which a 2019 Department of Conservation (DOC) discussion document characterised as “overlapping, contradictory, contested, ineffective”, “slow” and “outdated”, and “not able to adapt well to the current and future pressures”.²

2.2 Conservation Law Reform Project (Phase 1)

EDS was subsequently engaged by DOC to undertake an independent review of the conservation system. This culminated in the release of EDS's *Conserving Nature: Conservation Reform Issues Paper*,³ in July 2021, which was launched by Hon Kiritapu Allan at the 2021 EDS conference in Christchurch. We have sent a hard copy of the report to your office.

Our review concluded that the conservation system is under significant stress and is no longer fit for purpose. Central statutes such as Conservation Act and National Parks Act, date back to the 1980s, and the Wildlife Act to the 1950s. The laws predate the global biodiversity and climate change crises, the growth of the tourism industry, and the development of new technologies such as ebikes and drones. The legislation also fails to reflect or incorporate the values and aspirations of iwi/Māori.

Our review confirmed the need to reform the conservation management system to ensure it is coherent, effective and responsive. Our interviews with stakeholders from across the country revealed that there is widespread agreement on the need for reform. There was particular criticism of the Wildlife Act.

¹ Brown M A, R T T Stephens, R Peart and B Fedder, 2015, *Vanishing nature: Facing New Zealand's biodiversity crisis*, Environmental Defence Society, Auckland

² Department of Conservation, 2019, *Te Koiora o Te Koiora: A discussion document on proposals for a biodiversity strategy for Aotearoa New Zealand*, DOC, Wellington

³ Koolen-Bourke and R Peart, 2021, *Conserving nature: Conservation reform issues paper*, Environmental Defence Society, Auckland

Citing the EDS report and its findings, Minister Allan in December 2021 launched the 'Conservation Law Reform Roadmap',⁴ which set a broad agenda for reform of the conservation system over the next four years, beginning with a review of the Wildlife Act 1953.

2.3 Conservation Law Reform Project (Phase 2)

Following the release of *Conserving Nature*, DOC engaged EDS to undertake a second phase of the project to canvas options for conservation law reform and make recommendations for change. It includes a more detailed review of the Wildlife Act and the conservation management planning system.

A 'Synthesis and Options Report' is scheduled to be published in April 2023. It will set out proposals for a modern conservation management system that represents our uniquely Aotearoa New Zealand response to conservation governance, management and delivery.

EDS's conservation law project has been designed to link closely with DOC's law reform agenda and roadmap.

EDS values the current close working relationship with DOC on the Conservation Law Reform Project and we look forward to engaging with you on the reform agenda.

2.4 Oceans Management System Reform (Phase 1)

Over the past two years EDS has been conducting an in depth, first principles look at the future of our oceans management system (which comprises all of the laws, institutions and tools that manage our marine area as well as those that manage activities having impacts on it).

Phase 1 of the project, which has recently been completed, looked at what is going wrong under current settings and identified a number of options for systemic reform (to our norms, toolkit, legislative arrangements and institutions) that *could* be pursued. It culminated in a series of different starting points for what whole of system reform might look like, from better using what we currently have, to fundamentally reimagining the system's normative basis and structural features (eg through developing a single Oceans Act or pursuing legal personhood for the moana).

The Phase 1 synthesis report, *The Breaking Wave: Oceans Reform in Aotearoa New Zealand*,⁵ was launched by Hon Kiritapu Allan in June. We have sent a hard copy of the report (and a summary version) to your office. It has been designed to foster a conversation between stakeholders, policy makers and the public on what reform of the whole system might look like (and not just of individual policy silos such as fishing, aquaculture, marine protection and so forth). Our view is that such a

⁴ <https://www.doc.govt.nz/globalassets/documents/about-doc/role/legislation/conservation-law-reform-roadmap.pdf>

⁵ Severinsen G, R Peart, B Rollinson, T Turner and P Parson, 2022, *The breaking wave: Oceans reform in Aotearoa New Zealand*, Environmental Defence Society, Auckland

debate needs to happen in an open and inclusive way before coming to conclusions about what a future system *should* look like.

2.5 Oceans Management System Reform (Phase 2)

Phase 2 of our oceans work, which is commencing later in 2022 with completion in mid-2024, is about developing a single preferred model for reform as well as charting a pathway to transition to the new system over a reasonable timeframe. This is intended to provide a tangible starting point for government to progress whole of system marine reform next term (in a similar way that EDS's work on resource management reform supported the deliberations of the Randerson Panel and has led to subsequent reform of the Resource Management Act 1991 (RMA)). The context is different, but the need for integrated change is just as strong.

We understand that officials are in the process of preparing advice for the Minister of Oceans and Fisheries on the need for deeper change on this front, but as you will be aware, marine reform is as much a conservation issue as it is a "resource management" or "fisheries" issue (and the relationships between those policy areas needs close attention). Given the overlaps and intersections we recommend that marine reform is considered in close association with forthcoming reform of the conservation system (including the Wildlife Act).

We encourage you to prepare DOC to have a lead role in broader oceans reform in the following term of government.

3 Current Issues for attention

3.3 Resource Management Reform

Reform of the resource management system is now well underway, with legislation (the Natural and Built Environments Act and the Spatial Planning Act) due for introduction to the House later in 2022. EDS has been closely involved in this process from its inception and has provided advice to the Ministry for the Environment on many different topics. We would be happy to provide this advice to you if that would be helpful. While it is not the *only* thing that the reform is about, it is vital that the core of new legislation is about protecting and enhancing the natural environment, including ecosystems and species.

The intersection between new resource management legislation and conservation is extremely important in the terrestrial, freshwater and marine environments. They are not fundamentally separate things.

There is a strong need for DOC to have a powerful voice, not just in the legislative part of resource management reform, but also in the ongoing implementation of the system (including development of the National Planning Framework and regional level combined plans).

3.2 Wildlife Act

The Wildlife Act 1953 is widely recognised as no longer fit for purpose. EDS set out the case for reform of the Act in our *Conserving Nature* report. Key issues identified were that the Act makes no formal distinction between introduced and indigenous species, or between common and critically endangered species, and that it has confusing and vague definitions and inadequate tools. Further, Aotearoa New Zealand remains significantly out of step with international best practice for threatened species protection in having no dedicated threatened species legislation.

To inform the review of the legislation, EDS is currently undertaking an in-depth examination and review of the Wildlife Act, as part of our Conservation Law Reform project. The review is canvassing options for reform that would enhance biodiversity protection and bring the country into line with international best practice. A report outlining our findings and recommendations is expected to be released in late August.

We look forward to engaging with you on our Wildlife Act report.

3.3 Conservation Management Planning Review

EDS is also currently investigating options for improving the conservation management planning system as part of the Conservation Law Reform Project. This includes examining the legislative framework for conservation planning, the institutions involved in planning processes, international examples of effective conservation management planning and best practice, and current statutory planning documents. We are also undertaking interviews with conservation managers and stakeholders. Our report will be published in October 2022.

There is a sense of increasing urgency around the need to reform the conservation planning system which most people accept is broken. This is highlighted by DOC's recent discussion document on amending decision-making processes for plan development/review and concessions through a proposed Conservation Management and Processes Bill.

In our view, the proposals 'put the cart before the horse' by seeking to speed-up decision-making without addressing the need for *substantive* reform. By way of example, the proposed amendments could remove concessions requirements for certain (undefined) activities, in the absence of clear limits and guidance on what activities are compatible with conservation objectives. In many areas, there is a lack of clarity around what the core conservation objectives are, and these can be hotly contested. In our view *procedural* reform should not precede *substantive* reform.

The Conservation Management and Processes Bill should be delayed until holistic conservation law reform can be achieved.

3.4 Stewardship Land Review

The Stewardship Land Review provides an opportunity to think strategically about how best to reclassify land to achieve national conservation objectives. However, the review process appears to

be largely adopting a parcel-specific focus that fails to identify economies of scale. For example, parcels that currently have lower conservation value could be restored to provide better connectivity between adjacent high-value sites. In our view this represents a missed opportunity.

There is need to better align the Stewardship Land Review with national conservation objectives including those set out in Te Mana o te Taiao Aotearoa New Zealand Biodiversity Strategy 2020.

3.5 Partial Review of General Policy

EDS was not consulted on the work of the Options Development Group on the partial review of conservation general policy. The recommendations from the Group have profound implications for the way our conservation estate is managed.

While some of the recommendations are sensible and workable, others need testing with the wider community before changes are formalised. EDS wishes to engage in that process.

3.6 Mining on Conservation Land

In November 2017, as part of her opening speech following the general election, Prime Minister Jacinda Ardern announced that there would be “no new mines on conservation land.”⁶ Yet despite this promise, mining activities continue to be approved five years later. In fact prospecting, exploration and mining activities have occurred on more than 150,000 hectares of public conservation land since the speech.⁷

As part of the Stewardship Land Review, reclassifications are even being prioritised where mining access applications have been received: with the risk that even more, not less, land is opened for mining. This situation is extremely worrying.

We would like to remind Government of the promise made, and the importance of banning mining on conservation land, given that we are in the midst of a biodiversity crisis.

3.7 National Policy Statement on Indigenous Biodiversity

The state of biodiversity in Aotearoa New Zealand is in decline and we are reaching a crisis point. The RMA is the main framework for maintaining and protecting indigenous biodiversity on private land but has not resulted in good biodiversity outcomes. The need for a national policy statement for indigenous biodiversity (NPSIB) has been recognised since as early as 2000.

EDS has long supported the development of the NPSIB. We were represented on the Biodiversity Collaborative Group (which developed a first draft of the NPSIB) and the Stakeholder Reference Group for the New Zealand Biodiversity Strategy (which developed the current version). We have

⁶ <https://www.beehive.govt.nz/speech/speech-throne-2017>

⁷ <https://www.stuff.co.nz/environment/127157848/former-conservation-minister-calls-for-urgent-halt-to-mining-on-protected-land--our-smallest-frogs-are-at-stake>

also produced a number of publications on the subject, most notably *Vanishing Nature, Pathways to Prosperity: Safeguarding Biodiversity in Development*⁸ and *Banking on Biodiversity: The Feasibility of Biodiversity Banking in New Zealand*.⁹

The Biodiversity Collaborative Group delivered its draft of the NPSIB in 2018 and a discussion document was notified in 2019. EDS's submission on that document was broadly supportive but sought some important changes. EDS is currently preparing its submission on the exposure draft of the NPSIB which is due by 21 July 2022.

It is critical that the momentum to create the NPSIB is maintained and that the document is formally promulgated during this term of government. It will need to be aligned with any new Wildlife Act and the impending Natural and Built Environments Act.

3.8 Freshwater implementation

The Government's freshwater reforms are now transitioning from a policy development phase to an implementation one. The Ministry for the Environment is the lead agency on implementation and EDS is intimately engaged in that process. As an advocate for ecological values, DOC has a critical role to play in the plan-making process as these plans roll out over the next 3 years. EDS and other ENGOs will be engaged as well and there's a need to ramp up overall capacity to ensure that there are voices for the environment and te mana o te wai.

DOC will need to ensure that adequate planning, freshwater science and legal capacity is available for it to perform its responsibilities under section 6 (ab) of the Conservation Act 1987, "to preserve so far as is practicable all indigenous freshwater fisheries, and protect recreational freshwater fisheries and freshwater fish habitats".

3.9 Marine Protected Areas

Aotearoa New Zealand is lagging well behind in its protection of the marine area through establishing marine protected areas (MPA). Coverage is small and patchy with mainland bioregions having only 0.3-4.7% of their areas in a MPA.¹⁰ Further, there is currently no legal mechanism to create fully protected areas offshore in the exclusive economic zone. This is of considerable concern given the overall ongoing decline in the state of our marine environment.

It is widely acknowledged that the Marine Reserves Act 1971 is no longer fit for purpose and urgently needs to be replaced. We have presented some options for reform in this area in *The Breaking Wave*.¹¹

⁸ Brown M A, 2016, *Pathways to prosperity: Safeguarding biodiversity in development*, Environmental Defence Society, Auckland

⁹ Brown M A, 2017, *Banking on biodiversity: The feasibility of biodiversity banking in New Zealand*, Environmental Defence Society, Auckland

¹⁰ Department of Conservation, Ministry for the Environment and Ministry for Primary Industries, 2019, *New Zealand marine protected areas: Gaps analysis*, Wellington, at 15

¹¹ See Chapter 9

We urge you to progress with the MPA reform process within this term of government.

3.10 Sea Change Tai Timu Tai Pari

Sea Change Tai Timu Tai Pari was a collaborative marine spatial planning process for the Hauraki Gulf. The plan-making process commenced in 2013 and delivered a plan at the end of 2016. The process was overseen by a co-governance group consisting of equal numbers of central and local government representatives and iwi. The final plan was signed off by all participants in the stakeholder working group which represented the commercial fishing, recreational fishing, iwi, environment, land users and infrastructure sectors. It was endorsed by members of the co-governance oversight group. It included proposals for the establishment of 13 new MPAs (including the extension of 2 existing MPAs).

Since the plan was completed the state of the Hauraki Gulf has deteriorated further.¹² Implementation of the plan has been extremely slow. Government officially released its response to the 2016 plan in June 2021.¹³ This included a commitment to progress 14 MPAs including 11 high protection areas. It also indicated that a legislative process for the new protected areas would be initiated within the first year of the response (ie by June 2022) but this has not happened.

We are concerned about the ongoing delays in implementing the Sea Change Plan, and in particular the establishment of a network of highly protected areas, and urge you to speed this process up so that legislation is progressed during this term of government.

3.11 Kermadec Oceans Sanctuary

The Kermadec Oceans Sanctuary was announced by former Prime Minister John Key in September 2015. At some 620,000 km² in size, it was to be “one of the world’s largest and most significant fully protected ocean areas”.¹⁴ The Kermadec Islands are renowned for their high biodiversity, with some 32 per cent of all fish species known in Aotearoa New Zealand coming from the region. It was described by government as “one of the most pristine and unique places on earth”.¹⁵

Since that time the proposal has failed to progress due to issues around its impacts on Treaty Settlement fisheries quota. We also understand that this, in turn, has had a chilling effect on other marine protection initiatives including in the Hauraki Gulf, south-east coast and the reform of the MPA legislation itself.

¹² See latest State of the Gulf report 2020 at <https://www.aucklandcouncil.govt.nz/about-auckland-council/how-auckland-council-works/harbour-forums/docsstateofgulf/state-gulf-full-report.pdf>

¹³ Department of Conservation, Fisheries New Zealand and Ministry for Primary Industries, 2021, *Revitalising the Gulf: Government action on the Sea Change Plan*, 2021, Wellington

¹⁴ New Zealand Government, 2016, ‘Kermadec Ocean Sanctuary Bill introduced’, press release, 9 March

¹⁵ New Zealand Government, 2015, ‘Establishment of a Kermadec Ocean Sanctuary, Cabinet Economic Growth and Infrastructure Committee, 10 September

We therefore urge you to give priority to resolving the issues around the creation of the Kermadec Oceans Sanctuary.

3.12 Statutory Advocacy

In addition to the tasks outlined above, the next 5-10 years will see the evolution of new combined plans and regional spatial strategies under the new Natural and Built Environments Act and the Spatial Planning Act. These new plans will shape the way our country's resources are managed over the next generation. They are very important. DOC has a critically important role here both as the repository of scientific expertise across domains and as a consequence of its role as the lead advocate for nature. In our view this new challenge requires a review and reset of the Department's advocacy capacity and priorities.

We suggest you set up a short, sharp advocacy review of DOC with both internal and external members (including EDS, Forest & Bird and Fish & Game).

3.13 Interaction with ENGOs

Minister Allan held a regular Stakeholder Meeting with many people and entities across the range of interests involved. This hasn't worked well from our perspective. There are too many people and organisations involved to make the interaction useful. There are 5 ENGOs that work closely together (EDS, Fish & Game, Forest & Bird, Greenpeace Aotearoa and WWF) which also meet with the Prime Minister and Minister Parker and we'd like to arrange regular meetings with you too.

EDS and other ENGO colleagues would prefer interaction with you with a smaller group of key national environmental leaders.

4 Summary and timeline of recommendations

4.1 Over the next 6 months (July - November 2022)

- a) Better align the Stewardship Land Review with national conservation objectives including those set out in *Te Mana o te Taiao Aotearoa New Zealand Biodiversity Strategy 2020*.
- b) Delay the Conservation Management and Processes Bill until holistic conservation law reform has been undertaken.
- c) Give priority to resolving the issues around the creation of the Kermadec Oceans Sanctuary.
- d) Develop new legislation to establish a network of highly protected areas in the Hauraki Gulf in accordance with the Sea Change Tai Timu Tai Pari Plan.
- e) Ensure DOC has a powerful voice in the resource management reforms including in the wording of the new legislation and development of the National Planning Framework.

- f) Ensure DOC has adequate planning, freshwater science and legal capacity to actively participate in the implementation of the freshwater reforms.
- g) Establish a regular Ministerial meeting with a small group of national ENGOs.
- h) Engage EDS in the Partial Review of General Policy.

4.2 Over the following 12 months (December 2022 – May 2023)

- a) Promulgate the NPSIB.
- b) Progress legislative amendments to ban mining on conservation land.
- c) Progress new legislation for MPAs.
- d) Initiate a short, sharp advocacy review of DOC with both internal and external members (including EDS, Forest & Bird and Fish & Game).
- e) Prepare DOC to play a lead role in broader oceans reform during the next term of government through boosting its marine policy capability.