

The Environmental Defence Society National Conference 2010

Session 12B: Aquaculture Reforms

Background paper to the presentation on the 2010 Aquaculture Reforms

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Explanatory Note

This paper provides a background to the presentation on the proposed 2010 Aquaculture Reforms and *should not* be considered an item for submission to the conference. Its purpose is also to present a brief summary of particular matters recently approved by Cabinet concerning the pending aquaculture reforms. The context in which this paper is written is in lieu of other policy initiatives to be implemented by Government, which include the possible changes to the New Zealand Coastal Policy Statement, and the potential introduction of new foreshore and seabed legislation. While these particular items are not the subject of this background paper, suffice to say, they will be aligned with the Government objectives for aquaculture.

Aquaculture Reform 2004

In 2004, no less than 44 new provisions and one additional schedule for aquaculture¹ were inserted into the RMA. Of particular note, sections 12A and 12B restricted aquaculture activities to occur only in Aquaculture Management Areas (AMA), but guaranteed the continuation of a coastal permit if the AMA ceased to exist. The latter was to cover the anomaly between the AMA planning provisions and the coastal permit where the AMA could be removed from a plan, but a resource consent could only be terminated upon non-compliance to the conditions of consent, expiration, or where the consent holder requested termination of the consent.

Subject to Schedule 1, the AMA provided councils with a planning tool to determine where aquaculture activities could occur. Effectively the mandatory requirement to establish an AMA doubled up the process for granting a resource consent. The costs, time taken, and process was in the industry's view a disincentive to make an application for aquaculture. For regional councils however, it provided them with an additional planning tool that if managed prudently could allow

¹ This does not include those provisions under the Maori Commercial Aquaculture Settlement Act 2004, or the transitional provisions under the Aquaculture Reform (Repeals and Transitional Provisions) Act 2004.

for an effective means of balancing aquaculture with other competing interests in the coastal marine area.

Aquaculture Law Reform 2010

Following the release of the Aquaculture Technical Advisory Group's (TAG) report "Restarting Aquaculture", Ministers instructed officials to initiate a targeted consultation process between November and December 2009. Submissions were called and were due by 16 December. The timing of when the report was publicly released (November 2009) and the invitation to the ARC to attend a workshop with officials in early December, meant that consultation was based on the ARC's rapid (rather than substantial and methodical) assessment of the TAG proposals. Since then, the pattern of release of information by Government and response by the ARC has been the same – within very short time frames.

The Cabinet Economic Growth and Infrastructure Committee (EGI) paper on aquaculture reform was referred to Cabinet in March 2010 for decision and subsequently publicly released in late April.² Of particular note the EGI paper recommended:

- An additional call-in item for the Minister of Conservation.
- New intervention powers for the Minister responsible for aquaculture.

For the purposes of this background paper these two items have been identified for comment notwithstanding the other significant recommendations that in large part support the majority of recommendations made by TAG.

Additional call-in item for the Minister of Conservation

With the recommended and approved removal of restrictions placed on aquaculture under section 12A³ the Government considered other mechanisms that would give effect to its aquaculture objectives. To elevate aquaculture as a matter of national significance an additional item for call-in was recommended and approved to allow the Minister of Conservation to consider "proposals that relate to the occupation of space in the coastal marine area (CMA) for significant development". The scope of this item would not be limited to aquaculture and could have "broader implications for other activities in the CMA". The Minister of Conservation is not limited to the list under this section, indeed she or he has discretionary power to determine whether or not a matter is of national significance beyond the scope of the list. The inclusion of this item under section 142(3) effectively heralds the Government's objective to kick start aquaculture via Ministerial intervention.

² On the same day (30 April) that submissions were due on the Foreshore and Seabed Act 2004 consultation document.

³ Approval has been given by Cabinet to remove the mandatory requirement that an aquaculture activity must occur in an Aquaculture Management Area.

Where a call-in has been actioned the Environmental Protection Agency (EPA) becomes the primary agent on behalf of the Crown to review the application. It can make a number of recommendations and subsequently advise the Minister to refer it back to the regional council; refer it to a Board of Inquiry; or refer it to the Courts (see section 147). If the matter is referred back to a regional council, the call-in was likely to be at the request of the regional council and the Minister may either: not have deemed it a matter of national significance; or the EPA recommends that the Minister proceed under section 146(b) and apply section 149ZA – which amounts to Ministerial intervention. It is more likely that where “matters of National significance” are called in, the EPA will advise the Minister to refer the matter to a Board of Inquiry or to the Environment Court. Where the proposal is of significant interest to the Minister and aligns with a principal Government policy there is a high probability it will be referred to a Ministerial appointed Board of Inquiry. All subsequent decision making relating to the call-in item become a matter for the Board, the EPA and the Minister. Regional councils are required to amend their plans accordingly once notice to do so has been issued by the Minister.

By disabling the regional decision making process via the new call-in item for the occupation of space in the CMA, coastal plans become subject to any determination by the Board and EPA that has been approved by the Minister. The responsibility of administering any amendments subject to that determination is left with the regional council to provide for and enforce. While call-in features have been with us for some time now, they have not been used to any great extent since the inception of the RMA. What is significant is that an activity that has had a comparatively short history in New Zealand’s economic development will be elevated to a matter of national significance because it has the “potential” to make a significant economic contribution.

New powers of intervention for the Minister responsible for aquaculture

New powers of intervention for the Minister responsible for aquaculture have also been approved. While these are to be used in “exceptional circumstances”, they are revolutionary in terms of the RMA. For the first time, a Minister will have power under the RMA to have a direct impact⁴ on a regional council’s coastal plan, making changes faster than the conventional RMA plan change. For the first time, one activity – aquaculture – is supported by Ministerial discretion to assist its development above all other activities in the CMA. And, for the first time matters of “regional significance” are considered.

The parameters of the Minister’s powers have been approved in principle by Cabinet and include:

- To change, introduce or remove provisions relevant to the management of aquaculture in a Regional Coastal Plan.

⁴ Unlike a plan change where the Minister for the Environment (s 25A) can direct a council to lead a plan change or where the Minister of Conservation (s 25B) can direct a council to review whole or part of its coastal plan, these new powers enable the Minister for Aquaculture to become the co- author of the coastal plan.

- Matters to be addressed in the regulations are of “regional or national significance” and relevant to achieving the purpose of the RMA.

But:

- The Minister must “have regard to” the existing provisions in the Regional Coastal Plan.
- The plan as amended by regulation must continue to give effect to any national policy statement, the NZCPS, and any regional policy statement, and must not duplicate nor be in conflict with any national environmental standard.
- The Minister must consult with the Minister of Conservation, other relevant Ministers, the relevant council and any other persons the Minister considers appropriate.

What does this mean for the new Auckland Council and its community?

The new legislation is expected to be enacted late in 2010, probably late November. Auckland’s new governance structure would have been in operation for a month, and likely to be dealing with transitional matters as the first priority. It is questionable whether or not the new Council will have the capacity or the inclination to prioritise the new aquaculture legislation above other matters that would be regionally significant. The specific and complex nature of the legislation and the process to amend the coastal plan will compel the new Council to either request the Minister for Conservation to call-in the matter or request the Minister for Aquaculture to directly intervene and amend the relevant aquaculture provisions in the coastal plan.

It is probable that given the status of chapter 22 in the Regional Coastal Plan⁵, Government intervention will occur. Noting the discussions above under “call-in” and “new powers of intervention”, the Government will be looking to work closely with the new Council to alter the coastal plan and thereby give effect to the new legislation. This could be a problem for the new council if minimal resources and expertise have been allocated to coastal matters.

Government officials have already reviewed chapter 22 of the ARC’s coastal plan, and concluded that because of the multiple layers prepared for different circumstances, the current planning framework is not considered robust enough to enable efficient processing of consents in a consents led regime. Further, officials also consider that options to improve the planning framework to allow consent applications to be considered more efficiently and effectively exist, but will require central government intervention to implement.

A concern the ARC has is that the Government may not be able to access critical information during the bedding down period of the new Council. Much of this information has yet to be fully analysed and inserted into the coastal plan, particularly in respect to regionally significant or high value areas, recreational fishing and boating, and sites still under investigation and awaiting designation of status.

⁵ Partly operative under 1995 operative plan and 2002 Chapter 22 Variations 2, 4, 5, & 6 notified but on hold.

The Government has not signaled the extent to which intervention may occur in the Auckland region. ARC officers have consistently reminded officials that if intervention was to be the pragmatic and logical approach for Government to take, further analysis of other parts of the coastal plan would be required. Where rules pertaining to certain activities, values or uses have a generic application across the coastal plan and are referenced in Chapter 22, Government will need to be cognisant of these to ensure that the coastal plan in its entirety is not compromised.⁶

The impact on the regional community and other users of the CMA

Should the Government intervene the regional community will either be dealing with the EPA or the Aquaculture Business Unit (ABU) within the Ministry of Fisheries, or both. Any longstanding associations the ARC has had with users of the CMA will be absorbed into the pool of other stakeholder relationships across the region once the new Council is established.

There will be some level of “disconnect” with all stakeholder groups in the region during the bedding down period of the new Council. This is to be expected. However, given the speed at which new legislation concerning aquaculture will be introduced, the likely intervention by Ministers, and the coincidental timing of when the new governance structure for Auckland comes into effect, CMA stakeholder groups could be more alienated than others.

Some reprieve could be sought via submissions on future resource consent applications to the EPA, or consultation with the ABU, but the extent to which CMA stakeholder groups would be able to influence any outcome concerning aquaculture will be severely curtailed.

For the aquaculture industry, it will mean closure to a long frustrating battle to enable aquaculture development. The additional regulatory and Ministerial support given to the industry will reduce costs, and the time taken to establish new aquaculture developments as well as a seamless transition to extend the duration of existing consents. It will also create more opportunities for iwi to become economically self sustaining by participating in a less restrictive aquaculture dynamic through the partial settlement of assets related to pre-commencement space, and the receipt of 20% new space for every successful aquaculture consent application.

Unfettered by the requirement of a costly plan change process and geared toward an “effects based” regime rather than an “activity based” one, aquaculture could become a significant feature along Auckland’s coastline.

A balancing act: personal comment⁷

Any changes made by the Minister of Aquaculture to a coastal plan will not be set in stone, despite references in the EGI paper to an enduring outcome. Government policies and the legislation they

⁶ These rules and policies are found in Part III and Part IV of the ARC Coastal Plan.

⁷ This section does not reflect the position of the ARC, and is to be considered only as a personal point of view.

invoke are subject to epochs of political influence. Some may consider that the Government has gone too far with these measures. Others may think they have not gone far enough. Whatever we are subject to now, rest assured it will be subject to change in the future.

This is not a healthy situation to be in: creating new legislation, amending it, or replacing it. It creates uncertainty and it stifles progress on all environmental, social, cultural and economic levels. The contest between environmental and economic considerations was the fundamental rationale behind the drafting and implementation of the RMA. This “one stop shop” to address the management of effects and provide for sustainable development has undergone a multitude of amendments that local authorities, in particular regional councils, are struggling to keep up with. Perhaps less tweaking at the expense of regional decision making and more evaluation to improve the tools the RMA already has (or had) would be a more productive and practical way to balance competing interests and provide for the sustainable development of activities like aquaculture.

Other proposals approved by Cabinet

- Establishing a new ministerial portfolio for aquaculture and setting up the Aquaculture Business Unit with the Ministry of Fisheries.
- Development of a National Aquaculture Strategy. While this would be a non-statutory tool it would guide the development of any regulatory framework for aquaculture.
- Strengthening the NZCPS to provide for sustainable aquaculture development.
- Streamlining the re-consenting process by which regional councils will be obliged to follow. Officials have been directed to investigate this further and to also consider implementation of an upper restricted discretionary status for re-consenting the same activity in the same location.
- A minimum 20 year duration for aquaculture consents.
- Streamlining of the Undue Adverse Effects test with RMA protocols.
- Removing provisions for AMAs, Invited Private Plan Change requests, and excluded areas.
- Developing allocation tools that will sit outside a coastal plan.
- Suspending receipt of applications for up to one year to allow regional councils to prepare their Coastal Plans.
- Investigating the merit in amending coastal plans via the Aquaculture Bill.
- Investigating a strategy to deliver Maori Commercial Aquaculture settlements.

The [Cabinet Economic, Growth and Infrastructure Committee paper – Aquaculture Reform](#) and the [Minutes of Decision](#) can be down loaded from the Ministry of Fisheries website:

<http://www.fish.govt.nz/en-nz/Aquaculture+Reform/default.htm?WBCMODE=PresentationUnpublished%23MainContentAnchor>