

Aquaculture Reform Update

1. The Government wants to boost the aquaculture industry's potential to generate sustainable economic growth, and has introduced a reform package intended to reduce costs, delays and uncertainty associated with the current regulatory processes. We previously reviewed the background to the aquaculture reform, the reasons for change, the aims of the reform, and aspects of the reform that were of specific interest to industry.
2. This article describes the progress of the Aquaculture Legislation Amendment Bill (No 3), examines the content of the Bill in more detail, and provides an overview of the implications for industry. The article draws on and summarises information provided by the Ministry of Fisheries¹.

BILL PROGRESS AND TIMEFRAME

3. The Bill passed its first reading on 16 November 2010 and has been referred to the Primary Production Committee. The closing date for public submissions to the Committee is 11 February 2011 and the Committee will report to Parliament on 27 April 2011.
4. Submissions may be made online at www.parliament.nz/en-NZ/ or in writing², in which case two copies are required. Those submitters wishing to appear and speak in person should indicate this in their submissions.
5. The Bill is intended to be divided into four separate Bills during the committee of the whole House stage of the legislative process (one Bill for each of the Acts amended, being the Resource Management Act 1991, the Fisheries Act 1996, the Maori Commercial Aquaculture Claims Settlement Act 2004, and the Aquaculture Reform (Repeals and Transitional Provisions) Act 2004). These Bills are intended to come into force on 1 July 2011.

POINTS OF INTEREST TO THE INDUSTRY

Central Government Leadership

6. The reforms will enable the Government to take a more active leadership role in aquaculture, as expected. The Bill will enable the Minister for Aquaculture to amend aquaculture related provisions in regional coastal plans, where the change is of national or regional significance. Some provisions in the Tasman and Waikato Regional Coastal Plans will change as soon as the Bill is passed. Before exercising this power, the Minister for Aquaculture must consult with the Minister of Conservation, other relevant Ministers, the regional council concerned, and any other persons the Minister considers appropriate. The amendment of the Tasman and Waikato Regional Coastal Plans demonstrates the Government's willingness to intervene in regional planning matters.
7. An Aquaculture Business Unit is being established within the Ministry of Fisheries, as expected. Dan Lees has been appointed Director of the Aquaculture Unit. The Unit will be the Government's principal advisor on marine and land based aquaculture, leading the reforms and implementing the new regime. It will be responsible for the Aquaculture Planning Fund. However, the Unit will not make decisions on the Undue Adverse Effects ("UAE") test under the Fisheries Act.

¹ http://www.parliament.nz/en-NZ/PB/SC/MakeSub/7/a/1/49SCPP_SCF_00DBHOH_BILL10442_1-Aquaculture-Legislation-Amendment-Bill.htm

² Post to: Committee Secretarial, Primary Production, Parliament Buildings, Wellington

8. The reforms also include the development of a national aquaculture strategy and action plan, signalling the Government's intention to provide strong central direction.

Aquaculture Planning and Consenting

Aquaculture Management Areas Abolished

9. As expected, Aquaculture Management Areas ("AMAs") will no longer be required under the Resource Management Act 1991 ("RMA"). The two interim AMAs, in Tasman and Waikato, will be concluded under the current law.
10. The Waikato Communal Area, a site used collectively by marine farmers, will be deemed to hold a coastal permit subject to conditions in a Schedule to the Bill.
11. Councils will still be able to identify areas where aquaculture activities cannot occur and record these areas in regional coastal plans. However, councils will not be able to authorise aquaculture activities in regional coastal plans. Where a plan currently authorises aquaculture as permitted, applicants may act in accordance with those rules until they are altered, but councils must alter the rules to remove the "permitted" status as soon as reasonably practicable, and no later than 2 years after the Bill is passed.

New Applications

12. Applications for new marine farms in any part of the coastal marine area will be possible as soon as the Bill is passed, subject to the provisions of the relevant regional coastal plan.
13. Councils may refuse an application if the same or a similar application has already been refused within the previous year.

Pre-moratorium Applications

14. The Bill generally allows applications notified before 28 November 2001 to be completed. The Bill will amend the assessment under the Fisheries Act to align it with the UAE test as it applies to new applications. Consideration of fisheries resources will be removed from the test. Applicants can also negotiate aquaculture agreements. Therefore, applications assessed as having UAE need not be automatically declined.

"Frozen" Applications

15. "Frozen" applications, which were lodged but not notified before the moratorium, will generally be able to proceed under the new regime introduced by the Bill when the Bill is passed. Applications located within an interim AMA (including applications made between 1 January 2005 and 9 May 2006) will generally be able to proceed when the interim AMA is completed. For applications outside interim AMAs, the new UAE test applies. If a "frozen" application is for an area where aquaculture is prohibited in a regional coastal plan, the application will not be able to proceed unless a plan change is made and, if this does not occur, will be cancelled on 31 December 2014.

Processing

16. All applications for which processing can be resumed will be deemed to have been lodged on the date that the Bill is passed, in the order which they were originally received. Applications must be processed under the regional coastal plan applying at the time the application is considered, not that applying when it was lodged.

Allocation in Circumstances of Competing Demand

17. When multiple interests compete for the same space in the coastal marine area Councils used to apply a "first in, first served" approach to processing applications. Under the Bill regional

councils will have a range of allocation tools available to manage high and/or competing demand in the coastal marine area, without needing to write the tools into regional plans. This will avoid delays often associated with plan changes. Councils will be able to request that the Minister of Conservation allows them to use an alternative allocation tool, rather than the “first-in, first-served” approach.

18. Regional councils may request the Minister of Conservation to approve an alternative allocation method if the regional coastal plan does not provide effectively for competition for space in the coastal marine area. If the regional council has made a request, applications for coastal permits to occupy space subject to the request cannot be made until the request has been declined, or an approved allocation method is notified in the *Gazette*.
19. Regional councils may request the Minister to approve allocation by public tender or another method. If the request does not relate to a public tender, the request must specify the proposed method for allocation. The Minister must consult with relevant Ministers and any other person considered appropriate, and must not approve the request unless there is high demand for occupation of the space, and the allocation method will effectively manage that demand.
20. Where there are significant competing demands, regional councils implementing plan changes will be able to seek Ministerial direction to suspend the review of new applications for up to one year pending the preparation of the plan change. The Minister can also direct that new applications be processed and heard together.

Re-Consenting and Review

21. As expected, the Bill simplifies the process for re-consenting aquaculture activities. Information required will be limited to the effects of the activity and changes to the environment that mean the effects of the activity are no longer the same in character, intensity, or scale to those anticipated when the original consent was granted.
22. On 15 March 2010, Cabinet agreed to include requirements for monitoring data and performance indicators as part of the required information for re-consenting. However, those requirements have not been implemented in the Bill.

Duration and Lapsing

23. All consents will be a minimum of 20 years and maximum of 35 years, unless a shorter term is requested or there is significant risk or uncertainty about effects of a proposal that cannot be managed through consent conditions. Regional councils still have discretion to reduce the term of a consent.
24. The period before a consent will lapse if not given effect or an extension granted, will be reduced from 5 to 3 years.

Undue Adverse Effects

25. Removing AMAs will make aquaculture consent applications possible in most New Zealand coastal waters, but they will remain subject to the undue adverse effects UAE test under the Fisheries Act. The UAE test will remain the threshold test for impact on commercial, customary and recreational fishing.
26. UAE arise where aquaculture development would unduly prevent fishers from catching fish. The Bill coordinates the UAE test with the resource consent process. The aim of the Bill is to streamline the process, such that the UAE test is normally done only once for each area of coastal aquaculture space requested by the applicant. However, if a Council changes or reviews the conditions of a consent, the UAE test will be repeated.

27. When councils receive a consent application to undertake aquaculture activities, they must forward a copy to the Ministry of Fisheries. This allows the Ministry to make an early assessment of what information is required for the UAE test. The Ministry can seek additional information, and set a time limit for the receipt of information. If a council decides to grant the consent, the Ministry has 20 working days to make a decision on the UAE test. The consent cannot commence until the Ministry's decision is made.
28. UAE decisions will not be subject to appeal, only subject to judicial review within 15 working days of public notification of the decision. Where the Ministry of Fisheries already has sufficient fishing related information, public notification of the resource consent application for UAE purposes will not be required.
29. The cost of administering the UAE test will be met by the applicant. This will add to the overall cost of the consenting process.

Review or Change of Conditions

30. If a council intends to review a condition that requires an aquaculture decision under the Fisheries Act, the council must notify the chief executive of the Ministry of Fisheries.
31. If a council intends to change a condition and is required to notify the Ministry of Fisheries of the intended review, the chief executive of the Ministry of Fisheries will apply the UAE test.

Aquaculture Agreements

32. Under current law, if an aquaculture activity is assessed as having UAE on commercial fishing, the applicant can enter into an agreement to compensate the affected quota holders. Applicants presently need consent of 90% of quota holders before they can apply to the High Court to gain consent to lodge an agreement binding all quota holders. The High Court only gives consent if sufficient compensation has been offered to all affected quota holders who have not agreed to the arrangement.
33. As expected, the Bill lowers the consent threshold for aquaculture agreements to 75%. This may lead to agreements being utilised more in the future.

Pre-request Aquaculture Agreements

34. The Bill allows aquaculture applicants to negotiate an aquaculture agreement with quota holders and register it before the UAE test is undertaken. If such an agreement is registered for specific quota management system stocks, the impact of aquaculture on those stocks will be excluded from the UAE test.
35. Pre-request aquaculture agreements will be binding on all quota holders, provided agreement of 75% of quota holders is obtained. High Court consent will not be required for quota holders who did not consent, but they will be entitled to the same benefits as those who did.
36. Cabinet agreed on 22 March 2010 that the process for completing an aquaculture agreement be reviewed three years after the Bill is passed.

Maori Commercial Aquaculture Claims Settlement

37. The Bill retains the core elements of the Maori Commercial Aquaculture Claims Settlement Act 2004, which provides for settlement of Maori claims to commercial aquaculture space. However, a new mechanism for delivering Crown obligations regarding new aquaculture space will be developed as a consequence of removing AMAs. That mechanism is intended to be written into the law at a later date.

CONCLUSION

38. The next step in the reform process will be consideration of submissions by the Primary Production Committee. This is the main opportunity for public input, and given the upcoming Christmas holiday period, time for preparation of submissions is relatively short. They are due by 11 February 2011.
39. We will continue to provide updates on the progress of the Bill, and are well placed to provide advice on any questions arising, or to assist with preparation of submissions.

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