



AQUACULTURE LEGISLATIVE REFORMS 2011 GUIDANCE NOTE 1

AQUACULTURE PLANNING AND CONSENTING

This guidance note is one in a series explaining changes to the way marine-based aquaculture is managed as a result of the aquaculture legislative reforms that made changes to the Aquaculture Reform (Repeals and Transitional Provisions) Act 2004, the Fisheries Act 1996 (Fisheries Act), the Maori Commercial Aquaculture Claims Settlement Act 2004 (Settlement Act), and the Resource Management Act 1991 (RMA). The changes came into effect on 1 October 2011.

This guidance note provides a detailed overview of the changes to aquaculture planning and consenting under the RMA, including integrating the undue adverse effects (UAE) on fishing test with the resource consent process.

In this guidance note, the term 'regional council' includes both regional councils and unitary authorities.

Other guidance notes that describe different parts of the legislative reforms in more detail include:

- » **GUIDANCE NOTE 2:** Managing demand in the coastal marine area
- » **GUIDANCE NOTE 3:** Aquaculture regulation-making power
- » **GUIDANCE NOTE 4:** Re-consenting aquaculture
- » **GUIDANCE NOTE 5:** Mechanisms for managing allocation of coastal space (jointly produced by MPI and DOC)
- » **GUIDANCE NOTE 6:** Delivering on the Māori Commercial Aquaculture Settlement

SUMMARY OF CHANGES

The changes to the aquaculture planning and consenting processes introduced by the legislative reforms aim to reduce regulatory costs, delays and uncertainty; encourage investment in aquaculture; and integrate decision-making.

A key change is the removal of the requirement for aquaculture management areas (AMAs), meaning that applications for new marine farms can now be made, subject to the provisions of the relevant regional coastal plan.

Other changes to the way aquaculture consenting is handled include:

- » the specification of a minimum 20-year consent duration for most aquaculture consents;
- » a three-year default lapse period for all aquaculture consents; and
- » removal of the ability to classify aquaculture activities in the coastal marine area as permitted activities in regional coastal plans.

In addition, the removal of AMAs means that a UAE test is now undertaken for most coastal permit applications for aquaculture activities. The legislative reforms better integrate the consent process and UAE test to ensure that regional councils and the Ministry for Primary Industries work together to reduce regulatory costs and delays.

WHY CHANGES WERE MADE

Aquaculture planning and consenting processes are generally managed by regional councils under the RMA. The 2004 aquaculture regulatory regime was intended to help councils manage the increasing demand for space for aquaculture while still enabling the industry to develop. It introduced a requirement that aquaculture could only take place within AMAs, and that these had to be identified in regional coastal plans after consultation with the public and marine farming industry.

Creating AMAs was a complex, lengthy and expensive process. The result was that, under the 2004 regulatory regime, very little additional water space was made available for aquaculture.

This section outlines how the legislative reforms change the way consents for aquaculture activities are managed.

REMOVAL OF AMAS

A key component of the legislative reforms is the removal of AMAs. The reforms repeal section 12A of the RMA and makes consequential amendments throughout the RMA to remove references to AMAs. This means that, in all regions, applications for new aquaculture activities can now be made, subject to the provisions of the relevant regional coastal plan.

Councils can still identify areas where aquaculture activities cannot occur, and include provisions in their regional coastal plans to manage aquaculture.

Further planning work may be required in some regions to identify suitable areas for aquaculture and enable resource consent applications to be made in areas not previously allowed. This includes reviewing and updating regional coastal plans to ensure consistency with the new legislation.

The New Zealand Coastal Policy Statement 2010 promotes better spatial planning and zoning for coastal activities, including aquaculture. It also encourages regional councils to recognise the significant existing and potential contribution of aquaculture to the social, economic and cultural wellbeing of people and communities.

Amendments to Part 7A of the RMA provide new tools for managing demand in the coastal marine area, including situations of high and competing demand. These tools are discussed in detail in *Guidance note 2: Managing demand in the coastal marine area*.

DURATION OF CONSENTS FOR AQUACULTURE ACTIVITIES

The legislative reforms insert section 123A into the RMA, which provides for consent terms for coastal permits for aquaculture activities to be a minimum of 20 years. The purpose of this is to provide more incentive for marine farmers to invest in applying for consents. It also recognises the significant initial investment in infrastructure that is often needed and the length of time to see returns for some species.

Section 123A(2) allows for the term of a coastal permit to be less than 20 years if the applicant requests a shorter period, or if a shorter period is required to ensure that adverse effects on the environment are adequately managed.

CONSENT LAPSE PERIOD

Section 125 of the RMA has been amended to provide for a shorter default lapse period if coastal permits for aquaculture activities are not 'given effect to'. The shorter period of three years (compared with five years for non-aquaculture consents) is to ensure that consented aquaculture space is used in a timely manner. This is expected to reduce the incentive for people to speculate, which can put pressure on coastal space and councils' ability to manage demand effectively.

Whether a coastal permit has been given effect to can only be determined on a case-by-case basis.

Applicants will still be able to apply to the regional council to extend the lapse period under section 125(1A)(b).

REMOVAL OF PERMITTED ACTIVITY STATUS FOR AQUACULTURE ACTIVITIES

The legislative reforms remove the ability for regional coastal plans to authorise aquaculture activities in the coastal marine area as permitted activities. The new RMA section 68A ensures that a resource consent application is always made before new aquaculture activities are established, as this triggers the UAE test. This is discussed further below.

Section 68A(2) provides for transitional provisions to apply to rules in regional coastal plans that currently authorise any aquaculture activity as a permitted activity. These transitional provisions allow a person to rely on the existing rule while it continues to have legal effect, but require regional councils to review and alter existing rules as soon as reasonably practicable to ensure regional coastal plans do not authorise any aquaculture activity as a permitted activity.

The definition of 'aquaculture activities' in section 2 of the RMA has been amended to clarify that it applies to any activity described in section 12 of the RMA done for the purpose of 'farming' – that is breeding, hatching, cultivating, rearing or on-growing of fish, aquatic life or seaweed for harvest.

PROCESSING AND HEARING APPLICATIONS TO OCCUPY COASTAL SPACE AT THE SAME TIME

The legislative reforms insert sections 165ZFB to 165ZFH which allows for processing and hearing applications to occupy coastal space together – along with any associated consent applications. The intention is for applications to be processed and heard together where this enables better assessment and management of cumulative effects and/or more efficient processing.

Further information on how these changes will work in practice is contained in *Guidance note 2: Managing demand in the coastal marine area*.

INTEGRATING THE UAE TEST WITH THE CONSENT PROCESS

PURPOSE OF THE UAE TEST

The Fisheries Act requires an 'aquaculture decision' on whether a proposed aquaculture activity will have an undue adverse effect on recreational, customary or commercial fishing because it restricts access to or displaces fishing. The process for assessing those effects is known as the 'UAE test'. The UAE test is done by an official in the Ministry for Primary Industries under delegated authority from the Director-General.¹

If the test finds that there would be an undue adverse effect on recreational or customary fishing, or commercial fishing for species that are not part of the quota management system (QMS), the proposed aquaculture activity cannot go ahead.

If the test finds that there would be an undue adverse effect on commercial fishing for QMS species, the aquaculture activity can proceed if the person proposing the activity is able to enter into an aquaculture agreement with affected quota owners or refers the matter to an independent arbitrator to determine the level of compensation to quota owners.

¹Note that the merger of the Ministry of Agriculture and Forestry with the Ministry of Fisheries occurred on 1 July 2011. The Government publicly announced the renaming of the Ministry of Agriculture and Forestry to the Ministry for Primary Industries on 6 March 2012. For practical purposes we have replaced Ministry of Fisheries with Ministry for Primary Industries in this document although in the aquaculture legislative reforms the Ministry of Fisheries is still referred to.

Under the previous regulatory regime (2004), aquaculture could only take place within AMAs identified in regional coastal plans, and the UAE test was intended to be undertaken for an entire AMA as part of the planning process.

Because AMAs are no longer required, the legislative reforms have amended the Fisheries Act to require the UAE test to be undertaken when individual coastal permits are issued under the RMA. This means that the consent application process for aquaculture activities and the UAE test now follow a more integrated process.

A coastal permit for an aquaculture activity cannot commence under the RMA until the outcome of the aquaculture decision is known and any amendments to the coastal permit are made (new section 116A of the RMA).

WHEN A UAE TEST IS NOT REQUIRED

Section 186GA of the Fisheries Act sets out when the Director-General must not make an aquaculture decision. A request for an aquaculture decision is not required for applications in the following areas:

- » The area is, or was, subject to a lease, licence, marine farming permit or spat catching permit that was deemed under section 10, 20 or 21 of the Aquaculture Reform (Repeals and Transitional Provisions) Act 2004 (the Transitional Act) to be a coastal permit under the RMA, and the coastal permit has been continuously authorised by that permit or another permit granted under the RMA.
- » An area is in a gazetted aquaculture area where an aquaculture decision was made under section 35 of the Transitional Act (individual consents within an interim AMA).
- » An area is subject to an existing coastal permit unless the existing coastal permit has conditions 'tagged' in accordance with section 186H(3) of the Fisheries Act that are not being carried forward unchanged into the new coastal permit (tagged conditions are discussed later in this guidance note).

All other applications must be forwarded to the Ministry for Primary Industries under section 114(4) of the RMA.

STEP-BY-STEP GUIDANCE ON THE INTEGRATION OF UAE TEST WITH THE CONSENT APPLICATION PROCESS

The following sections provide detailed guidance on how the UAE test integrates within the consent application process. The relevant stages of the consent application process are discussed, along with detail of how the UAE process will operate and feed into the final coastal permit.

The organisation responsible for each stage is identified in brackets.

This section should be read in conjunction with figure 1 at the end of this guidance note, which provides an overview of the new process. Each step is numbered to simplify cross-referencing with figure 1.

Steps 1 to 6 describe the resource consent application process, while steps 7 to 10 describe the UAE test process.

STEP 1: RESOURCE CONSENT APPLICATION IS LODGED (REGIONAL COUNCIL)

When a 'complete' application for a coastal permit for an aquaculture activity is received (that is, it is not returned under section 88(3) of the RMA), the regional council must forward a copy as soon as is reasonably practicable to the Director-General of the Ministry for Primary Industries (new section 107F(3)(a) of the RMA).

The application should be forwarded electronically to uae@mpi.govt.nz. If an electronic copy is unavailable, the regional council should notify the Ministry for Primary Industries of the application by email and forward the hard copy to:

Ministry for Primary Industries
Private Bag 14
Port Nelson 7042

To aid this initial step, applicants are required under new section 88(2A) of the RMA to provide an additional copy of the application to the council. Councils will need to ensure that application forms for coastal permits for aquaculture activities are updated to reflect this requirement.

STEP 2: FURTHER INFORMATION SOUGHT FOR AQUACULTURE DECISION (MINISTRY FOR PRIMARY INDUSTRIES)

The need for an aquaculture decision is triggered once a council grants an application for a coastal permit, including the completion of any appeals. The Ministry for Primary Industries may gather information while the coastal permit application is being processed, to ensure that it can make an informed and timely aquaculture decision when requested. To assist with this, new section 107F of the RMA requires that the regional council provides the Director-General of the Ministry for Primary Industries with certain information during the consent process.

The Director-General of the Ministry for Primary Industries may also choose to consult with the applicant, any fisher whose interests may be affected, or any people or organisations that represent affected customary, commercial or recreational fishing interests. The Ministry for Primary Industries may set a date by when this consultation must be finished, and may also choose to extend the consultation period if required. This consultation period is likely to occur following the request for an aquaculture decision.

STEP 3: APPLICANT REQUEST TO DEFER PROCESSING OF APPLICATION WHILE PRE-REQUEST AQUACULTURE AGREEMENT IS SOUGHT (REGIONAL COUNCIL)

New section 88F allows the applicant to request that the regional council defers processing the application while trying to obtain a 'pre-request aquaculture agreement' (under section 186ZM of the Fisheries Act). A pre-request aquaculture agreement is an agreement the applicant makes with registered quota owners of affected QMS stocks before a UAE test is undertaken.

The agreement must be with registered quota owners for the stock, holding not less than 75% of the quota shares for that stock. Further detail on pre-request (and standard) aquaculture agreements can be found later in this guidance note.

The applicant can make the request at any time after their coastal permit application for an aquaculture activity is successfully lodged; however the request may only be made once. The regional council must grant the request.

The consent processing 'clock' is stopped once the request to defer the processing of the application is granted.

The applicant has 80 working days from the date the request is made. The regional council must continue to process the application at the end of this period or earlier, if the applicant notifies it to continue. The regional council cannot waive or extend this time period (section 37(1A) of the RMA).

STEP 4: FURTHER INFORMATION OR REPORTS OBTAINED (REGIONAL COUNCIL)

The regional council must, under s107F(3)(b) of the RMA, forward to the Director-General of the Ministry for Primary Industries any information or report obtained under the following procedures:

- » a report commissioned by the regional council under section 42A of the RMA;
- » a further information request under section 92 of the RMA; and
- » a further information request or a report commissioned by the Environmental Protection Authority (EPA) under section 149 of the RMA.

This information must be forwarded to the Director-General of the Ministry for Primary Industries as soon as is reasonably practicable.

STEP 5: NOTIFICATION OF APPLICATION (REGIONAL COUNCIL)

If an application is notified under section 95 of the RMA, the regional council must, as soon as is reasonably practicable after the closing date for submissions, forward a copy of any submissions received to the Director-General of the Ministry for Primary Industries (new section 107F(3)(c) of the RMA).

STEP 6: DECISION MADE TO GRANT APPLICATION (REGIONAL COUNCIL)

If the regional council decides to grant an application for a coastal permit for an aquaculture activity, it must send a copy of the decision (and the notice of decision) to the Director-General of the Ministry for Primary Industries (section 114(4) of the RMA).

The council must also advise the applicant that the decision is still subject to an aquaculture decision, and that the consent may only commence in accordance with section 116A of the RMA.

Following the completion of any appeal related to the application (if there is one), the regional council must send a copy of the final decision to the Director-General of the Ministry for Primary Industries and request that an aquaculture decision be made (section 114(4)(c)(ii) RMA).

STEP 7: DIRECTOR-GENERAL MUST MAKE AQUACULTURE DECISION (MINISTRY FOR PRIMARY INDUSTRIES)

The Director-General of the Ministry for Primary Industries has 20 working days to make an aquaculture decision following a request from a regional council. Time spent during any consultation undertaken under section 186D(3) of the Fisheries Act is not included in this 20 working day limit.

The Ministry for Primary Industries will process requests as received and will have 20 working days to make a decision. If more than one request is sent by a regional council at the same time, the council must specify the order in which the applications were received. Requests for aquaculture decisions that are within the same fishing area or may impact on the same fish stocks will also be processed in the order they are received. Because the UAE test is a cumulative test, this means that some UAE decisions can only be made once decisions relating to the same fishing area or fish stocks have been made and concluded. In this case, the 20 working day period will begin only once a final decision is made on the previous request (section 114(5) of RMA).

As an exception to the above, under section 186F(5) of the Fisheries Act, the Director-General of the Ministry for Primary Industries may make aquaculture decisions in a different order than the requests were received in, if making such a decision would not have an adverse effect on any other aquaculture decision that the Ministry has been requested to make.

The matters which the Director-General of the Ministry for Primary Industries must consider are outlined in section 186GB of the Fisheries Act. QMS stocks that have been subject to a prerequisite aquaculture decision cannot be considered by the Director-General of the Ministry for Primary Industries for an aquaculture decision over the same area.

The Director-General of the Ministry for Primary Industries must notify both the regional council and the holder of the coastal permit of the decision (section 186H(1)(d) Fisheries Act).

The aquaculture decision may be made up of:

- » a 'determination', where the Ministry for Primary Industries is satisfied that there are no undue adverse effects – this amounts to a green light for the activity, which can then proceed; or a 'reservation', where the Ministry for Primary Industries is not satisfied that there are no undue adverse effects on either customary, recreational or non-QMS commercial fishing – this amounts to a red light and the application will not proceed; or
- » a 'reservation', where the Ministry for Primary Industries is not satisfied that there are no undue adverse effects on commercial fishing in relation to stocks that are subject to the QMS – this amounts to an orange light, as there is an opportunity to negotiate an aquaculture agreement with affected quota holders or refer the matter to an independent arbitrator to determine compensation to allow aquaculture to proceed; or

- » a combination of reservation for some part(s) of the area, and a determination for the rest.

The process followed for each of these scenarios is detailed in steps 8 to 10.

Following notification of the aquaculture decision, there is a 30 working day period within which anyone can seek a judicial review of the decision. This time period does not suspend the regional council's obligations under section 116A of the RMA, which are outlined in the following sections.

The Ministry for Primary Industries will inform the regional council of any proceedings brought to seek judicial review and the outcome of those proceedings, including appeals.

STEP 8: DETERMINATION (MINISTRY FOR PRIMARY INDUSTRIES/REGIONAL COUNCIL)

If the Director-General of the Ministry for Primary Industries is satisfied that the aquaculture activities authorised by the coastal permit will not have an undue adverse effect on fishing, a determination is made over all or part of the area the permit covers (under section 186E(1)(a) and (c) of the Fisheries Act).

In making a determination, the Ministry for Primary Industries may 'tag' any conditions in the coastal permit which are material to the aquaculture decision and relate to the character, intensity or scale of the aquaculture activity (section 186H(3) Fisheries Act). The purpose of tagging the conditions is to ensure that the activity cannot be altered in a way that may change the impact on fishing without undergoing a further UAE test. It is recommended that the tag takes the form of an advice note on the coastal permit, using the following wording:

"Prior to the change or cancellation of the following conditions, a further aquaculture decision in relation to the area affected by the change or cancellation will be required to be made by the Director-General of the Ministry for Primary Industries: [insert tagged conditions]."

When the regional council is notified of the determination by the Ministry for Primary Industries, it must complete the following steps as soon as is reasonably practicable:

1. Amend the coastal permit to include an advice note which identifies any conditions which have been tagged under section 186H(3) of the Fisheries Act (section 116A(2)(a) RMA).
2. Notify the applicant that the permit may commence, unless the permit states a later date (section 116A(2)(b) RMA).

STEP 9: RESERVATION (IN WHOLE OR PART) IN RELATION TO RECREATIONAL, CUSTOMARY OR NON-QMS COMMERCIAL FISHING (MINISTRY FOR PRIMARY INDUSTRIES/REGIONAL COUNCIL)

If the Director-General of the Ministry for Primary Industries is not satisfied that the aquaculture activities authorised by the coastal permit will not have an undue adverse effect on fishing, a reservation is made over all or part of the area covered by the coastal permit (section 186E(1)(b) and (c) of the Fisheries Act).

If a reservation is made in relation to recreational, customary, or non-QMS commercial fishing and the regional council is notified of that decision by the Ministry for Primary Industries, it must complete the following steps as soon as is reasonably practicable.

If the reservation is over the entire area:

1. Cancel the coastal permit by way of written notice served on the applicant (section 116A(8) RMA).

If the reservation is over part (or parts) of the area:

1. Amend the coastal permit to remove the area(s) affected by the reservation (section 116A(3)(a) RMA).
2. Perform the steps outlined in determination (Step 8) and/or reservation in relation to QMS commercial fishing stocks (Step 10), for the rest of the area covered by the coastal permit.
3. Notify the consent holder of the changes and provide a copy of the amended coastal permit (section 116A(3)(b) and (c) RMA).
4. Notify the consent holder that the amended permit may commence immediately, unless the permit states a later date.

STEP 10: RESERVATION (IN WHOLE OR PART) IN RELATION TO QMS COMMERCIAL FISHING STOCKS (MINISTRY FOR PRIMARY INDUSTRIES/REGIONAL COUNCIL)

If a reservation is made in relation to QMS commercial fishing stocks, the Ministry for Primary Industries will notify the consent holder and the regional council when the aquaculture decision is made.

When the regional council is initially notified of the aquaculture decision by the Ministry for Primary Industries, it must complete the following steps as soon as is reasonably practicable:

1. Amend the coastal permit to show the area(s) affected by the reservation (section 116A(4)(a) RMA).
2. Perform the steps outlined in determination (Step 8) and/or reservation in relation to recreational, customary or non-QMS commercial fishing (Step 9) for the rest of the area covered by the coastal permit.
3. Provide the consent holder with a copy of the amended coastal permit and inform him or her that the permit will not commence in the area affected by the reservation unless an aquaculture agreement is registered (section 116A(4)(b) and (c) RMA).

Once notified of the decision, the consent holder has the opportunity to seek an aquaculture agreement by obtaining the consent of registered quota owners for the stock(s) specified in the reservation. As an alternative, the consent holder can refer the matter to an independent arbitrator to determine the level of compensation to quota owners, resulting in a compensation declaration.

The consent holder has six months (plus an additional three months if an extension is granted by the Ministry for Primary Industries) to either obtain an agreement with registered quota owners holding at least 75% of the quota shares or lodge a compensation declaration resulting from the decision of an independent arbitrator. Note: The time period for lodging an aquaculture agreement or compensation declaration does not include the time taken by any judicial review of the aquaculture decision (section 186ZI Fisheries Act).

The Ministry for Primary Industries will notify the regional council if an aquaculture agreement or compensation declaration has been registered, if an extension has been granted, if an application has been made to the High Court for its consent to the lodging of an agreement, or if an aquaculture agreement or compensation declaration has not been reached at the end of this period.

If an aquaculture agreement or compensation declaration is reached, the regional council (once it has been notified by the Ministry for Primary Industries), must complete the following steps as soon as is reasonably practicable:

1. Amend the coastal permit to remove the area(s) shown as affected by the reservation (section 116A(5)(a) RMA).
2. Provide the applicant with a copy of the amended permit and inform him or her that the permit can immediately commence in the area(s) previously affected by the reservation, unless the permit states a later date (section 116A(5)(b) and (c) RMA).

Note: Following this process, the entire coastal permit is to be treated as having commenced on the date stipulated in point (2) above (section 116A(6) RMA).

If an aquaculture agreement or compensation declaration is not reached, then once notified by the Ministry for Primary Industries, the regional council must complete the following steps:

If the reservation is over the entire area:

1. Cancel the coastal permit by way of written notice served on the applicant (section 116A(7)(c) RMA).

If the reservation is over part (or parts) of the area:

1. Amend the coastal permit to remove the area(s) affected by the reservation (section 116A(7)(a) RMA).
2. Notify the consent holder of the changes and provide a copy of the amended coastal permit (section 116A(7)(b) RMA).
3. Notify the consent holder that the amended permit may commence immediately, unless the permit states a later date.

REVIEWING, CHANGING OR CANCELLING CONSENT CONDITIONS

As discussed earlier, in making a determination, the Ministry for Primary Industries may tag any of a coastal permit's consent conditions to ensure the activity cannot be altered in a way that changes the adverse effect on fishing without undergoing a further UAE test.

If a consent holder applies to change or cancel a consent condition (or conditions) (under section 127 of the RMA), the regional council may process it without requiring an aquaculture decision as long as it does not include a change or cancellation of a tagged condition. Should the application include a tagged condition, the regional council must make a request to the Director-General of the Ministry for Primary Industries for an aquaculture decision as if the application was for a new coastal permit.

Similarly, if a regional council wishes to review a tagged consent condition under section 128 of the RMA, it must make a request to the Director-General of the Ministry for Primary Industries for an aquaculture decision as if the review was an application for a new coastal permit.

WHERE TO FIND OUT MORE

Information on the aquaculture reforms is available on the Ministry for Primary Industries website.

This document is intended to give general technical guidance on aspects of marine-based aquaculture under the 2011 aquaculture legislative reforms.

It is not legal advice. For legal advice on any aspect of the legislation you should consult your lawyer.

The general disclaimer on the Ministry for Primary Industries website also applies to this document and should be read in conjunction with it.

Figure 1. UAE Aligned Processes

