AQUACULTURE LEGISLATIVE REFORMS 2011
GUIDANCE NOTE 4

RE-CONSENTING AQUACULTURE

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 information about the re-consenting process for aquaculture including:

- an overview of the RMA;
- the undue adverse effects (UAE) on fishing test and re-consenting; and
- a discussion of the concepts of 'reverse sensitivity' and evergreen consenting.

In this guidance note, the term 'regional council' includes both regional councils and unitary authorities. Please note that councils administer many of the processes under the RMA. For this reason, it is advisable to contact your council to learn their practices and processes regarding re-consenting.

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

- **GUIDANCE NOTE 1:** Aquaculture planning and consenting
- **GUIDANCE NOTE 2:** Managing demand in the coastal marine area
- **GUIDANCE NOTE 3:** Aquaculture Regulation-Making Power
- **GUIDANCE NOTE 5:** Mechanism for managing allocation of coastal space (jointly produced by MPI and DOC)
- **GUIDANCE NOTE 6:** Delivering on the Māori Commercial Aquaculture Settlement

RMA PROVISIONS – CONTINUATION OF EXISTING AQUACULTURE

LIMITED TERM OF CONSENTS

Resource consents in the coastal marine area (CMA) are issued for a finite period, with a maximum of 35 years. The maximum term recognises that consents are for the use of, or impact on, a public resource and the council and community should have the opportunity to determine whether this use remains appropriate.

The legislative reforms set a minimum consent term of 20 years for aquaculture activities unless the applicant has asked for a shorter period, or a shorter period is required to ensure that adverse effects on the environment are adequately managed.

RE-CONSENTING APPLICATIONS TREATED AS NEW APPLICATIONS

Consent holders who wish to continue marine farming in the same space (whether for the same or a different aquaculture activity) must apply for all new consents required before their coastal permit expires, if they want to ensure that their application(s) are considered ahead of others.

If applying for consents to continue aquaculture activities in the same space, the normal consenting process applies. Section 88 of the RMA specifies the requirements an application must meet.

The regional council will consider the application on its own merits, assessing it against the regional coastal plan provisions and relevant RMA matters, including national policy statements and any relevant national environmental standards. A regional coastal plan's provisions may have changed since the original consents were granted, and may now require different consents or treat applications in a different consent category, for example, discretionary rather than controlled.

PROTECTIONS FOR EXISTING HOLDERS OF COASTAL PERMITS TO OCCUPY SPACE FOR AQUACULTURE ACTIVITIES

Existing aquaculture consent holders have two key protections. The legislative reforms have amended the RMA to provide that these protections apply even if the consent holder is applying to establish a different aquaculture activity, though it must be within the same space already consented for aquaculture.

1. Protection of existing consent holder pending decision on application.

When a resource consent is due to expire, the consent holder can apply for a new consent for an aquaculture activity in the same space (whether for the same or a different aquaculture activity). If they do this, they can continue to exercise the existing consent until the relevant council (or the Environment Court if appealed) makes a decision to either approve or decline the application (section 165ZH(1)(c) of the RMA). The new application must be lodged at least six months before the expiry of the existing consent (or three to six months at the discretion of the council).

2. Priority processing for existing consent holders.

As explained above, for marine farming, current consent holders are allowed to continue to exercise the consent pending a decision. In addition, provisions in the RMA (sections 165ZG to 165ZJ) means that if a consent is due to expire and the application for a new consent is for an aquaculture activity in the same space, then the existing consent holder's application to occupy that coastal space is given priority by the relevant council. In other words, the application must be processed and determined before any other application for the space.

The level of information required will vary from council to council. The application needs to provide all the information that is required for an assessment to be made, including an updated assessment of environmental effects (AEE). This is particularly important for older existing marine farms that obtained their consents based on limited AEEs, before the 2003 amendment to section 88 of the RMA. In general, new site plans will be required.

The legislative reforms have amended the RMA to require that a regional council consider all relevant information available in relation to the existing consent, including any available monitoring data where the consent holder is applying to continue the same aquaculture activity in the same space (section 165ZJ(1AA) of the RMA).

Based on information provided by councils, it is expected that most applications to continue existing aquaculture activities at the same scale and of the same type will be non-notified (but may require written approvals) provided that monitoring shows no adverse effects occurring in the surrounding CMA. Limited notification may occur when written approvals have not been obtained from 'affected parties'. See the Quality Planning website at **www.qp.org.nz/consents/notify.php** for more information.

It is important to note that, although the existing consent holder's application has priority, this does not amount to a right of renewal, or even a presumption that the existing consent will be renewed.

ADDITIONAL MATTERS FOR CONSENT AUTHORITIES TO CONSIDER

There are additional matters consent authorities must consider in determining whether or not to grant consent. If an application satisfies the time frame under section 165ZH(1)(d) of the RMA and is for an aquaculture activity in the same space, then the consent authority must have regard to the value of the investment made by the existing consent holder (section 104(2A) of the RMA).

The consent authority must also consider the applicant's track record including compliance with resource consent conditions for current or previous aquaculture activities undertaken by the applicant (section 165ZJ(1AA)) of the RMA).

The legislative reforms have removed the requirement that consent authorities consider whether a consent holder applies current industry good practice. What constitutes current industry good practice is considered to be unclear. Giving explicit consideration to following established practice may create uncertainty and constrain innovation. Councils can still require that an applicant adhere to industry codes of practice through the imposition of consent conditions.

UNDUE ADVERSE EFFECTS AND RE-CONSENTING OF AQUACULTURE

The UAE test is carried out by the Ministry for Primary Industries.[1] It applies to recreational, customary and commercial fishing and assesses the scale of potential effects of a specific aquaculture operation in a specific location in the CMA. The focus is on the displacement of fishing from a specified area, together with how the proposed aquaculture activity may limit people's ability to access fish in the area.

The Director-General of the Ministry for Primary Industries makes the decision about the UAE test. The decision considers the 'bundle' of coastal permits required for an aquaculture activity, although the focus of the assessment of UAE is on the applications for occupation and structures.

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

1 Note 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.

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.

When making a determination, the Fisheries Act provides a mechanism for the Director-General to identify conditions for the coastal permit, known as 'tagged conditions'. Examples are conditions that relate to the location of marine farm structures and the length of time that marine farming is undertaken (on a seasonal and rotational basis). Most tagged conditions relate to things that would affect people's ability to continue recreational and customary fishing such as the location of marine farming structures.

Any area of a marine farm operation that would have a UAE on recreational, customary and non-QMS commercial fishing stocks is removed from the space to be farmed.

Two potential scenarios apply to re-consenting existing marine farm sites, as described below.

1. Tagged conditions apply to the existing site.

In this scenario, the original consent(s) for an existing marine farm have a determination that there are no undue adverse effects as long as certain tagged conditions continue to be met.

The legislative reforms provide that a coastal permit application to continue an existing aquaculture activity will not require a new UAE assessment as long as any tagged conditions are carried over into the new consent. However, if an applicant wishes to cancel or amend any of the tagged conditions then a further aquaculture decision will need to be made.

Similarly, if there has been any material change to the specific activities and area covered by the original coastal permit – for example if the size or site coverage of structures has increased, or the duration of the aquaculture activity has gone from short to full term – then a different UAE decision may be made regarding impacts on recreational, customary and commercial fishing.

2. An aquaculture agreement or compensation declaration has been reached with QMS quota holders.

In this scenario, the original consent(s) are found to have an undue adverse effect on commercial QMS fishing, but an aquaculture agreement or compensation declaration has been reached with the fishing quota holders.

By amending section 186ZF(3) of the Fisheries Act, the legislative reforms provide that after an aquaculture agreement is registered, no person whose consent is contained in that agreement may revoke their consent. The consent and the aquaculture agreement or compensation declaration will remain in place if a new coastal permit is issued to enable the existing aquaculture activity to continue in accordance with section 165ZH of the RMA.

EVERGREEN CONSENTING

A consent holder may apply for consents to continue aquaculture activities midway through the term of the existing consent(s) which is sometimes referred to as evergreen consenting. The Aquaculture Technical Advisory Group, in its report of 15 October 2009, described an 'evergreen' approach as:

…a rolling opportunity to review consent conditions and renew the consent at mid-term or earlier. In that way the consent could provide for a longer effective duration alongside ongoing improvement in managing environmental effects. [page 35]

In most cases, the value of a resource consent diminishes the closer it gets to the end of its term. For example, banks and other lending institutions take into consideration the remaining term of consents when deciding whether to issue loans to marine farmers. A consent holder may therefore wish to apply for consents to continue mid-term if contemplating further investment or development of the site.

Consent holders will need to consider whether any changes that have been made to a regional coastal plan may adversely affect obtaining consents.

REVERSE SENSITIVITY AND RE-CONSENTING OF AQUACULTURE

Only some parts of the CMA are suitable for aquaculture. This is recognised in the New Zealand Coastal Policy Statement 2010 (policy 6(2)(c) and policy 8). The suitability of a particular site depends on the characteristics and qualities needed for marine farming, including water quality, depth and current movements. The provisions of the relevant regional coastal plan will also play a part in site selection by taking other values and users of the coastal marine area into consideration.

The concept of 'reverse sensitivity' has become well recognised in resource management law over recent years, although it is not specifically mentioned in the RMA. The term describes the situation when people involved in a newly established activity complain about the effects of pre-existing activities.

In terms of aquaculture, reverse sensitivity may be raised when a consent is due to expire and the existing marine farmer wishes to continue to operate. There may have been changes in adjoining land use that lead to issues regarding the visual impact and effects of the marine farm on the amenity values of the area.

METHODS TO ADDRESS REVERSE SENSITIVITY

Methods to address reverse sensitivity focus on how to avoid, remedy or mitigate the effects on a new activity of a legitimately established existing activity.

In plans

Regional coastal plans can recognise the existing aquaculture activity through zoning and a more explicit and generous consent status. This gives a clear message to consent holders and the community that existing marine farms are to be treated as part of the environment/amenity values of the area.

There may be instances where it is appropriate that existing marine farms are not protected in this way due to changes in amenity values of the wider area, or because the council considers that there is a better use of the space. Plan provisions can be changed so that a fuller reassessment of the existing marine farm is required if the incumbent wishes to continue beyond the term of the current consent.

A further method to manage reverse sensitivity in the re-consenting process is to limit or prohibit the establishment of new land uses where existing marine farming is likely to result in complaints from new neighbours. This approach will require a consistent approach between a regional council and the relevant district and/or city councils.

WHEN ISSUING CONSENTS

Councils can consider issues of reverse sensitivity and how to address them when assessing consent applications for land uses adjoining existing marine farms, and when assessing consents to continue existing aquaculture activities.

For more information on reverse sensitivity, including an overview of case law, see the Quality Planning website at **www.qp.org.nz**.

STREAMLINING THE RE-CONSENTING PROCESS

In most cases, it is expected that re-consenting existing aquaculture activities should be quicker and simpler than the original consenting process.

The re-consenting process gives councils and their communities the opportunity to consider whether an activity's potential (predicted) effects did in fact occur (actual effects) and whether these actual effects remain appropriate.

USING PLANS TO SPEED UP THE PROCESS

Where an activity has effects that are well understood and capable of being managed through consent conditions, a council may consider providing for re-consenting as a controlled or restricted discretionary activity in its regional coastal plan.

Providing specifically for the continuation of existing marine farms achieves the following:

- provides certainty for the consent holders and supports ongoing investment;
- provides certainty to the community – council has clearly set out its expectations for the continuing use of the coastal marine area for marine farming;
- recognises the investment the consent holder(s) have made; and
- identifies what a council takes into account when deciding whether a farm should be able to continue.

MARINE AND COASTAL AREA (TAKUTAI MOANA) ACT 2011 AND RE-CONSENTING OF AQUACULTURE

Existing aquaculture activities are permitted to continue in a specified area of the common marine and coastal area regardless of whether there is any change in species farmed or in the method of marine farming, provided that there is no increase in the area, or change of location, of the coastal space occupied by the aquaculture activities for which the existing coastal permit was granted (sections 55(3)(a) and 64(2)(e) of MACA Act).

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.

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