



AQUACULTURE LEGISLATIVE REFORMS 2011

GUIDANCE NOTE 2

MANAGING DEMAND IN THE COASTAL MARINE AREA

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 discusses the methods available to councils under Part 7A of the RMA to manage occupation and the demand for space in the coastal marine area (CMA). Some methods remain unchanged, while others have been changed by the legislative reforms.

While the changes made to Part 7A of the RMA have been driven by the aquaculture reforms, they now apply to all activities in the CMA – the only exception being those powers residing with the Minister responsible for Aquaculture.

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 1:** Aquaculture planning and consenting
- » **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

OVERVIEW

The legislative reforms retain a number of existing provisions in Part 7A of the RMA while also providing councils with some additional methods. Both existing and new provisions are explained in this guidance note.

UNCHANGED PROVISIONS IN PART 7A OF THE RMA

- » Councils remain able to include provisions in their regional coastal plans and proposed regional coastal plans to address the effects of occupation in the CMA, and to manage competition for space (section 165F).
- » There are no changes to the provisions around the characteristics of authorisations, public notice requirements, and other provisions relating to running a public tendering process (sections 165R to 165ZA).
- » The Minister of Conservation retains the power to direct that an allocation of authorisations proceed or not proceed in order to give effect to Government policy or to preserve the ability of the Crown to give effect to its historic Treaty settlement obligations (section 165K).

CHANGES TO PART 7A OF THE RMA

- » Regional councils may ask the Minister of Conservation to approve an allocation method via Gazette notice – this applies to any activities in the CMA (section 165L).
- » Regional councils may ask the Minister responsible for Aquaculture for a stay on new applications for consents to occupy space for specified aquaculture activities (section 165ZB).
- » Regional councils may ask the Minister responsible for Aquaculture to direct that aquaculture applications be processed and heard together (section 165ZF).

PURPOSE OF THE CHANGES

The changes to Part 7A of the RMA are intended to:

- » Make it easier for councils to apply allocation methods other than 'first in, first served', and respond to and manage the demand for space in the CMA in a timely manner.
- » Enable councils to ask for an extension of time when processing applications to enable them to put measures in place to better manage high or competing demand.
- » Provide for applications for coastal permits for the occupation of space in the CMA (and associated applications) to be

processed and heard together where this would help assess and manage cumulative effects and/or enable more efficient processing of applications.

FIRST IN, FIRST SERVED – THE DEFAULT PROCESS UNDER THE RMA

Regional councils are responsible for allocating the right to occupy space in the CMA through their plan provisions (section 30(1)(b)), and for issuing coastal permits for occupation (section 12(2) of the RMA).

The legislative reforms remove the requirement for an aquaculture management area (AMA) to be in place before marine farming consent applications can be made. This means applying for a marine farm follows the same process as seeking a resource consent for any other activity in the CMA.

While not explicitly mentioned in the RMA, if no alternative is specified, first in, first served is the de facto method used to allocate space in the CMA, including the allocation of coastal occupation permits for aquaculture activities.

The law regarding priority is still evolving, but recent Environment Court decisions clarify that applicants wanting priority should lodge complete applications as early as possible because the test of entitlement to priority of hearing is the first to file a complete application. Where practicable, all necessary consents should be applied for at the same time. 'Complete applications' are those determined by the council as having an adequate assessment of environmental effects under section 88(3) of the RMA.

It is expected that a first in, first served approach, together with spatial coastal planning and detailed plan provisions, will, in most cases, be sufficient to manage the demand for space in the CMA. However, there may be times when a council considers that it will not be able to adequately manage demand using this approach and the legislative reforms provide some alternatives, as described below.

SUBPART 1 OF PART 7A OF THE RMA – MANAGING DEMAND FOR SPACE

Regional councils have two principal methods to allocate space in the CMA.

1. FIRST IN, FIRST SERVED SUPPORTED BY SPATIAL PLANNING AND PLAN PROVISIONS

Councils can rely on the default first in, first served approach, supported by spatial coastal planning (zoning) and associated plan provisions that establish consent categories, information requirements, and the standards and terms to be met for identified activities.

Section 165F of the RMA enables regional councils to include provisions in their regional coastal plans (including proposed plans) to address the effects of occupation in the CMA and to manage competition for space. This includes rules specifying:

- » that no application can be made for a coastal permit to

occupy space before a particular date, to be specified in a public notice;

- » that applications to occupy space (and any related applications) must be processed and heard together;
- » limits on character, intensity or scale of activities; and
- » limits on the amount of space that may be subject to a coastal permit and the proportion of any space that may be occupied for the purpose of specified activities.

Section 165G of the RMA specifies that councils may provide for allocation methods in existing and/or proposed regional coastal plans, rather than defaulting to first in, first served. Authorisations can be allocated through a range of methods, including tendering (whether public or otherwise and using financial or non-financial criteria), auction and ballot. The default alternative to first in, first served is public tendering (section 165L(2)) unless a council thinks another method is justified. The term 'public' refers to the ability of any person to participate in the process.

2. COUNCILS CAN ALSO PROVIDE FOR A METHOD TO ALLOCATE THE RIGHT TO APPLY FOR A RESOURCE CONSENT FOR SPECIFIED ACTIVITIES IN A DEFINED AREA (AUTHORISATIONS) BY:

- (a) amending a regional coastal plan; or
- (b) requesting the use of ministerial powers to manage demand.

Each of these options is discussed in more detail below.

OPTION A: AMENDING REGIONAL COASTAL PLAN

The first option may apply if councils propose a plan change that lifts a prohibition on a specific activity or changes its activity status and this is expected to trigger a high level of interest in the space.

The legislative reforms provide that rules in proposed plans and plan changes have immediate legal effect if they relate to aquaculture activities (sections 86B(3)(e) and 149N(8)(b)).

This means that if a council prepares a plan change to provide for an alternative allocation method then that rule will apply from the date the proposed plan or plan change is publicly notified – before it becomes formally operative. The existing plan provisions also apply until the plan change or proposed plan become operative. The weighting to be given to the proposed rule versus the existing provisions has been established in case law. Any new rule that prohibits aquaculture will be treated as a discretionary rule until it becomes operative (section 87B).

OPTION B: REQUESTING THE USE OF MINISTERIAL POWERS TO MANAGE DEMAND

There may be times when a council needs to respond to high and competing demand for space more quickly than is possible through the plan change process. The legislative reforms provide councils with two options, which could be used together or separately:

- » they may request an allocation of space by tendering or some other allocation method and ask the Minister of Conservation

- to approve it via Gazette notice – this applies to any activities in the CMA (section 165L of RMA); or
- » they may ask the Minister responsible for Aquaculture for a stay on the receipt of applications for consents to occupy space for specified aquaculture activities (section 165ZB of RMA) while an allocation method is established.

NEW MINISTERIAL POWERS AND HOW THEY OPERATE

MINISTER OF CONSERVATION: GAZETTE NOTICE PROCESS TO APPROVE METHOD TO ALLOCATE AUTHORISATIONS

Sections 165L to 165Q enable a council to request that the Minister of Conservation issues a Gazette notice to approve an alternative method for allocating authorisations for specific space and activities. ‘Authorisation’ is defined as the right to apply for a coastal permit to occupy space in the CMA, and can be applied to any activity, not just aquaculture.

This process is designed specifically to manage actual (or anticipated) high or competing demand for space in the CMA and enable a planned allocation of authorisations to apply. It offers an alternative solution when the standard RMA plan change process is too slow to deal adequately with demand management issues.

While the resulting authorisation would be limited to coastal permits for occupation, in effect a person will not be able to apply for other coastal permits required for a proposal without an authorisation and the consequential coastal permit to occupy.

The legislative reforms retain existing RMA provisions about the characteristics of authorisations (sections 165R, 165S and 165T of the RMA), public notice requirements (section 165U of the RMA), what is to be in an offer for an authorisation (section 165V of the RMA), the acceptance process (sections 165X and 165Y of the RMA) and use of tender money (section 165Z and 165ZA of the RMA).

PROCESS FOR REQUESTING THE MINISTER OF CONSERVATION TO EXERCISE THEIR GAZETTAL POWER

Figure 1 sets out the process steps in a flow diagram.

STEP 1: REGIONAL COUNCIL REQUEST LODGED WITH MINISTER OF CONSERVATION (SECTION 165L)

Regional councils will need to:

- » provide information to demonstrate to the Minister why the council considers there is actual or anticipated high or competing demand for coastal permits for the occupation of space in their region; and
- » provide information that either the regional coastal plan does not include a method to allocate authorisations or the regional coastal plan does include a method but the council

considers that the method will not enable the effective management of the demand.

Demonstrating demand

Councils will be able to demonstrate actual demand in specific areas using the number of coastal permit applications for space they have received.

Anticipated demand in specific areas will be more difficult to demonstrate and will largely depend on a council's relationship with those who have an interest in accessing space in the CMA. The information could be:

- » pre-application discussions;
- » the council's knowledge of the areas experiencing pressures; and/or
- » extrapolation of long-term trends from monitoring information.

STEP 2: STAY ON APPLICATIONS (SECTION 165M)

Where a regional council has made a request to the Minister of Conservation:

- » No-one can apply for a coastal permit to occupy space that is subject to the request until the Minister has either declined or approved it. The council must publicly notify that a request has been lodged (section 165L(5)) and also notify the EPA.
- » The council will not be able to receive any new coastal permit applications for the area and activities while the Minister is considering the request.
- » Applications already accepted by the council in terms of section 88 of the RMA, however, will continue to be processed on a first in, first served basis.

STEP 3: MINISTER OF CONSERVATION CONSIDERS THE REQUEST (SECTION 165N(1), (2) AND (3))

- » The Minister must consult with relevant Ministers, including the Minister responsible for Aquaculture if the request relates to aquaculture activities.
- » The Minister may consult with other people as appropriate.
- » The Minister may request further information from the council that made the request.

STEP 4: MINISTER OF CONSERVATION MAKES A DECISION (SECTION 165N)

- » The Minister has 25 working days from the date a request is received to either issue the Gazette notice or decline the request.
- » The 25 working days excludes time taken to request further information or consult with people other than relevant Ministers.

Figure 1: Process for requesting the Minister of Conservation to exercise their gazettal power

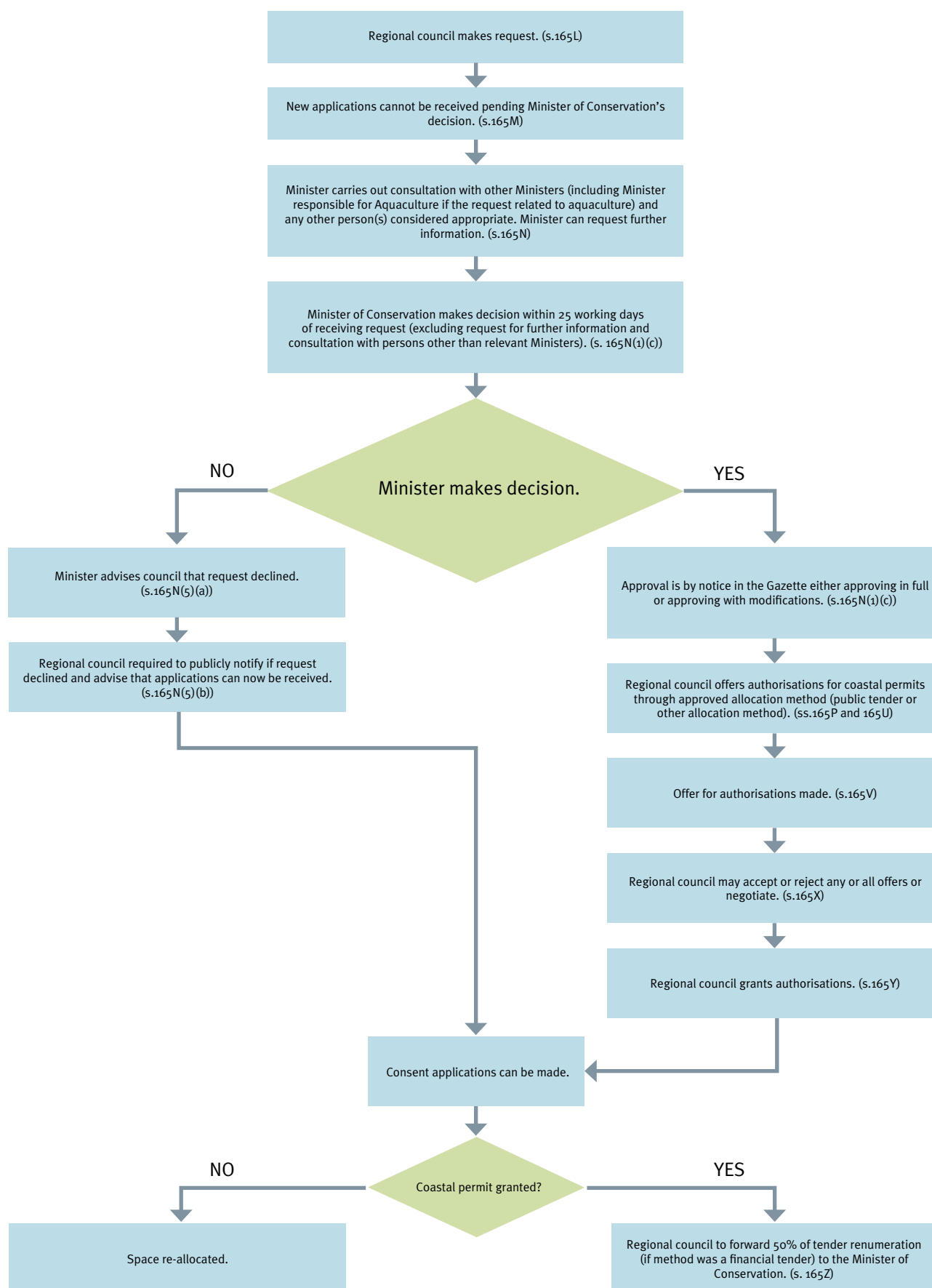
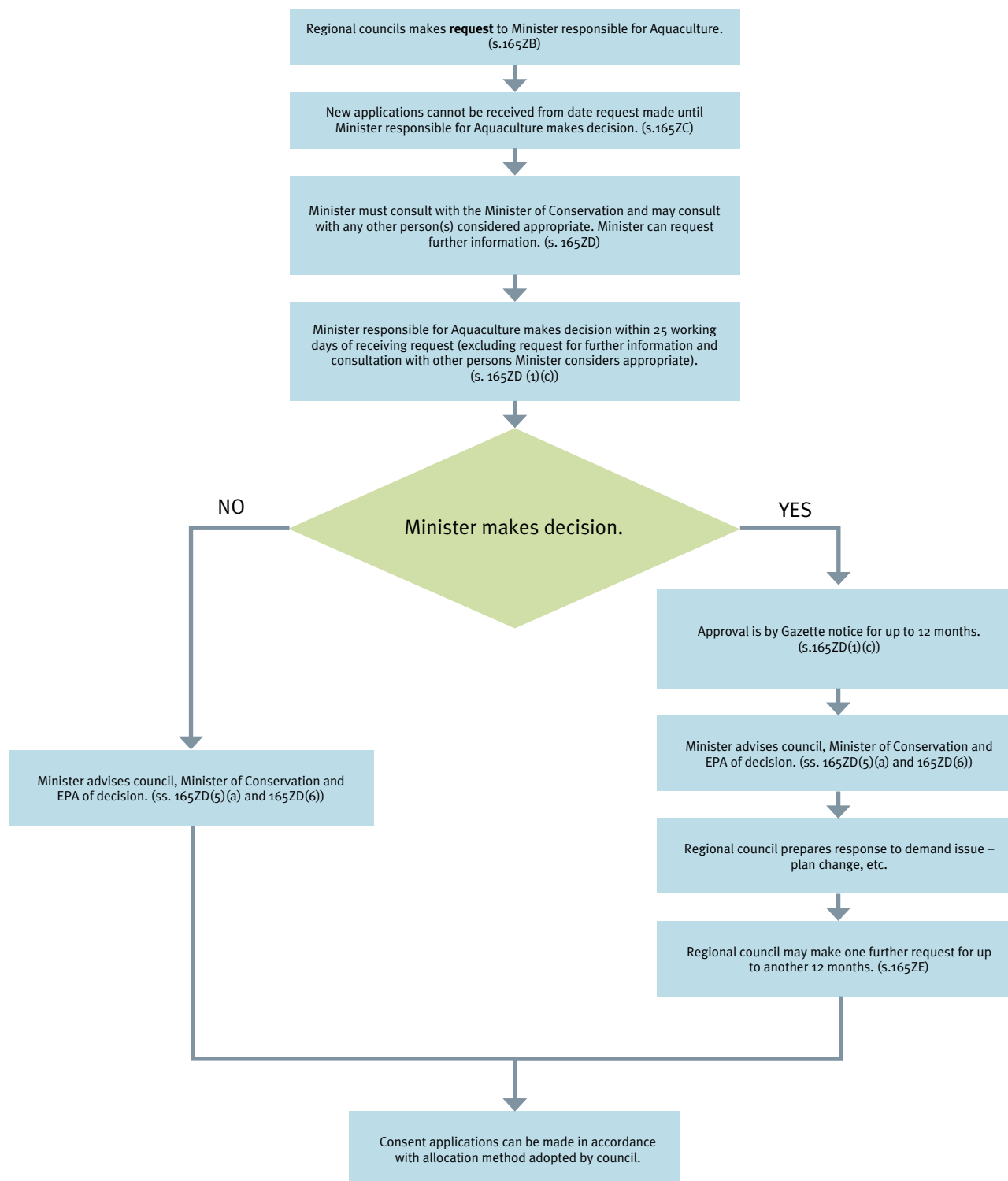


Figure 2: The Minister responsible for Aquaculture's power to suspend applications



STEP 5: MINISTER APPROVES OR DENIES THE REQUEST

- » The Minister must not approve the request unless they consider that:
 - there is actual or likely high or competing demands for coastal permits for occupation for the activities that the request applies to; and
 - the method and terms of the allocation method in the request will effectively manage the demand, be implemented in a reasonable time frame, give effect to Government policy in the CMA and preserve the ability of the Crown to give effect to any historic Treaty settlement.
- If a council request does not meet this test, the council retains the option to make a change to its plan via the RMA Schedule 1 plan change process.
- » The Minister can approve the request on different terms than requested that, in their opinion, will better manage the actual or anticipated high demand or competing demands in the space.

STEP 6: IF APPROVED, THE MINISTER ISSUES A GAZETTE NOTICE (SECTION 165N(4))

The Gazette notice must specify:

- » the allocation method – if not a public tender;
- » the space and activities the public tender or other allocation method will apply to; and
- » how, and within what period, the public tender or other allocation method must be implemented, including any staging of the allocation.

The Gazette notice may specify:

- » whether it is for a single allocation process or is to be used on more than one occasion;
- » an expiry date of the approval;
- » a date within which authorisations must be exercised;
- » not more than two years after they are granted;
- » a requirement that coastal permit applications received as a result of authorisations allocated be processed and heard together – along with any other related applications for coastal permits;
- » a maximum term for any coastal permits granted – within the allowable range of a maximum term of 35 years and a minimum for aquaculture of 20 years; and/or
- » that authorisations relating to specific areas must be allocated to the Crown.

Provisions relating to the period of any approval, the power to revoke an approval, and the power to substitute an approval are set out in section 165O.

If approval is given to use a method to allocate authorisations, the council must, by public notice, offer authorisations in accordance with the approval (section 165P). Only those people or organisations successful in obtaining an authorisation as a result of this process may apply for a coastal permit (section 165Q).

Minister responsible for Aquaculture: Power to suspend applications for coastal permits for aquaculture

This power rests with the Minister responsible for Aquaculture. It applies only to applications for aquaculture activities.

Regional councils may request that the Minister responsible for Aquaculture direct, via Gazette notice, that no new aquaculture applications be received for up to 12 months.

The intent is to give councils some breathing space to put plan provisions in place or to access another tool to manage demand – such as the Minister of Conservation's power to approve an alternative allocation method.

PROCESS FOR THE MINISTER RESPONSIBLE FOR AQUACULTURE TO EXERCISE SUSPENSION POWERS

The steps in the suspension process are similar to those for the Minister of Conservation and are set out in figure 2.

STEP 1: COUNCIL REQUEST TO THE MINISTER RESPONSIBLE FOR AQUACULTURE (SECTION 165ZB(1))

Councils, in their requests to the Minister, will need to demonstrate:

- » There is actual or anticipated high or competing demand for coastal permits to occupy space in the CMA for the purpose of aquaculture activities.
- » Why the council considers that its regional coastal plan or proposed regional coastal plan does not enable effective management of the identified demand.
- » Why the council considers applications for the occupation of space for aquaculture should be suspended so that the council can amend its regional coastal plan or access another tool under subpart 1 of Part 7A of the RMA.

Situations when a council may consider pursuing a suspension rather than the Minister of Conservation's Gazette notice process

There may be situations when a council is unable to determine whether demand for coastal marine space for aquaculture can be appropriately managed by a plan change or by the Minister of Conservation's Gazette notice process. In these cases, a council may require more time to decide the best option, and possibly develop a method to allocate authorisations to include in a request to the Minister of Conservation.

The request to the Minister responsible for Aquaculture must include the following information (section 165ZB(3)):

- » the space the suspension would apply to;
- » the aquaculture activities the suspension would apply to;
- » the planning or other measures the council proposes to put in place to deal with the demand;
- » the proposed duration of the suspension – which must be no more than 12 months; and
- » evidence to support that there is or will be high or competing demand.

If a suspension is approved, a council can request a further 12-month suspension if required (section 165ZE).

STEP 2: NO NEW APPLICATIONS CAN BE RECEIVED FROM THE DATE THE REQUEST IS MADE (SECTION 165ZC)

The effect of a request is that, from the date it is made, no-one may make an application to a council for a coastal permit to occupy that space for aquaculture activities. The suspension is lifted when either the Minister declines the request, or the Gazette notice approving it expires. These dates are:

- » the day the council notifies that its request has been declined by the Minister responsible for Aquaculture; or
- » if the Minister approves the suspension, the date on which the Gazette notice expires.

STEP 3: THE MINISTER RESPONSIBLE FOR AQUACULTURE CONSIDERS THE REQUEST (SECTION 165ZD)

In making their decision, the Minister must consult with the Minister of Conservation, and may consult with anyone else they consider appropriate.

STEP 4: MINISTER RESPONSIBLE FOR AQUACULTURE MAKES A DECISION (SECTION 165ZD(1)(C))

The Minister has 25 working days to make a decision on the request. This excludes any time during which the Minister requests further information from and consults with appropriate people.

The Minister can only approve the request if they consider that:

- » there is actual or anticipated high or competing demand for coastal permits for occupation for the aquaculture activities that the request applies to; and
- » the planning or other measure that the council proposes to implement will effectively manage the demand and be implemented in a reasonable time frame.

STEP 5: MINISTER RESPONSIBLE FOR AQUACULTURE APPROVES OR DENIES THE REQUEST

The Minister can approve the request in its original form or on different terms that in their opinion, will better manage the actual or anticipated high or competing demand.

The Minister must notify the Minister of Conservation and the Environment Protection Authority (EPA) of the decision.

STEP 6: IF THE MINISTER RESPONSIBLE FOR AQUACULTURE APPROVES THE REQUEST

The Minister responsible for Aquaculture will issue a Gazette notice (section 165ZD(1)(c)(i)).

Dealing with actual demand

Because the suspension power and the Minister of Conservation's Gazettal power cannot be applied retrospectively, applications for

coastal permits for occupation already received by a council will not be covered by these powers.

This actual demand for coastal space can be managed to a certain extent through a new 'process and hear together' provision, where applications for coastal occupation permits for aquaculture (and associated activities) have been received by a council but not yet determined to require a hearing.

A discussion of the new provisions is provided below.

Minister of Conservation's power to direct that an allocation proceed or not

The legislative reforms retain the power of the Governor-General to direct that a regional council proceed or not proceed with an allocation of authorisations (as provided for in its operative or proposed regional coastal plan) to give effect to Government policy or to preserve the ability of the Crown to give effect to its historic Treaty settlement obligations (section 165K). This power is exercised by Order in Council on the recommendation of the Minister of Conservation.

Re-consenting and reallocation

Section 165ZG of the RMA enables a council to provide for an allocation method (other than first in, first served) that will apply over the space occupied by an existing marine farm through a plan provision. In this situation, if an existing marine farmer wishes to continue to operate, they need to first obtain the right to apply for the consents (authorisations) and will not have priority consent processing. This provision has been unchanged by the legislative reforms.

The Minister of Conservation Gazettal process cannot be used to apply an allocation method to space already consented for aquaculture.

PART 7A – PROCESS AND HEAR APPLICATIONS TOGETHER

Sections 165ZFB to 165ZFH of the RMA set out the steps for processing and hearing together applications to occupy coastal space (and any associated consent applications).

The intention of these provisions is to specify what is meant by 'process and hear together' in light of the different consent processing paths that can be taken and the different mechanisms by which processing and hearing together may be requested.

The consenting paths available are:

- » council consideration;
- » call-in of nationally significant proposals by the Minister of Conservation, with the matter then considered by a Board of Inquiry or the Environment Court
- » direct application to the EPA – on the basis that the proposal is nationally significant; and
- » direct referral to the Environment Court.

The legislative reforms provide for three processes by which councils are able or required to process and hear consent applications together:

1. When a plan provides for processing and hearing consent applications together (section 165F) – driven by the council and not necessarily specific to aquaculture.
2. When the Minister of Conservation includes a direction to process and hear applications together via the Gazette notice approving the use of a method to allocate authorisations (section 165N) – driven by the Minister of Conservation or the council and not necessarily aquaculture specific.
3. When the Minister responsible for Aquaculture directs that applications for the occupation of space for aquaculture activities be processed and heard together (section 165ZFA).

The purpose of the processing and hearing together provisions is to enable more efficient processing of applications and better assessment and management of cumulative effects. It may prove particularly helpful if comprehensive spatial planning has not yet been carried out or if environmental thresholds have not been established.

Applications will retain their place in the queue, with decisions issued on a priority basis established either under first in, first served or another allocation method.

Minister responsible for Aquaculture's power to direct that aquaculture applications be processed and heard together
A regional council is able to request that the Minister responsible for Aquaculture direct the council to process and hear together applications for the purposes of undertaking aquaculture activities.

It is anticipated that this will be a useful tool when a number of applications are received close together, as it will help councils address cumulative effects on the environment.

A council must demonstrate that:

- » processing and hearing certain applications together would enable more efficient processing and better assessment and management of cumulative effects; and
- » the regional coastal plan is not adequate to manage cumulative effects (section 165ZF).

The Minister has 25 working days from the date the request is received to make a decision. The Gazette notice by which the Minister's direction is to be given must specify the space, aquaculture activities and types of applications it applies to (section 165ZFA(5)).

The process and hear together requirement can apply to:

- » applications made on or after the date of the Gazette notice;
- » applications made but not determined before the date of the Gazette notice; and
- » applications defined by reference to the nature of their proposal – for example, size.

Applications excluded from the process and hear together requirement are:

- » applications for which the hearing has started or been completed before the Gazette notice is in place;
- » applications for which the council has determined no hearing is required before the Gazette notice is in place;
- » re-consenting applications (section 165ZH of the RMA);
- » applications made more than 12 months after the Gazette notice is in place
- » applications called-in by the Minister of Conservation before the Gazette notice is in place;
- » applications for which a request for a call-in has been made by the regional council or applicant before the Gazette notice is in place (unless the request is declined);
- » applications lodged with the EPA before the Gazette notice is in place – unless the applications are referred back to the council;
- » requests for direct referrals to the Environment Court where the notice of motion has been lodged with the Environment Court before the Gazette notice is in place.

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.