Aquaculture Legislative Reforms 2011 technical guidance note 5:

Mechanisms for managing allocation of coastal space

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PURPOSE

This guidance sets out information and four examples of potential allocation mechanisms available under the Resource Management Act 1991 (RMA) for management of coastal space. This guidance is to assist regional and unitary councils in their coastal management role under the RMA. Please note, this guidance conveys key principles on these four allocation mechanisms only and is not intended to be detailed. It is also not to be regarded as legal advice.

INTRODUCTION

The 2011 aquaculture reforms provide councils with tools to manage demand to occupy space in the common marine and coastal area ("CMCA"). One tool is the ability to access alternative allocation mechanisms to manage actual or anticipated high and/or competing demand in the CMCA through provisions in a regional coastal plan (s165G) or a gazettal process (s.165L–165Q RMA). This is briefly explained in Part 7A below.

The table overleaf provides information on four potential allocation mechanisms for aquaculture and other activities in the CMCA: first in, first served; tendering (including weighted attributes tendering); auctions; and ballots. The latter three are the mostly likely alternative allocation mechanisms councils could consider using when facing a situation of high and/or competing demand, but this is not an exhaustive list. When deciding to depart from first in, first served, councils should ensure the principles of fairness, transparency and timeliness are applied. In addition, allocation mechanisms other than first in, first served need to be carefully designed, communicated (see 7 in the list of principles below), conducted and advertised and particular attention paid to the requirements set out in Part 7A of the RMA.

PART 7A

Under Part 7A of the RMA, the default mechanism for allocating space in the CMCA is by resource consents processed on a first in, first served basis. Councils can amend their regional coastal plan to include a different allocation mechanism using the normal Schedule 1 process. The default allocation mechanism in the RMA is tendering, but councils can opt to use other alternative mechanisms. It is important to note that the Part 7A allocation provisions in the RMA are not limited to aquaculture, but may include other activities in the CMCA, such as the allocation of sand and shingle resources.

Councils can also provide for a method to allocate the right to apply for a resource consent for specified activities in a defined area (known as an authorisation). This change can be made through either the RMA Schedule 1 process or through the provisions introduced by the 2011 reform, which is to request approval of an allocation method by the Minister of Conservation by Gazette Notice (if there is high and/or competing demand). For additional background and detail on the gazettal process, please refer to the *Aquaculture Legislative Reforms 2011 technical guidance note 2: Managing demand in the coastal marine area*.

PRINCIPLES GUIDING THE USE OF ALLOCATION MECHANISMS

1. Demand for occupation of space in the CMCA (a finite resource) is expected to increase over time.
2. Unless the regional coastal plan or a Gazette Notice requires allocation via authorisations, the default allocation of first in, first served processing of resource consent applications applies.
3. Using allocation mechanisms instead of first in, first served can provide a more controlled, strategic and integrated approach to decision-making in the CMCA and enable councils to sort and prioritise applications, before proceeding to consent processing.
4. All of the allocation mechanisms set out in the below table at least temporarily remove the first in, first served method of allocation in the CMCA (that is, for specified activities in a specified area).
5. A strategic approach to spatial planning is a necessary first step before using an allocation mechanism. Spatial planning could include constraint mapping, comprehensive and up-to-date scientific information, stakeholder perspectives and user requirements, clear information on why an area has been chosen and the specified activities for which the occupation has been and/or will be managed.
6. Several regional coastal plans (for example, Auckland, Waikato and Tasman plans) currently provide for tendering in the CMCA although, at the time of writing, these allocation provisions have not been exercised. There is, therefore, no known case law or test cases of coastal allocation of authorisations in New Zealand. However, these allocation mechanisms (or variations of them) are currently used overseas, for example, in Australia. Councils are encouraged to access expert advice (such as planning and legal advice) and to weigh up the costs and benefits themselves before looking to utilise these alternative allocation mechanisms.
7. As allocation mechanisms other than first in, first served have not yet been used in New Zealand, there is limited current public understanding of these tools. Councils need to ensure the rationale for the use of alternative allocation tools is clearly explained and communicated as part of the allocation design process.

WHERE TO FIND OUT MORE

Information on aquaculture and the 2011 aquaculture reforms is available at **www.fish.govt.nz** and **www.aquaculture.govt.nz**.

This document is intended to give general guidance on aspects of mechanisms for managing the allocation of coastal space following the changes made by the 2011 aquaculture legislative reforms. It is not legal advice. For legal advice on any aspect of the reforms you should consult your lawyer.

The general disclaimer on the **www.fish.govt.nz/en-nz/info/legal/default.htm** also applies to this document and should be read in conjunction with it.

Photos by Phil Kirk.

OVERVIEW ON FOUR ALLOCATION MECHANISMS

Allocation mechanism	Comments	Possible benefits/advantages	Possible risks/disadvantages
1. FIRST IN, FIRST SERVED Description: • First in, first served means that the applicant who first lodges a complete resource consent application is presumptively entitled to the first hearing before a consent authority.	• Default allocation mechanism under RMA.	Well understood, established case law that supports its use. • Functional and works well where there is little competing demand.	In a situation of high and/or competing demand: • could result in regulatory bottlenecks; • may not achieve the most efficient or effective use of coastal space (it may, but not by design) and cumulative effects may be difficult to manage; • where resources are scarce and there is high competition, there can be legal arguments about who is first in the queue; • it is the first application, rather than the best application, that potentially gets allocated the coastal space; • where applications overlap, the application which was lodged first is assessed first, including the overlapping space – the remainder of the space which is not overlapping in subsequent applications is not affected by this restriction and may continue to be processed; and • in circumstances of high demand and resource constraints, the result for subsequent applications is likely to be affected by earlier decisions in adjacent or nearby areas.

Allocation mechanism	Comments	Possible benefits/advantages	Possible risks/disadvantages
2A. TENDERING – FINANCIAL ONLY Description: • A price-based allocation mechanism where the tender may be awarded to one of the bidders, but not necessarily the highest bidder.	• Requires spatial planning to be undertaken to set environmental limits. • Cost of tender may deter speculative applicants. • In addition to first in, first served, tendering continues to be the other default method as a result of the RMA Amendment Act (No 2) 2011. • Tendering provisions and requirements are set out RMA Part 7A. • Successful tenderers have to progress authorisations within two years. • Tender revenue split evenly between Crown and council (s 165Z). • Council share used for promotion of sustainable management of natural and physical resources in the coastal marine area in its region (s 165ZA). • Any annual rental that is set as a result of a tender is reduced by any occupation charge (s. 165V) • Tender money reimbursed if coastal permit application is unsuccessful (s. 165Z).	• Could promote more efficient use of space and resources and management of the coastal environment including cumulative effects. • Easy to assess applications due to (primarily) price-based criteria. • Would generate revenue to assist with the promotion of sustainable management in the region's coastal marine area (see final bullet in comments column). • Expected to be reasonably administratively simple. Note: This is an area of emerging practice in New Zealand and has yet to be tested.	• Requires people to pay for the right to apply for a consent which may never be granted. • Requires spatial planning and/or setting of environmental limits before allocation occurs so council has space to allocate.
2B. WEIGHTED ATTRIBUTES TENDERING Description: • A version of tendering that considers a range of weighted criteria to evaluate the tender. These criteria, or attributes, can be broader than purely financial considerations and may include wider regional benefits, sustainable management and social and cultural considerations. The criteria and weights are included in the tender documentation to allow tenderers to design bids suited to the specified attribute criteria.	• See 2a for comments on general tendering. • Weighted attributes must be consistent with the RMA. • Cost of tender may deter speculative applicants. • The **Waikato Regional Coastal Plan** has been changed as part of the 2011 Aquaculture Reform and the changes are included in Schedule 2 of the Resource Management Amendment Act (No 2) 2011. The plan now provides for weighted attribute tendering in the newly created 300-ha Coromandel Marine Farming Zone (CMFZ) – see new Plan Method 17.5.2A. Authorisations to apply for a resource consent within the CMFZ will be allocated in two ways – as settlement assets (20%) and by weighted attributes tender (80%). The weighted attributes are listed as including, but not limited to: » the extent to which the tender proposal achieves the purpose of the CMFZ; » contribution to economic and social well being of the region and New Zealand; » promotion of sustainable management of natural resources; » environmental management practices of applicant; and » monetary contribution.	• Could promote more efficient use of space and resources and management of the coastal environment, including cumulative effects. • Would generate revenue to assist with the promotion of sustainable management in the region's coastal marine area. • The "weighted attributes" component allows consideration of wider values, for example, Māori participation, regional economic priorities (see Waikato CMFZ example) and allows councils to tailor to local and regional needs. • Could be effective in choosing between different proposals in the same or adjacent space.	• Care and thought would need to be applied to the design and development of the weighted attributes to ensure they are transparent and defensible. • Choosing appropriate weighted attributes may be difficult without both detailed strategic spatial planning and comprehensive assessment of environmental effects. • Weighted attributes are often subjective and therefore more open to challenge than, for example, price-based financial tendering.

OVERVIEW ON FOUR ALLOCATION MECHANISMS continued

Allocation mechanism	Comments	Possible benefits/advantages	Possible risks/disadvantages
3. AUCTION Description: • A priced-based allocation mechanism. • An auction sets up a process of exchange based on competing bids, with the winning bid usually going to the highest bidder. There are many ways to construct an auction, including low price to high price (standard auction), high price to low price (dutch auction) or open or sealed bids. Auctions often set a reserve which is the minimum price the seller expects the good or service to be sold for; councils will need to consider if this is appropriate in the aquaculture context.	• Cost of auction may deter speculative applicants. • Requires spatial planning to be undertaken to set environmental limits.	• Simple and well understood process. • With an open auction, applicants are able to see who else is interested in bidding for the space and its value (or perception of value). • Applicants interested in paying the most for the space are likely to use it the most efficiently.	• If standard auction is used and authorisations are awarded to the highest price bidder, this may preclude consideration of broader values and local community needs.

Allocation mechanism	Comments	Possible benefits/advantages	Possible risks/disadvantages
4. BALLOTING Description: • A (generally) chance-based allocation mechanism.	• Requires spatial planning to be undertaken to set environmental limits. • Chance-based (see comments in next column). • Cost of ballot may deter speculative applicants.	• If used on its own, this is an impartial and arbitrary mechanism. However if used, for example, after proposed applications meet well-defined pre-requisite criteria, a ballot could assist councils to make a final decision with two very similar applications. • Simple process.	• Generally an arbitrary mechanism, but see comments in the first bullet point of previous column. • On its own it relies on chance and therefore is not expected to promote efficient economic use, for example the most efficient operator is not necessarily rewarded.