Regulatory Impact Statement

Aquaculture Legislation Reform Paper: Undue Adverse Effects Test – Further options to provide a better balance between fishing and aquaculture

Agency Disclosure Statement

1 This Regulatory Impact Statement has been prepared by the Ministry of Fisheries. It summarises analysis of options to improve the undue adverse effects on fishing (UAE) Test provisions in the Aquaculture Legislation Amendment Bill (No 3) (the Bill) to provide a better balance between fishing and aquaculture interests.

2 Some of the options analysed in this paper have been canvassed by submitters in the Select Committee process, who believe that improvements can be made to the Bill. Many submitters see the UAE test as being one of the largest impediments to the growth of aquaculture.

3 The Ministry has been working on a combination of improvements to the current UAE test and aquaculture agreements approach in the Bill. The Ministry believes that the introduction of a threshold will provide much needed certainty to aquaculture applicants and quota holders. The proposal is for a 10% cumulative loss of estimated average annual catch threshold, and the Ministry is working on the implementation of this option.

4 The fishing industry will be concerned that a 10% threshold will shift the Bill in favour of aquaculture to the detriment of commercial fishing. The Ministry believes that the threshold will help to provide a balance between protecting fishing rights and to enable the best value use of space. A threshold better fits with the objectives of the aquaculture reforms.

5 Option 2 also proposes a formula for compensation, in order to provide greater certainty about how compensation will be calculated, and represent fair market value. The Ministry is working on the specifics of how the formula will work, to ensure that it can be implemented with the fisheries information available now and in the future.

6 The Fishing Industry will be concerned that the decision of the arbitrator would be binding, and thus remove the ability to block aquaculture. The Ministry believes that independent arbitration will provide a commercially acceptable way of independently resolving disputes about the formula process.

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6 April 2011

Executive summary

1 There is a need to find a better balance between protecting fishing rights while encouraging aquaculture development.

2 The current form of the UAE test gives very strong protection to fishing rights at the expense of aquaculture. As such, the UAE test is one of the largest risks to success of the aquaculture reforms.

3 Submissions on the Aquaculture Legislation Amendment Bill (No 3) (Bill) express a range of viewpoints about the UAE test. In general, fishers strongly support it, while other submitters questions the greater protection of fishing over other activities and see the test as a duplication of the Resource Management Act 1991 (RMA). Aquaculture interests are divided, generally depending on whether they are also involved in the fishing industry.

4 The Ministry agrees that further changes to the current provisions of the Bill are necessary.

5 Amending the UAE test to specify the threshold and providing a formula for compensation (with arbitration) where commercial fishing is affected will achieve an appropriate balance between protecting fishing rights while encouraging aquaculture development.

6 The option of moving the threshold test into the RMA is also analysed here (option 3a), along with the complete shift of the assessment under the RMA balancing framework (option 3b).

Introduction

7 The government's objectives for the aquaculture reforms are to: reduce cost, delays and uncertainty with the aquaculture regulatory process; promote investment in aquaculture development; and enable integrated decision making.

8 The Bill is based on Cabinet decisions in March, April and July 2010. The Cabinet papers supporting these decisions and the associated Regulatory Impact Statements are available at www.fish.govt.nz.

9 This paper summarises analysis of options for improvements to the UAE Test to ensure a better balance between fishing and aquaculture interests is reached. The options considered are:

- **Option 1** - Status quo (current drafting in the Bill);
- **Option 2** – Amend the UAE test and aquaculture agreements process - combination of UAE threshold, formula for compensation and option for independent arbitration
- **Option 3a** - UAE Test moved into the RMA as a threshold test;
- **Option 3b** – Remove the UAE test from the Fisheries Act and consider effects of aquaculture on fishing under the RMA as a balancing test.

10 This RIS supports the paper seeking Cabinet's agreement to changes to the proposed UAE process contained in the Bill, to be achieved by Supplementary Order Paper.

Criteria for analysis and summary table

11 The analysis undertaken is based on the contribution of mechanisms to the reform objectives as well as the following criteria:

- **Protects fisheries rights** - the extent to which the option protects existing rights of customary, recreational and commercial fishers;
- **Enables competition and prevents anti-competitive behaviour** – the extent to which the option enables competition for space in the coastal marine area and prevents anti-competitive behaviour;
- **Reduces potential for litigation** – the extent to which the option reduces the potential for the aquaculture process to be stalled by litigation.

12 The following table outlines options for options for amendments to the UAE Test process. Ratings of the options are given using up to three ticks or crosses according to the how the options contribute to the reform objectives and satisfy the identified criteria.

Option	Contribution to reform objectives			Assessment criteria			Key risks and drawbacks
	Reduces costs, delays and uncertainty	Promotes investment	Integrated decision making	Protects fisheries rights	Enables competition and prevents anti-competitive behaviour	Reduces potential for litigation	
1. Approach in Bill: - Lower aquaculture agreements threshold - shortened timeframes - Pre-request aquaculture agreements option	✔✔	✔	✔✔	✔✔ ✔	✕	✕	• Threshold may not adequately protect against anti-competitive behaviour by larger industry players. • Pre-request aquaculture agreements have potential to increase time in streamlined process. • Pre-request agreements may be practically difficult for aquaculture applicants to reach due to number of affected parties to negotiate with. • Uncertainty for applicant as there is no flexibility for an early UAE option.
2.Amend UAE Test and aquaculture agreements process: -Introduction of a UAE threshold -Formula for compensation -Optional independent arbitration	✔✔ ✔	✔✔ ✔	✔✔	✔✔	✔✔ ✔	✔	• Quota holders may consider that fisheries rights will be impacted due to higher threshold for UAE impacts. • Difficulties in determining threshold due to uncertainty in information. • Loss of quota value through formula may be difficult to determine and will be disputed. • Risk that quota owners will consider that property rights have been diminished through binding decision.
3a - UAE in RMA	✕	✔	✔✔ ✔	✔	✕	✔	• Moving a threshold test to the RMA is a major shift from RMA approach (balancing). • Risk that quota owners will consider that property rights have been diminished. • Potential for litigation to be shifted from MFish to councils. • Potential for lack of consistency between councils. • Objectivity of councillors decisions may be questioned due to other interests
3b – No UAE, RMA only	✔✔ ✔	✔✔ ✔	✔✔ ✔	✔	✔✔ ✔	✔✔	• RMA only option would have implications for commercial fishers, who would be concerned about protection of quota rights with balancing of interests under the RMA. There are no special provisions for compensation for loss of value in the RMA. • Would require Cabinet to rescind previous decision on the UAE test.

Status quo

Current regime

13 Under the current regime a regional council must request that the Chief Executive of the Ministry of Fisheries (MFish) make an aquaculture decision before notifying a proposed aquaculture management area (AMA). The Chief Executive's decision is guided by criteria in the Fisheries Act. The decision only considers the effects on fishing of the proposed AMA. Consideration of the sustainability of fisheries resources was removed on the basis that this environmental effect was better considered under the RMA.

14 The test does not take into account whether the benefits of aquaculture development outweigh the adverse effects on customary, recreational of customary fishing. Nor does it allow for any general weighing of the benefits of fishing in the area against the benefits that might be gained from aquaculture. The test operates as a threshold and does not consider which use of a resource would result in the highest net benefit to society.

15 If the Chief Executive decides that there will be no UAE on fishing, then the application can proceed. If he finds there would be a UAE on recreational or customary fishing in a particular area, then that area must be removed from the proposed AMA. If a reservation is found on commercial fishing (i.e. the Chief Executive considers there are undue adverse effects), then the law enables applicants to reach agreement with quota holders to enable the space to be approved, in exchange for compensation.

Current drafting in the Bill

16 With the removal of AMAs, the Bill proposes that a resource consent should be the only requirement for marine farming, together with an aquaculture decision made on the basis of the consent application.

17 Legislated timeframes for the completion of the UAE test will be reduced significantly to 20 days. The UAE Test will follow the coastal permit decision, with parallel analysis and information sharing enabling timeframes to be met. A time limit for the receipt of information is also proposed, to reduce potential delays.

18 The Bill proposes that the UAE Test process be further streamlined by removing the ability to appeal UAE decisions in the High Court, with a return to judicial review alone.

19 The Bill aims to further facilitate tradeoffs where desired, through reducing the threshold for aquaculture agreements from 90% (of quota holdings for a stock) to 75%. The Bill provides the flexibility for applicants to pause the RMA process to negotiate agreements prior to the permit being notified. These "pre-request aquaculture agreements" will not require a UAE Test for stocks where 75% of quota holders have agreed. Aquaculture applicants will be required to ensure that all quota holders have a vote in the agreement, and are notified when an agreement has been reached. All quota holders are entitled to the same level of compensation.

20 Information would be provided to applicants on potentially affected fish stocks along with wider fishing information specific to the area to assist in the negotiation process.

Key problem summary

21 There is a need to find a balance between protecting fishing rights while encouraging aquaculture development.

22 The current form of the UAE test gives very strong protection to fishing rights at the expense of aquaculture. Although the UAE Test has not been triggered many times to date, the Ministry believes that the test will be triggered more frequently as more space is approved. As such, the UAE test is one of the largest risks to success of the aquaculture reforms.

23 The UAE test:

- protects fishing at the expense of aquaculture development (aquaculture either cannot proceed, or can proceed only if the applicant can reach agreement with commercial fishers), even when aquaculture development may be the most economically beneficial use; and
- adds an additional, litigable decision point to the process of getting a permit for aquaculture development (all other activities and their impacts are considered and balanced solely under the RMA).

24 No activity other than fishing is protected by a similar test (that is, no other party impacted by an aquaculture proposal can prevent aquaculture or negotiate for compensation). No activity other than aquaculture is subject to a similar test (so other activities that have an undue adverse effect on fishing do not allow commercial fishers to decide whether the activity can proceed or negotiate for compensation).

25 Officials believe that further amendments to the UAE Test and aquaculture agreements processes in the Bill (option 2) can address these problems. Alternative options to address these problems under the RMA are also discussed.

Objective

26 To ensure that the Bill enables aquaculture space to be created to support the aquaculture industry in meeting its goal of annual sales of $1 billion by 2025, while protecting the integrity of the quota management system.

Regulatory impact analysis – analysis of options

27 The UAE Test can be implemented in many different ways. Options 1 and 2 assume that the Ministry of Fisheries conducts the UAE Test, with possible improvements discussed to better meet the objectives of the aquaculture reforms. The remaining options move the UAE Test under the RMA framework, whether as a threshold test, or as a balancing test under the RMA. The benefits, risks and drawbacks of each option are discussed below.

Option 1 - Current approach in the Bill

28 The current approach in the Bill is described in detail above.

Benefits	*Risks and drawbacks*
• Timeframes for completion of the UAE Test process have been reduced to 20 working days, enabled by parallel analysis taking place with the coastal permit process. • Provides the flexibility for applicants to reach agreement prior to the UAE Test.. • Provides further information to applicants to enable assessment of potentially affected fish stocks. • Lower 75% threshold will make it harder for large quota holders to prevent aquaculture agreements being reached.	• Potential for large players in the fishing industry to prevent aquaculture development through UAE Test and current aquaculture agreements process. • Risk that minority interests will not be adequately protected through 75% threshold for aquaculture agreements, despite measures currently in the Bill (prior notification of agreement, entitled to equal compensation). • Pre-request agreements process unwieldy and add time to the process. Potentially difficult for agreements to be reached with many quota holders unless an agent is appointed. • Does not provide as much certainty as the aquaculture industry would like. Does not allow for an option of an early UAE decision to increase certainty and reduce risks.

Option 2 - Amend the UAE Test and aquaculture agreements process

29 This option would see the following measures adopted as a package, to strengthen the UAE Test where risks have been identified with the current approach in the Bill. Each option is discussed individually below.

Amend the UAE test to include a threshold (10% cumulative estimated average annual catch loss)

30 This measure would maintain the UAE test and its role in protecting fishing rights, while providing greater certainty about when an UAE is likely to be triggered. A threshold would provide more certainty to all parties regarding the level of effect that is considered undue. Some case law indicates the courts may be moving toward confirming a UAE threshold of 5% cumulative estimated average catch loss. This view is supported by observations of arguments during a recent appeal of the Tasman interim AMAs decision. A 10% threshold would provide more flexibility for growth of aquaculture development.

Improve the aquaculture agreements process by providing a formula for purchase/compensation

31 This measure would provide greater certainty about how compensation would be calculated and give more assurance that it would represent fair market value. Greater certainty around compensation should reduce some of the costs and delays associated with the Bill's current aquaculture agreements process, including litigation. While the fishing industry may perceive a weakening of their 'property right', this option offers a means of supporting the QMS and the value of quota rights, by ensuring a fair market value for quota impacts and facilitating a working 'quota market'. If arbitration is considered as part of this option, this provides a commercially acceptable way of independently resolving disputes about the formula process.

Independent arbitration

32 Under this measure the applicant or quota holders could request an independent arbitrator to review the compensation offered, and whose decision would be binding in the event that the level of compensation could not be agreed upon. There would be no option for review.

Benefits	*Risks and drawbacks*
Threshold • Fishing and aquaculture industries generally support more clarity around what is "undue" and would favour definition of a threshold. • Would provide additional certainty. • Would shift legal challenge from "what is the threshold" to "how did we calculate the threshold". • Higher threshold could help to alleviate any queuing of applications to consider cumulative effects whilst within the threshold. *Formula for compensation/purchase* • Reduces some of the costs, delays and uncertainty in the process. • Reduces potential for unnecessary litigation. *Arbitration* • Provides an independent alternative to the High Court process • Increase certainty for applicant that agreement will be reached as decision is binding	*Threshold* • Fishing industry may consider that quota rights are being diminished *Formula for compensation/purchase* • May require additional rules. • May not be sufficiently robust quota market to determine value - potential for disputes with calculation and resulting figure. • Can only be applied to a completed UAE decision, so not an option for pre-request aquaculture agreements. *Arbitration* • Quota holders will be concerned that the arbitrator's decision is binding, with no option to review.

RMA options

Option 3a - UAE Test in the RMA

33 Option 3a would involve moving the UAE Test in its current form (i.e. a threshold test) into the RMA. The council would be responsible for undertaking the test for this option, not the Ministry of Fisheries. The exact costs and benefits are dependent on whether the UAE test would be moved in its current form or in some amended version. The UAE test could be moved in the form of option 1 or 2 discussed above. The exact benefits and risks of this option will depend on the nature of the test under the RMA framework.

Benefits	*Risks and drawbacks*
• Provides one decision process under the RMA	• A threshold test (like the UAE Test) would not fit well within the framework of the RMA, which operates by balancing different interests. • Risk that councils will not have the capability and capacity to undertake the UAE Test. Additional costs for councils would result due to additional resource requirements. • Potential for litigation to be shifted from MFish to councils. • Limited additional benefits to option 1. The test would encounter the same issues, but would be conducted by less experienced fisheries practitioners. • Potential for lack of consistency between the decisions of different councils.

Option 3b – No UAE RMA only (balancing test replacing threshold test)

34 Option 3b would involve deleting the UAE Test from the Fisheries Act and requiring that an assessment of the effects of aquaculture proposals on fishing be made under the RMA. The effects of aquaculture on fishing would be balanced against all other uses of the coastal marine area.

Benefits	*Risks and drawbacks*
• Balancing test more consistent with objectives of aquaculture reforms. • Effects on fishing (recreational, customary and commercial) already covered under the RMA (along with impact on fisheries resources), so minimal if any additional costs are anticipated. • Provides one decision process and one decision, reducing the potential for litigation.	• Risk that fishing industry will perceive that their rights will not be adequately protected under the RMA framework, with associated effects (impact on investment, protection of fisheries).

Consultation and engagement

35 The following departments were consulted on the contents of this paper: the Treasury, the Ministry for Economic Development (MED), the Ministry for the Environment (MfE), the Department of Conservation (DOC), the Ministry of Justice (Justice) and Te Puni Kokiri (TPK). The Department of Prime Minister and Cabinet has been informed of this paper.

36 MED, MfE, DOC, Justice and TPK support the proposals discussed in this paper.

37 Submissions on the Bill expressed a range of viewpoints about the UAE test. In general, the test is strongly supported by fishers and opposed by other submitters (including councils, recreational users and environmental NGOs) who see the UAE test as a duplication of the RMA and question why fishing has greater protection than other activities.

38 The seafood industry wants a number of Bill changes, including legislated support for collectivised negotiation between quota owners and aquaculture applicants. The industry believes that legislated collective action is essential for any transfer from fishing to aquaculture rights to be possible.

39 Aquaculture interests are divided. The majority of the companies in the aquaculture industry are also involved in the fishing industry, and strongly defend the UAE test and their quota rights. An exception is Sealord, who has called for the UAE test to be amended and for compulsory purchase to be introduced. It is important to note, however, that the majority of Sealord's quota holdings are in deepwater fisheries where there is less conflict with aquaculture.

40 The fishing and aquaculture industries have not been consulted on the proposals in the paper. The fishing industry is likely to be very unsupportive of the proposals.

Implementation

41 Additional mechanisms arising from the chosen option are anticipated to be incorporated into the Aquaculture Legislation Amendment Bill (No 3) by way of Supplementary Order Paper. This would make changes to the Fisheries Act 1996 and the Resource Management Act 1991.

42 Implementation following enactment will vary according to the mechanisms used. However, in all cases, the Crown will engage with the aquaculture and fishing industries regarding the implications of the chosen option/s on the different sectors.

43 The costs of delivering the options would vary depending on the option chosen. The Ministry does not consider that option 2 would add significant costs to the Ministry. Existing resources within the Ministry would be allocated to undertake further work on the recommended options.

44 Option 3a would impose additional costs on councils and would require support from the Ministry of Fisheries to work through the details of implementation. The Ministry would need to assist councils to ensure there was sufficient capability and capacity to run a threshold test under the new law.

45 Option 3b would lower costs for the Ministry, through the reduction of approximately 4 FTEs and through an expected drop in administrative and legal costs associated with the UAE test. Councils are currently required to balance aquaculture proposals against the effects on fishing and fisheries resources, so it is anticipated that no additional resources would be required to support this option.

Monitoring and Evaluation

46 Evaluation of the mechanisms themselves will be based on their ability to deliver new aquaculture space, with Cabinet agreeing to a formal review of the UAE process in 3 years from the enactment of the Bill.

47 If option 2 is chosen the Ministry will monitor the threshold and the formula and ensure that the settings are delivering the intended outcomes. The Ministry anticipates that these mechanisms will be continually reviewed and improved in consultation with the Seafood Industry.

Conclusion and recommendations

48 Based on the above analysis, the Ministry considers that either option 2 or 3b would address the problems associated with the current UAE process proposed in the Bill (option 1) to different extents.

49 The combination of improvements to the UAE test suggested in option 2 will provide greater certainty, reduce the potential for litigation and address the issue of anti-competitive behaviour within the Seafood Industry.

50 Option 3b would provide for a balance between fishing rights while encouraging aquaculture and best achieves government's objectives for aquaculture development. However this option would have wider and more significant impacts than the other options and would require Cabinet to rescind its previous decision about the UAE test.