NEW ZEALAND LAW SOCIETY
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4 August 2017

Ministry for Primary Industries
Private Bag 14
Port Nelson
Nelson, 7042

By email: aquaculture@mpi.govt.nz

Re: Proposed National Environmental Standard for Marine Aquaculture

Introduction

1. The New Zealand Law Society welcomes the opportunity to comment on the *proposed National Environmental Standard for Marine Aquaculture* (proposed NES). The Law Society's Environmental Law Committee has reviewed the proposed NES and considers it would be a useful addition to the regulatory toolbox for marine aquaculture under the Resource Management Act 1991 (RMA).

2. The Law Society welcomes greater consistency of marine aquaculture management between different regions where local context particularly in relation to environmental matters does not otherwise justify the application of different management regimes. The objective of ensuring national consistency in the re-consenting process is appropriate.

3. The comments set out below relate to the proposed changes to public notification requirements for replacement consents for existing marine farms. The Law Society is concerned that a blanket proposal to exempt replacement consents from the public notification requirements is inconsistent with:

   (a) sections 6(d) and 12 of the RMA; and

   (b) the provision for customary rights under the Marine and Coastal Area (Takutai Moana) Act 2011 (MCAA).

Sections 6(d) and 12 of the RMA

4. Section 6 of the RMA states that matters of national importance must be recognised and provided for by anyone exercising functions or powers under the RMA, in relation to managing the use, development and protection of natural and physical resources. This includes the "maintenance and enhancement of public access to and along the coastal marine area, lakes and rivers".[1]

5. The coastal marine area (CMA) is recognised as public property and is accorded special status under section 11 of the MCAA. Section 11 establishes a 'no owner' regime and recognises there is a common interest in the CMA.[2] Notably, one of the purposes of MCAA is *"to ensure*

1 Resource Management Act 1991, section 6(d).
2 Marine and Coastal Area (Takutai Moana) Act, section 11.

the protection of the legitimate interests of all New Zealanders in the marine and coastal area of New Zealand".[3]

6. Accordingly, there is a general prohibition on (amongst other things) the use and occupation of the CMA unless expressly allowed for in a plan or resource consent.[4] In *Golden Bay Marine Farmers v Tasman District Council*[5] the Environment Court held that the prohibition emphasises the significance of the CMA to the environment and people of New Zealand and *"provides a statutory presumption against wholesale development and use"*.[6]

7. Marine farming case law has made it clear that public access is not limited to the shoreline, but also extends to the public's access to and use of the sea.[7] The Planning Tribunal (the predecessor to the current Environment Court) went so far as to say that any development which prevents free public access to the coastal marine area *"amounts to an alienation of that public space and must be balanced against other relevant considerations"*.[8]

8. The Environment Court held in *Re Auckland Regional Council*[9] that there is a general thread in the RMA starting at section 6(d) and culminating with section 122(5)[10] that requires *"a council to actively address its mind – not to whether public access should be permitted – but to whether it should be excluded"*.[11]

9. The proposed NES suggests that public participation should be based on the extent to which an existing marine farm will change its impacts on the environment.[12] It further records that the public can still participate in second generation regional coastal plan processes to ensure marine farms are not located in inappropriate areas.[13]

10. Under clause 12 of the proposed NES, the list of matters of discretion for restricted discretionary activities includes issues in respect of which members of the public might legitimately have a different point of view to the consent holder and the Council. It includes:

    (c) The layout, positioning (including density), lighting and marking of marine farm structures within the marine farm site, in relation to:

        i. ensuring continued reasonable public access (including recreational access) in the vicinity of the marine farm

        ii. navigational safety, including the provision of navigation warning devices and signs

11. The Law Society submits that once public interest considerations are accepted to be relevant to the process, it would be hard to sustain a position that excludes public involvement.

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3 Ibid, section 4(1)(a).

4 Above n 1, sections 12(1) and (2).

5 *Golden Bay Marine Farmers v Tasman District Council*, EC, Christchurch, W 42/2001, 27 April 2001.

6 Ibid at [268].

7 *Sanford (South Island) Ltd v Southland Regional Council*, EC, Christchurch, C 106/02, 3 September 2002.

8 *Thomas v Marlborough District Council*, PT, W 16/95, 21 February 1995 at p 17.

9 *Auckland Regional Council, Re*, EC, A 109/00, 14 September 2000.

10 Above n 1, section 122(5) which provides that no coastal permit should be regarded as conferring occupation to the exclusion of other classes of person.

11 Above n 9, at p 9.

12 Ministry for Primary Industries, Proposed National Environmental Standard for Marine Aquaculture, p 13.

13 Ibid.

12. The Law Society is concerned that a blanket rule exempting notification of applications for replacement consents could enable consented occupations of the CMA (whether exclusive occupation or not) to exclude public participation indefinitely. This would be inconsistent with the presumption under the RMA that the CMA should be retained for public access and/or use.

Customary Rights under the MCAA

13. The proposed NES states:[14]

> Some Statutory Acknowledgements across the country recognise the relationship of tangata whenua with the coastal marine area. Any groups with Statutory Acknowledgements in or relating to the common marine and coastal area could be provided for through limited notification to them of applications for replacement consents for existing marine farms, if regional councils determined that they were affected parties.

14. The Law Society acknowledges that section 55(2) and (3) of the MCAA exempts existing aquaculture from the prohibition on granting consent where an activity will have a more than minor effect on the exercise of a protected customary right. Likewise, the RMA permission rights of customary marine title holders (to decline consent for any reason) do not extend to applications for consent of existing aquaculture.[15]

15. Notwithstanding that, section 62(2) and (3) provides, in relation to applications for customary marine title, that:[16]

> (2) Subsection (3) applies if a person applies for a resource consent, a permit, or an approval in relation to a part of the common marine and coastal area in respect of which—
>
> (a) no customary marine title order or agreement applies; but
>
> (b) either—
>
> i. an applicant group has applied to the Court under section 100 for recognition of customary marine title and notice has been given in accordance with section 103; or
>
> ii. an applicant group has applied to enter negotiations under section 95.
>
> (3) Before a person may lodge an application that relates to a right conferred by a customary marine title order or agreement, that person must—
>
> (a) notify the applicant group about the application; and
>
> (b) seek the views of the group on the application.

16. As at 30 June 2017 there were 186 applications before the High Court for various recognition orders under the MCAA.[17] In practice the combined applications cover the entire coastal marine area of New Zealand.

17. In the Law Society's view, the notice provision under section 62 of the MCAA is intended to allow a customary marine title applicant group the opportunity to put its views on any application for resource consent before the regional council. The underlying principle is one of procedural fairness: in order to protect the legitimate interests of persons who might be

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14 Above n 12, at p 31.

15 Above n 2, sections 64(2)(e) and 66(2).

16 Ibid, section 66(2) and (3).

17 Memorandum of counsel for the Attorney-General in response to Minute dated 1 June 2017 of Mallon J, dated 30 June 2017, at [14].

adversely affected by a decision, those persons should receive advance notice and have an opportunity to put their views to the decision maker.

18. The Law Society considers the inference from section 62(3) must be that the views of an applicant group on an application for consent will be a relevant matter that the regional council may have regard to under section 104(1)(c) of the RMA.

19. It would be incongruous with the statutory requirement that customary marine title applicants should be notified of consent applications under the MCAA not to have a corollary notification requirement in respect of existing marine farms under the proposed NES.

20. Furthermore, the Law Society believes it would be reasonable for the holders of protected customary rights and/or customary marine title to be notified of any renewal application that might affect those rights. It would be unusual in this respect to require notification of customary marine title applicants under the MCAA, but not to require notification of the holders of customary rights. This view is supported by the strong protection afforded to Māori under sections 6(e) and (g) of the RMA.

Recommendations

21. It is consistent with the RMA's purpose to seek a greater level of integration between different regional planning regimes for the coastal marine area, where good reason does not otherwise exist for different approaches. However, the Law Society is concerned that a complete removal of public notification of aquaculture consent renewals runs contrary to the public interest in the coastal marine area under the RMA, and the rights conferred on applicants and holders of customary rights under the MCAA and the RMA.

22. The Law Society does not consider that all applications for renewal of existing marine aquaculture consents should be notified. Rather, it recommends that further consideration be given to the aforementioned interests with a view to formulating methods that:

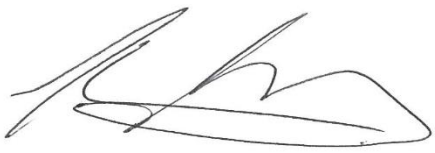
    (a) enable identified groups representing the public interest in the CMA to be represented in replacement processes; and

    (b) requires notification to applicants and holders of customary rights under the MCAA.

Conclusion

23. If you wish to discuss this submission, please contact the convenor of the Law Society's Environmental Law Committee, Phil Page, through the committee secretary Amanda Frank (04 463 2962 / amanda.frank@lawsociety.org.nz).

Yours faithfully



Kathryn Beck
President