STAFF REPORT

TO: Environment & Planning Committee

FROM: Neil Jackson, Policy Planner

REFERENCE: C424

SUBJECT: **AQUACULTURE LEGISLATION AMENDMENTS - SUBMISSION - REPORT REP10-01-07 -** Report prepared for meeting of 27 January 2011

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1. PURPOSE OF REPORT

The purpose of this report is to advise Council of the proposed amendments to legislation about aquaculture, and to request approval to a submission on the Bill.

The draft submission is generally in support of the Bill, and seeks alterations to clarify the intent or to make the Bill more workable.

2. BACKGROUND

The Aquaculture Legislation Amendment Bill (No 3) makes major changes to the law relating to aquaculture. It is open for submissions until 11 February 2011.

The principal change is to remove the statutory requirement that aquaculture can only take place in aquaculture management areas (AMAs). The current law requires AMAs to be identified in coastal plans, through a full Schedule 1 public process, before applications can be received for aquaculture activities. The Bill will remove that requirement, allowing applications to be lodged anywhere, unless a coastal plan has rules that say otherwise. This will be the default situation that applies throughout the country, except for the Tasman and Waikato regions.

Tasman and Waikato have developed AMAs to an advanced stage under the previous legislation, and prohibit aquaculture outside the AMAs. The Bill does not interfere with the location or extent of the Tasman and Waikato AMAs. Those AMAs are to be finalised under the current law.

The Tasman and Waikato coastal plans currently limit aquaculture in their AMAs to mussel farming. The Bill contains new rules, to be inserted into those two plans, to provide for a wider range of species to be farmed in the AMAs. MFish worked collaboratively with each of the two councils to develop new rules to fit each plan. DoC and MfE have also been involved.

The Bill retains the role of the Ministry of Fisheries in assessing whether aquaculture is likely to have an undue adverse effect on fishing (UAE test). The UAE test is intended to ensure fair compensation for fishers if space used for fishing is wanted for aquaculture. The Bill provides for prospective marine farmers and affected quota holders to negotiate an agreement, as an alternative to the UAE test.

There is overlap, as councils can also assess effects of aquaculture on fishing. This overlap is likely to cause some confusion, as an MFish decision on undue adverse effects cannot be appealed (judicial review is available), but a council decision can be appealed. The MFish decision would prevail, so there is potential inefficiency if effects of aquaculture on fishing are also considered by councils.

The Bill proposes a Minister of Aquaculture, and gives the Minister power to direct amendments to coastal plan provisions relating aquaculture.

The Bill also amends RMA section 39B about accreditation of persons conducting a hearing. The main change is to introduce an "out" – if "there are exceptional circumstances that do not provide the time or opportunity to ensure that all persons in the group are accredited."

3. RECOMMENDATION

That Council adopt the following draft submission contained in Report REP11-01-07 on the Aquaculture Legislation Amendment Bill (No 3).

Neil Jackson
Policy Planner

Draft submission

Matters specific to Tasman

Definition of spat

The definition includes the clause: "which settle out of the water column onto natural or man-made substrates". The clause implies that spat settle out of the water. What is meant is that they change from a drifting or free-swimming stage, and attach themselves to solid material.

Proposed amendment: Omit "out of the water column" and substitute "from a motile or drifting phase"

Clause 100

100 (2) as drafted says the RMAct does not apply to the amendments being made to the TRMP rules about aquaculture. That can't be intended. The intention is that the plan amendments are made directly by the Bill, and do not require Council to follow the RMA Schedule 1 process.

Proposed amendment: Amend 100 (2) to commence: "The Resource Management Act 1991 Schedule 1 does not apply …"

100 (3) says the plan becomes operative on 1 July 2011. Currently the interim AMAs are subject to High Court proceedings. They cannot become operative until those are completed, and 20% of space allocated to Maori, unless the Bill cancelled the current court proceedings and either let the aquaculture decision made by MFish stand, or let the AMAs as determined by the Environment Court stand. The Bill does not do that.

Proposed amendment: Amend 100 (3) to say the plan will become operative one month after Gazettal of aquaculture areas under section 35 of the Transitional Act.

100 (6) lists those parts of TRMP text that constitute the regional coastal plan, but does not specifically refer to the planning maps. Out of an abundance of caution it is suggested they should.

Proposed amendment: Add a new (e) to 100 (6): "all planning maps referred to in the definitions, provisions and rules of (a) to (d).

Policies 22.1.10A (a) and 22.1.10B (c) (i): The phrase "full intensity of development" needs to be confined to that allowed by the initial stage of development.

Proposed amendment: Add at the end of 22.1.10A (a) and 22.1.10B (c) (i): "allowed for that stage".

22.1.40: typo

Proposed amendment: In the second amendment, "(a)" should be "(ca)".

Rule 25.1.5AA: typo

Proposed amendment: The reference to “standards” (j) and (k) should be changed to “conditions” (j) and (k).

Rule 25.1.5CC: typo (in the original plan)

Proposed amendment: In the reference to (c) (iii), add “omit “block” and substitute “subzone””.

Rule 25.1.5DD: typo

Proposed amendment: In the first paragraph, omit “standards and terms” and substitute “conditions”, twice.

Schedule 25.1J: There is an omission from the first item relating to Composition paragraph 2.

Proposed amendment: Insert “of an EAG”.

Matters relating to the general parts of the Bill

Amendments to the Aquaculture Reform (Repeals and Transitional Provisions) Act 2004

Clause 8: new 17B

This relates to marine farm permit 364 in Waikato:
Clause (3) (a) confirms the grant date already given in (1).

Proposed amendment: For consistency, clause (3) should confirm the expiry date, also given in (1)

Clause 13: new 25A; also Clause 15: new 26A; and clause 27: new 50A

These relate to existing applications for marine farming permits or spat catching permits under the Fisheries Act.

(7) requires public notice of a decision to grant or decline a Fisheries Act permit application. There appears to be no reason for public notice of this decision, when there is no public notice of the original application and no requirement for public notice of the final decisions made under clauses 9 and 10.

Proposed amendment: Confine notice of the decision to the persons from whom the chief executive has sought information under clause (1).

(8) requires similar notification of a finding that the chief executive is not satisfied that the aquaculture activity would not have an undue adverse effect on commercial fishing.

Proposed amendment: Confine notice of the decision to persons from whom information has been sought, and the commercial fishers whom the chief executive considers to be adversely affected.

Clause 13: new 25B; also Clause 15: new 26B; and clause 27: new 50B

These list the matters that the chief executive (MFish) must consider in the UAE test.

There is no reference to whether the proposed aquaculture activity or the existing fishery is likely to produce the greater national benefit. The legislation may assume this will be realised through any negotiation between fishers and prospective farmers, but they are not negotiating from equal start points. Nor is there any reference to whether the affected fishery is stable, expanding, or declining.

Proposed amendment: Add further matters to 25B (2), 26B (2), and 50B (2) to address relative national benefit and whether the affected fishery is stable, expanding, or declining.

Clause 20: new 44 and Clause 21: new 44A to 44N

These amend the procedure for allocating 20% of space to Maori, after the chief executive (MFish) has made an aquaculture decision on interim AMAs.

Under 44B, a council must notify the trustee (Te Ohu Kai Moana Trustee Ltd), and any person who has applied for a coastal permit for aquaculture in any area that the aquaculture decision confirms, of the decision. Those parties then have six months in which to negotiate an agreement over 20% of the application space to be allocated to the trustee. There is no option to negotiate any alternative settlement: it must be 20% of the application space.

Proposed amendment: Add to 44B an option to negotiate an alternative settlement to 20% of space similar to new Section 7A of the Maori Commercial Aquaculture Claims Settlement Act 2004.

Under 44C, the trustee may need to seek instructions from iwi aquaculture organisations. There is no indication that the six month period for negotiating with applicants is suspended while the trustee seeks and is given instructions from iwi aquaculture organisations.

Proposed amendment: Amend 44C to interrupt the six month negotiating period where the trustee needs to obtain instructions from iwi aquaculture organisations.

If the negotiations do not result in an agreement within the six months, 44E requires the council to identify and publicly notify 20% of space to be allocated to the trustee. 44H says the council's decision can be appealed.

There is little point, where the parties have not reached agreement, in requiring a council to make a decision which can then be appealed by the parties. It would be more efficient that where the parties cannot reach agreement, the matter is referred directly to a Court.

Proposed amendment: Delete the 44E requirement for a council to make an appealable decision where the parties do not reach agreement, and provide direct access to a Court for a decision.

44H allows an appeal by an applicant, an iwi aquaculture organisation, a recognised iwi organisation, and "any other person who has an interest in aquaculture activities in the region concerned greater than the public generally".

There is no obvious reason why an appeal right should be extended to parties other than those involved in the original negotiations.

Proposed amendment: Limit the parties to any Court proceeding on the allocation of 20% of space to Maori, to those required to negotiate under 44B.

Clause 23: new 47

The clause applies to applications that were affected by the moratorium which was in place until 31 December 2004. It allows a council to resume processing those applications, subject to an aquaculture decision having been made, but makes no reference to the allocation of any space to Maori.

Proposed amendment: Add to 47 (2) (b) after (i): "the council has complied with sections 44B to 44D and, if necessary, 44E". *(This amendment is subject to the amendments sought under clauses 20 and 21 above.)*

Typo in 47 (4), where "are" should be "is".

Clause 26: section 50

Amendment (1) has the words "as it was at the commencement of this Act".
Amendment (5) has the words "as it was before the commencement of this Act".

Both versions should use "before". "At" the commencement of this Act, the previous Act is amended or revoked and the new version applies.

Proposed amendment: In amendment (1), replace "at" with "before".

Clause 27: new 50A

Typo in 50A (7): "noficiation".

Amendments to the Fisheries Act 1996

Clause 33: new 6 (2) (clause 66 corresponds)

This amends the Fisheries Act section 6 to acknowledge that regional councils can take into account effects on fishing when deciding an application for a coastal permit for aquaculture.

There is a corresponding provision in section 30 (3) of the RMAct.

Where there is a statutory requirement for the chief executive of Fisheries to make an aquaculture decision about likely effects of aquaculture activities on fishing, and that decision is not appealable, it is inefficient to allow effects of aquaculture on fishing to also be considered under the RMAct. A council or Environment Court decision that such effects are negligible could not override a Fisheries decision that those effects are "undue". What is the likelihood of a council or Environment Court decision stating that such effects are undue, when a Fisheries decision says they are not?

Proposed amendment: Amend both the Fisheries Act and the RMAct to provide an efficient process where effects of aquaculture on fishing are considered under one Act only or an integrated process.

The clause 33 amendments to 6 (2) apply only in relation to coastal permits, and not to zoning or other methods to provide for or prohibit aquaculture in plans.

Proposed amendment: Amend section 6 (2) to apply to zoning or other methods to provide for or prohibit aquaculture in plans, as well as to coastal permits for aquaculture.

Clause 35: new 186GA

Matters to be considered in the UAE test.

Proposed amendment: Add further matters to 186GA (1) to address relative national benefit and whether the affected fishery is stable, expanding, or declining.

Clause 46: new 186ZM

186ZM (8) and (9) refer to the role of the High Court in the MFish aquaculture decision process. (9) says: "An order or direction under subsection 8 must not prevent or delay the chief executive making an aquaculture decision".

Proposed amendment: Clarify whether the aquaculture decision process is suspended while a High Court process is undertaken; or what mechanism compels the High Court action to be completed within the time limit imposed on the chief executive.

Amendments to the Resource Management Act 1991

Clause 66: new 30 (2) and (3)

See comments under clause 33 re section 6 of the Fisheries Act.

Clause 69

Tasman opposes the change to Section 39B of the RMA requiring, in relation to plan change hearings, the Chairperson is accredited and likewise all other persons are accredited "unless there are exceptional circumstances that do not provide the time or opportunity" to be accredited. Councillors are elected to make policy decisions on a wide range of matters. RMA policy decisions should be treated no differently. If it is the Government's intention to "professionalise" RMA policy decision making then it needs to think again.

Clause 73

The rewording of Section 86B(3) of the RMA highlights a problem with this section generally but which will impact on aquaculture opportunities in particular. Where a plan change "deregulates" aquaculture opportunities, the rules will not have immediate effect under the redrafting. The redrafting itself is uncertain and possibly redundant as we are not aware of any regional coastal plan which makes aquaculture a permitted activity.

Proposed amendment: Prefer to repeal Section 86B and revert back to pre-RMA Amendment Act 2009. A lesser alternative would be to repeal Section 86((3)(d) and rely on (a) as water includes coastal water.

Clause 82: new 116A

This requires a coastal permit to include any conditions required by the chief executive. These are imposed via an aquaculture decision after any appeals on the coastal permit have been resolved. Neither an applicant nor a council can contest the purpose, practicality, or cost of compliance, of these conditions.

The clause implies regional councils will be responsible for monitoring and enforcing compliance with any such conditions.

Proposed amendment: Clarify whether MFish or a council will be responsible for monitoring and enforcing compliance with conditions imposed by MFish on a coastal permit for aquaculture. If monitoring and enforcement is to be by councils, add a provision allowing councils to recover from MFish the costs of monitoring and enforcing compliance with the Ministry's conditions.

We note that new Section 116A(8) may lead to the premature cancellation of a coastal permit if judicial review proceedings against the Chief Executive reservation is instigated.

Clause 90: new subpart 1 of Part 7A

This is a replacement subpart of the RMAct dealing with methods for allocating space for occupation in the coastal marine area. It allows coastal plans to include allocation methods other than first-in-first-served

165G allows a council to publicly notify an offer of "authorisations" to apply for coastal permits to occupy space.

165I requires a council to give the Minister of Conservation 4 months notice of an offer of authorisations.

Proposed amendment: Amend 165G to make it subject to 165I (as is the case for 165S).

In the "authorisations" provisions, the word "offer" is used in two different senses in different provisions:

In 165G, 165I, 165N (1), and the heading to 165S, a council "offers" authorisations. That is, the "offer" is what the council makes available or "puts to the market".

Within 165S, at (1) (d), (e), and (g), "offer" is used for the bids made by prospective coastal permit applicants; but in (f) it reverts to what is offered by a council.

"Offer" is also used in the "bid" sense in 165T, 165V and 165W.

Proposed amendment: Use separate defined terms for each of these senses in which "offer" is currently used.

165S lists what must be included in any offer of authorisations made under 165G or 165N. It would be useful to signal this in those sections.

Proposed amendment: Add a clause to 165G and 165N to cross-reference the requirements of 165S.

Clause 98: 25 (4) (b) of Schedule 1

The amendment in the Bill produces a criterion that is grammatically obscure:

"(b) the substance of the request or part of the request has been considered and given effect to or rejected by the local authority or Environment Court or was made by regulations under section 360A within the last two years;"

Proposed amendment:
"(b) the substance of the request or part of the request has been considered and given effect to or rejected by the local authority or Environment Court, or has been given effect to by regulations under section 360A, within the last two years;"