Research Assignment

Aquaculture Reform- Consenting to a New Gold Rush?

Aquaculture in the Marlborough Sounds.

Source: Aquaculture New Zealand.

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Introduction

As part of the phase II reforms of the Resource Management Act[1] (RMA), the Government announced its intention to create "sustainable and cost effective aquaculture planning and development".[2] This resulted in an independent report being prepared by the Aquaculture Technical Advisory Group (TAG report), which recommended a raft of changes to "kick-start" the aquaculture industry, as no new aquaculture space had been created since the passing of the Aquaculture Reform Act 2004.[3] Subsequent to the release of the report, the Government signalled its intention to support the aquaculture industry's goal of reaching $1 billion in sales by 2025,[4] and the Minister for Fisheries and Aquaculture announced that there would be sweeping reforms of current legislation to enable the aquaculture industry to "realise its full potential".[5] In line with the Government's intention to have a more active role in the RMA generally,[6] the proposed Aquaculture Reform Bill seeks to give the Government an active role in undertaking and directing plan changes, ministerial ability to amend Regional Coastal Plans (RCPs) without going through the RMA process, and enhanced planning and consenting processes. The proposed reforms raise significant issues in terms of the effect on current RMA processes, and raise questions as to whether the proposals will in fact achieve the desired results, or simply create more issues, now and in the future. To assess whether the reforms will have the anticipated outcomes, it is necessary to briefly look at the history of policy affecting aquaculture in New Zealand.

The Old Regime and Aquaculture Management Areas

The RMA is an effects based statute, focusing not on activities themselves, but the effects of those activities on the environment. Unlike prior legislation, the RMA moved away from central government decision making

[1] Resource Management Act 1991.
[2] Ministry for the Environment < www.mfe.govt.nz/rma/central/amendments/main-features-rm-phase-2.html>.
[3] Technical Advisory Group "Restarting Aquaculture", October 2009, at p6.
[4] Ministry of Fisheries. <www.fish.govt.nz/en-nz/Press/Press+Releases+2010/April10/Govt+outlines+plans+for+aquaculture+reform.htm>.
[5] Ibid.
[6] Above, n 2.

and towards decision making at the regional and territorial levels.[7] In line with the RMA being an effects based statute was the fact that decision makers at all levels were not to "pick winners"; and the view of the Government at the time was that they should only decide what effects they wished to avoid, not who or what causes those effects.[8] An anomaly in the legislation was that fisheries were not to be included in the ambit of resources controlled by the RMA. This represented a problem for marine farmers, as not only did they need to apply for a coastal permit to occupy marine space under the RMA, they also needed a marine farming permit from the Ministry of Fisheries (MFish) to harvest the fish.[9] This became known as the dual permit system.[10] In order for a marine farmer to obtain a marine farming permit they would have to satisfy MFish that no Undue Adverse Effects (a UAE test) would be caused to commercial, customary and recreational fishers rights.[11]

Against a backdrop of uncertainty as to how easily marine farm permits could be obtained, a significant number of permits for marine farming were lodged prior to the RMA coming into force. Competition for marine space soared, and the volume of consent applications overwhelmed local authorities and MFish, particularly in the Marlborough Sounds.[12] The share volume of consent applications resulted in consent authorities being uncertain as to whether favourable environmental outcomes could be achieved as the demand for space in the Coastal Marine Area (CMA) increased.[13] Added to this was an increase in speculative applications by entrepreneurs and existing marine farmers, some of whom were applying for farms nearing 50 hectares in size.[14] The case of *Golden Bay Marine Farmers v Tasman District Council*[15] highlighted issues in the area concerning competition for space in the CMA. It

[7] David L. VanderZwaag and Gloria Chao (eds) *Aquaculture Law and Policy: Towards Principled Access and Operations* (Routledge, New York, 2006), at513.
[8] Ibid.
[9] Ibid.
[10] Wendy Banta and Mark Gibbs "Factors Controlling the Development of the Aquaculture Industry in New Zealand: Legislative Reform and Social Carrying Capacity" 37 Coastal Management 170, at 177.
[11] Above, n7 at 513.
[12] Ibid.
[13] Above, n10 at 177.
[14] Above, n7 at 515.
[15] *Golden Bay Marine Farmers v Tasman District Council* unreported, 27 April 2001, Judge Kenderdine, Environment Court, W42/2001.

resulted in the Court recommending that Aquaculture Management Areas (AMAs) be established in coastal plans, and that aquaculture outside of those areas be prohibited.[16]

In response to what became a "gold rush" of consent applications, and recognising the issues facing local councils in terms of allocation in the CMA, the Government imposed a national moratorium on the granting of new consents, pending new legislation.[17] The purpose of the moratorium was to provide consent authorities an adequate timeframe to assess and establish suitable areas in their coastal plan that could be deemed AMAs.[18]

In 2004 the Aquaculture Reform Act[19] was passed and amended a number of Acts, including the RMA. Applicants would now only be required to obtain a resource consent under the RMA, replacing the dual-permit system.[20] Under the new regime district or regional councils were to identify zones in their coastal plans that could be set aside as AMAs, or alternatively zone areas where aquaculture would be prohibited.[21] The new regime was to offer a more streamlined and straightforward mechanism by which marine farmers could get consents, as before an AMA could be notified it would have had to have satisfied the MFish UAE test, which had proved to be problematic for marine farming applications in the past.[22]

The 2004 reforms did not achieve the desired results, and since the passing of the legislation, no new space for aquaculture has been created.[23] A Cabinet paper[24] cited a number of reasons for the legislation not being effective, but in particular attributed it to a lack of incentive for councils to create AMAs. It noted that the legislation was complicated, with many opportunities for appeal resulting in significant cost and delays, and that councils suffered from a lack of funding and adequate staff capacity to manage the process. Additionally, the paper identified that poor processes for managing

[16] Above, n7 at 515.
[17] Ibid, at 516.
[18] Above, n10 at 178.
[19] Aquaculture Reform Act 2004.
[20] Above, n10 at 179.
[21] Ibid.
[22] Ibid.
[23] Above, n3 at p6.
[24] Cabinet Papers "Aquaculture Reform" (April 2010) CAB Min (10) 9/2.

competing interests in the CMA exist, with aquaculture often competing for space with other users of the CMA such as boaties and other recreational users, as well as customary, recreational and commercial fishers.[25] As will be discussed below, an adequate policy framework for managing competing demand for space in the CMA should have had a strong presence in the reforms.

With an overview of the context in which the reforms are taking place, it is possible to analyse some specific aspects of the reforms to determine if in fact they are likely to resolve the issues which have been encountered, or exacerbate more fundamental issues relating to the allocation of resources in the CMA.

Greater Central Government Role

New Regulation-Making Power

Currently under the RMA the Government has a range of powers for dictating policy and standards to local authorities by way of National Policy Statements and National Environmental Standards, which have the ability to insert provisions into plans.[26] It also has the ability under the RMA to direct a regional council to prepare, change or vary a plan to address an issue[27]. Not content with these current intervention powers, the Government has proposed a new regulation-making power that it considers "necessary for situations when other options are unlikely to achieve Government objectives for aquaculture".[28] The new regulation-making power would enable the Minister of Fisheries and Aquaculture to amend Regional Coastal Plans (RCPs) under the RMA, taking into account the purpose and the principles (Part 2) of the Act.[29] In using this power, the Government has indicated that it would only be used in "exceptional circumstances", with the parameters on its exercise being:[30]

> -to change, introduce or remove provisions relevant to the management of aquaculture in a Regional Coastal Plan;

[25] Above, n24 at 5.
[26] Above, n1 at s55(2).
[27] Ibid, at s25A.
[28] Above, n24 at [82].
[29] Ibid, at [83].
[30] Ibid.

-the Minister must have regard to existing provisions in the Regional Coastal Plan, and the reasons for those provisions;

-the Minister must consult with the Minister of Conservation, other relevant Minister, the relevant council, and any other persons they consider appropriate.

It is not clear what would constitute "exceptional circumstances", however, nor is it clear on what grounds the Minister would consider it necessary to intervene to avoid the Government's aquaculture strategy being "stymied by regional plan making processes".[31] The Government has conceded that this may not be seen as "encouraging a collaborative working relationship with councils and communities",[32] and recognises further that final decisions on plan changes will not be made by an RMA expert body, such as the Environment Court, or Board of Enquiry.[33] Nevertheless the Government see it as advantageous to their aquaculture strategy that it has the final say on an outcome, and that they retain control over the process.[34]

This should be of real concern to all users of the CMA; and seen as a significant undermining of established RMA processes for establishing and varying RCPs. This level of intervention has been dimly received by regional councils, and also Local Government New Zealand, who see it as a violation of the principles promoted for local government, and an unnecessary power that cuts across the due process of the RMA.[35] This has been echoed by regional authorities who cite that adequate provisions are already in the RMA, such as through a National Policy Statement, which is subject to scrutiny by a Board of Inquiry, submissions, and a s32 RMA analysis.[36] It appears the only reason for the Government implementing such a power is to avoid a transparent decision making process which excludes independent scrutiny and public participation. This should be of great concern. It may also be an indication of the direction the Government will be taking with other Phase II RMA reforms, which is worrying.

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[31] Above, n24 at [85].
[32] Ibid, at [91].
[33] Ibid.
[34] Ibid, at [90].
[35] Local Government New Zealand, Submission to the Ministry of Fisheries "Re-Starting Aquaculture, Report of the Aquaculture Technical Advisory Group" 17 December 2009, at (29).
[36] Environment Waikato, "Environment Waikato's Comments on the Technical Advisory Groups Report "Re-Starting Aquaculture" 15 December 2009, at [8].

Changing Regional Coastal Plans by Legislation

The Waikato is one region in New Zealand where aquaculture, and the need for aquaculture space has been intense, with 1500 hectares of water space currently allocated to aquaculture.[37] Currently, any aquaculture activity outside of the areas currently zoned for aquaculture is a prohibited activity.[38] This poses a significant problem to the Government's aquaculture strategy and has been addressed in the proposed reforms. As opposed to the conventional plan change process, which can be costly to consent authorities, the Government has proposed to simply amend the RCP for Waikato through the Reform Bill. The Government considers this necessary to amend the plans through legislation so that the new regime can take effect from day one.[39]

There are several issues in this style of planning (if it can be called planning), which don't appear to have been adequately addressed. RCPs, and any plans for that matter, go though a rigorous plan making process which is transparent, and offers local input via submissions and select committees. Additionally, the right of appeal of any decision to the Environment Court will be removed with this proposal. These issues have been acknowledged by the Government, with it citing that it is assessing support for such a move,[40] but it is unclear whether this assessment will have any bearing on a final decision. The risk such a strategy poses is that consent authorities may have very good reasons for not allowing aquaculture activity in certain areas of their respective CMAs, and this should not be compromised by a single minded central government strategy.

Resource Consents

[37] Environment Waikato, http://www.ew.govt.nz/Policy-and-plans/Regional-Coastal-Plan/#Heading6b.
[38] Environment Waikato Regional Coastal Plan http://www.ew.govt.nz/Policy-and-plans/Regional-Coastal-Plan/Regional-Coastal-Plan/16-Implementation-Methods-/165-Marine-Farming/1656-All-Other-Marine-Farm-Structures-Prohibited-Activity/, at 16.5.6.
[39] Cabinet Papers "Aquaculture Reform Paper 2- Further Proposals and Report Back" (July 2010) CAB Min (10) 24/10, at [60].
[40] Ibid, at [63].

A New Gold Rush?

The Reform Bill will remove s12A of the RMA[41] which currently prohibits aquaculture outside areas zoned as AMAs. As has been discussed above, AMAs have not had the desired result, and it is clear that they have been a significant impediment to consenting for new aquaculture space. With the removal of AMAs, aquaculture will come back under the normal RMA consenting and planning process; and consent authorities will be able to receive applications from day one of the reforms.[42] This potentially means that once again, consent authorities could be faced with another "gold rush" of applicants eager to be granted new consents for aquaculture. Added to this issue is the fact that there are many other competing interests in the CMA which presents a challenge for consent authorities in terms of making effective decisions regarding the CMA. Currently allocation is on a 'first in first served' basis and this has proved to be problematic in the past, and was a part of the reason for the moratorium in the first place.

The Government has proposed a number of allocation tools which the Minister of Conservation is to specify for consent authorities to utilise for managing high or competing demand for space in the CMA. These new allocation tools that have been proposed are: tendering (based on a financial offer, merit or a combination of both), auction- where the highest bidder wins the right to apply for consents, calling for applications over defined parts of the CMA, and ballot (random selection).[43]

Whilst these allocation tools may assist consent authorities in the short term, it does not provide a sound planning framework based on strategic spatial planning for the long term. Unfortunately the Government has acknowledged this, but has not decided to pursue such planning citing time and funding constraints.[44] Additionally, the Government has proposed a provision that would allow consent authorities to apply to the Minister of Fisheries and Aquaculture for a suspension on new applications for up to one year, should

[41] Above, n24 at [108].
[42] Ibid.
[43] Above, n39 at [129].
[44] Above, n24 at [28].

they not be able to cope with competing or high demand.[45] This, in my opinion, is an indication that the Government acknowledges the proposed reforms could create another gold rush, after all, the reason for the reforms is due to the fact no new space has been allocated for aquaculture since the prior reforms. These mechanisms may offer some assistance in the short term but make no attempt to fix fundamental issues relating to the allocation of space in the CMA where there is competing or high demand. Such issues relate to the long term viability of the CMA as not just a provider of economic benefit; but an important resource in terms of recreation and amenity, and, most importantly, as a unique ecosystem. In fact, the effects of marine farming are still not well understood in New Zealand, with much research still needing to be undertaken to assess the impact of aquaculture on, for example the seabed floor, and changes to the composition of the water column.[46]

As identified by the Environmental Defence Society, the only way we can expect sound, long term management of the CMA is through an integrated approach that recognises the benefits and effects of *all* activities within the CMA.[47] It is disappointing that the Government acknowledges that strategic spatial planning is the only viable long term solution for allocating space in the CMA, but has instead opted to add to the problem, instead of making a concerted effort to resolve it.

Investment Certainty

Issues around investment certainty and security of tenure are a feature of all natural resource tenures, and there is no doubt that they are important for investment and finance.[48] The Government again seeks to enhance both consents and private plan changes to afford increased investment security to the aquaculture industry. Included in the proposals is the ability for initiators of private plan changes to be entitled to apply for up to 80% of the space applied for, with the remaining 20% going to iwi to fulfil fisheries settlement

[45] Above, n39 at [124].
[46] Raewyn Peart and Kate Mulcahy *Managing the Marine Environment: An EDS Community Guide* <http://www.eds.org.nz/eresources/e-books.cfm>, at 127.
[47] Environmental Defence Society, Submission to the Ministry of Fisheries "Re-Starting Aquaculture, Report of the Aquaculture Technical Advisory Group" 15 December 2009. at 3.
[48] Above, n36 at [10].

obligations.[49] This will effectively mean that those who have the capital to initiate a plan change as soon as the legislation is passed, such as large corporate players in the fishing industry, will be able to secure significant portions of newly allocated space to the exclusion of other, smaller operators or late comers. Consent authorities have seen this as a positive move however, citing the need to reward private plan initiators for their efforts, and remove disincentives to invest.[50] This may be so, but it begs the question as to who will actually benefit from such a change.

The Government also sees it as necessary to dictate the duration of consents for aquaculture. Currently under the RMA an applicant can apply for a resource consent from anywhere between five and thirty five years.[51] Whilst the Government has acknowledged that most consents for aquaculture are granted for a minimum of fifteen years, it sees it as necessary to impose on consent authorities an obligatory term of twenty years for aquaculture consents.[52] Concerns have been raised that this removes the discretion of consent authorities to grant shorter duration consents where, for example, the effects of a proposed farm are unknown or not certain, and also removes the flexibility that consent authorities require.[53]

Another enhancement to consents for aquaculture proposed by the Government is that of the process for re-consenting. Currently consent renewals must satisfy the criteria of s104 of the RMA, which includes an Assessment of Environmental Effects (AEE). The reforms seek to remove this aspect of the re-consenting process, and also constrain a consent authority's scope of discretion to only consider effects not considered at the time the original consent was granted, or where the significance or scale of the effects has changed considerably over time.[54] Environment Waikato, in their submission on the TAG report, noted that under the current regime it is unlikely a council will decline a renewal if the current operation has not caused

[49] Above, n24 at [113].
[50] Environment Bay of Plenty, "Aquaculture Submissions", 14 December 2009. at [14].
[51] Above, n1 at s123.
[52] Above, n24 at [127].
[53] Above, n35 at [56].
[54] Above, n24 at [135].

any adverse effects during the course of its consent.[55] Further, the re-consenting provides an important opportunity for a council to assess the impacts of a consent holder's activities. Removal of the AEE and reducing the scope of a consent authority's discretion at the re-consent stage will put a strain on maintaining a balance between investment certainty, and the protection of the environment.[56]

To the Governments credit, recommendations by the TAG to make consents for aquaculture include a presumption of renewal, as well as controlled or restricted discretionary status to limit consent authority's discretion, have not been implemented in the reforms.[57] Such provisions would have the potential to give consent holders an interest in perpetuity to something which is essentially public space.[58]

Is the Government 'Picking a Winner'?

As aforementioned, when the RMA was enacted its purpose was to not pick winners. This is reflected in the way that it operates as an effects based statute in which local and regional authorities can dictate what effects they want to control, but not the activities that produce them. Some have criticised the TAG report due to the fact the purpose of the report was how to "normalise" aquaculture within the RMA.[59] It is quite clear that aside from recommending steps to safeguard fishing rights (which I have not discussed), there is little recognition of other activities carried out within the CMA, and how aquaculture may integrate with them. The report also makes no mention of any consultation undertaken with environmental groups in the course of preparing the report,[60] or the potential effects of increased aquaculture on the CMA.

Additionally, a number of the recommendations, such as enhanced consents for aquaculture and making obligatory consent durations have been

[55] Above, n36 at [10].
[56] Above, n47 at 9.
[57] Above, n39 at [148].
[58] Above, n10 at 181.
[59] Above, n3 at 7.
[60] Royal Forest and Bird Protection Society, Submission to the Ministry of Fisheries "Re-Starting Aquaculture, Report of the Aquaculture Technical Advisory Group" 12 December 2009, at 1.

adopted by the Government in the reforms, and these clearly favour aquaculture above other activities in the CMA. Instead of normalising aquaculture with the RMA framework, the reforms will remove what were insurmountable obstacles impeding aquaculture development, to a regime that actively promotes aquaculture over other activities in the RMA.[61]

Conclusion- the outlook for the future.

It is abundantly clear why there needs to be change to aquaculture policy in New Zealand. The old regime, with a dual permit system was a time consuming and uncertain process, which ultimately led to a gold-rush of applications. The resulting moratorium and the introduction of AMAs put aquaculture at a distinct disadvantage compared to other activities in the CMA, and council's had little incentive to accommodate AMAs in their RCPs which quite clearly stymied any new development of aquaculture.

The proposed reforms however, go far beyond what is required to "kick start" aquaculture, which was purpose of the TAG report. Intervention by the Government, such as the insertion of provisions directly into plans and avoiding a transparent process overseen by an independent body is of great concern. Additionally, altering RCPs by legislation to accommodate aquaculture completely disregards the plan making process, and the comprehensive local and regional consultation required to implements those plans. Tools already in the RMA provide adequate avenues for central government intervention in a transparent manner.

It also seems inevitable that in areas where there is significant demand for aquaculture space that there will be an influx of applications; after all this is the reason for the removal of AMAs. The Government appears to have acknowledged this by providing a suspension tool for councils to use should they experience unforeseen demand they cannot cope with. But this will eventually only serve to exacerbate the underlying issue of allocation within the CMA, and in no way addresses it. This 'band aid' approach to planning may kick start the aquaculture industry, but the time will come when a strategic

[61] Above , n35 at [2].

integrated approach to spatial planning in the CMA will be a necessity (if that time has not already come). It is a shame the Government hasn't attempted to rectify these issues comprehensively, before adding to the problem.

These reforms clearly place aquaculture above other activities in the CMA. This can be seen in the way the reforms aim to give more certainty to marine farmers through resource consents in terms of duration and re-consenting, which non-marine farming consents will not enjoy. It also means less flexibility on the part of the consent authority and doesn't acknowledge the need maintain a balance between certainty and protection of the environment.

There are many other issues which I have not canvassed in this essay. Such issues include the tension between quota holder's property rights under the Fisheries Act[62] and other users of the CMA; settlement of Maori fishery claims; and an appropriate charging regime for users of the CMA. These are just a few of the many issues which need to be resolved currently and in the future, should New Zealand expect to see a cohesive management system for the Coastal Marine Area.

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