Re-Starting Aquaculture

Report of the Aquaculture Technical Advisory Group

15 October 2009

Contents

Highlights

The new regime will enable the sustainable economic growth of aquaculture through the following actions.

1. Strengthen the role of government in setting national direction by appointing a Minister responsible for Aquaculture and establishing an Aquaculture Agency within the Ministry of Fisheries to:

    - Provide policy direction through an Aquaculture Strategy
    - Provide national consistency through national standards

2. Return to more flexible approach to planning by:

    - Removing ‘prohibition’ on aquaculture and use flexible zoning
    - Improving incentives to plan through an Aquaculture Fund
    - Simplifying and streamlining the planning process

3. Enhance coastal permits for aquaculture by:

    - Increasing certainty to encourage investment
    - Simplifying and streamlining the consenting process

4. Improve the allocation of space for aquaculture by:

    - Using full set of RMA planning tools to allocate space
    - Providing alternatives to “first in, first served” for managing high demand

5. Increase the resources available for enabling aquaculture development by establishing an Aquaculture Fund maintained through Tender proceeds and an Aquaculture Levy

6. Streamline the Undue Adverse Effects test (UAE) by:

    - running parallel process to the RMA
    - allowing early agreements
    - early sharing of information between the fisheries and RMA processes

7. Deliver the Maori Commercial Aquaculture Settlement by:

    - encouraging early dialogue
    - ensuring the settlement is delivered within and outside of zones
    - providing government with the tools to create additional space

8. Ensure a decisive transition through the use of legislation and regulations.

9. Undertake a targeted consultation process with iwi, regional councils, and industry during the development of policy and drafting of the legislation.

Introduction

The government is concerned that the "complexity, cost, and uncertainty of the current regime, along with poor incentives for development, are impeding aquaculture growth. No new space has been created under the 2004 aquaculture reforms and it is unlikely that any new space will be created for several more years. The ability to research and innovate is being stifled by inflexible rules that limit the ability to advance new technologies and higher value species. This represents a significant opportunity cost in terms of lost aquaculture development and income."[1]

A Technical Advisory Group (TAG) was established to provide the government with a report with recommendations "to enable the development of sustainable aquaculture in New Zealand."

In developing our recommendations the TAG considered the following issues contained in our terms of reference:

- The type of planning regime best suited to managing aquaculture in New Zealand
- Allocation of coastal space for aquaculture versus other competing uses and interests
- Recognition of existing uses, including fishing, which may be displaced by aquaculture development
- Allocation of available space between aquaculture interests
- The roles and responsibilities that central government, local government and, potentially, other entities should have in providing for and regulating aquaculture
- The type of occupation right that is necessary to support long-term investment in the industry
- Appropriate provision for cost recovery and resource rentals.

See Appendix A for the detailed terms of reference.

The TAG was chaired by the Hon Sir Douglas Kidd. The members of the TAG were Mike Burrell, Dennis Bush-King, Mark Farnsworth, Nici Gibbs, Keir Volkerling, and Kirsty Woods.

The TAG began work on reviewing the aquaculture regime in early August 2009 and met every week during August, September and early October. We received technical advice from officials from the relevant Ministries and were provided with substantial background information. The TAG also sought and obtained technical advice from consent authorities, academic staff, industry and other agencies.

[1] Engagement Letter to the TAG.

As the Minister for the Environment noted in setting up the TAG:

> "the RMA is not working for the aquaculture industry. The changes made [in 2004] have stalled the industry and need to be revisited."

The report looks at how the RMA and other parts of the regulatory regime for aquaculture can be reformed so that they *do* work for the aquaculture industry while continuing to ensure environmental sustainability.

The underlying purpose of our report is to "normalise" aquaculture within the RMA.

This approach is well summarised in a recent article by Hamish Rennie, an expert on aquaculture regulation:

> "In New Zealand, aquaculture legislation dates back to the Oyster Fisheries Act 1866, but marine farm planning was not introduced until the Marine Farming Act 1971 (MFA71).This Act's focus on planning for a specific activity, marine farming, ended with the integrated, effects-based Resource Management Act 1991 (RMA). The RMA amendments in 2005, re-introduced activity based planning for marine farming. The abject failure of the activity-based approach has led the past and current governments to identify reformation of aquaculture legislation as a high priority…"[2]

We agree that the 2004 amendments have not achieved a good outcome for aquaculture. Indeed, the first part of the new millennium has been something of a lost decade for aquaculture in New Zealand.

In writing this report the TAG has been conscious of the government's commitment to improving regulatory efficiency, as noted in the terms of reference to us. This has been challenging given the complexities of a multi-statute[3] regulatory system, with multiple agencies[4] and two levels of governance (central and local).[5]

Where possible we have eliminated steps, introduced parallel processes to compress timeframes, and rationalised cost (such as centralising the aquaculture functions within government).

In addition, we have recommended enhancing the role of government in the implementation of the regime. This has included recommending the appointment of a responsible Minister and establishing an aquaculture agency within the Ministry of Fisheries to drive the implementation of these reforms.

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[2] Hamish G. Rennie (2009) "Aquaculture Management Areas - an example of why we should not rush to ditch the RMA's effects-based approach?", *Planning Quarterly*, September 2009, 14 – 16

[3] The Aquaculture Reform Act 2004 came into force on 1 January 2005. It amended five existing Acts - the: Resource Management Amendment Act (No 2) 2004; Fisheries Amendment Act (No 3) 2004; Conservation Amendment Act 2004; Biosecurity Amendment Act 2004; Te Ture Whenua Māori Amendment Act 2004. It also created two new Acts: Māori Commercial Aquaculture Claims Settlement Act 2004; and Aquaculture Reform (Repeals and Transitional Provisions) Act 2004.

[4] There are the three regulatory agencies for aquaculture: Ministry of Fisheries (operating under the Fisheries Act); Ministry for the Environment (operating under the RMA); and Minister of Conservation (operating under the RMA and responsible for the New Zealand Coastal Policy Statement).

[5] Regional Councils are responsible for the implementation of the Aquaculture legislation, with national guidance provided by the three "aquaculture agencies" – MFish, MfE, and DoC.

We have faced the reality that aquaculture development costs. For this reason, we have proposed an Aquaculture Fund and recommended introducing an Aquaculture Levy. Regional councils[6] and the Aquaculture Agency will be able to access this fund to undertake aquaculture planning, and therefore reduce the disincentive to plan for aquaculture.

There has been some discussion within the TAG about whether the regime we are recommending could be further streamlined and simplified. We don't believe this is possible without going to the heart of the principles of the RMA and Fisheries Act.

Re-starting aquaculture will require some initial up-front costs. We are forthright in stating this, since we are confident that once aquaculture is again flourishing, the revenue generated will compensate for this modest outlay of government expenditure by an order of magnitude.

In the medium term the growth potential of aquaculture has been estimated in a recent Ernst and Young report to be in the order of between $1.7 to $2.2 billion *per annum* by 2025 if some basic business practices are followed, further water space is made available and there is flexibility for farm conversions in some existing space.[7] Evidence for this potential also exists in pre-2001 domestic growth rates and international growth rates (around 8% per annum).[8]

The result of our recommendations will be a more effective regime which recognises the need to expand aquaculture opportunities without sacrificing the environmental standards and public character of the marine commons, and recognises the rights of iwi, fishers, and other users of the coastal space.

If our recommendations are implemented we are confident this will re-start New Zealand's aquaculture industry and put it back onto a path of sustainable economic growth.

Acknowledgements

We would like to thank officials at the Ministry of Fisheries, Ministry for the Environment, Department of Conservation, Ministry of Economic Development, Te Puni Kōkiri, State Services Commission, and the Department of Prime Minister and Cabinet for their assistance in providing advice that helped shape the development of this report. The TAG also thanks and acknowledges all those persons from various organisations who gave up their time to respond to informal requests for background information and advice. Any errors or omissions remain ours.

[6] In this document reference to "Regional councils" includes Unitary Authorities.
[7] Ernst and Young (2009) *New Zealand Aquaculture: Industry Growth Scenarios*
[8] FAO (2009) *The State of World Fisheries and Aquaculture - 2008 (SOFIO),* FAO Fisheries and Aquaculture Department, Rome

Next steps

We recommend that the government undertake a targeted consultation process with iwi, regional councils, and industry during the development of policy and drafting of the legislation.

The Hon Sir Douglas Kidd
Chairman

Recommendations

The TAG recommends the following:

Introduction

1. The government undertakes a targeted consultation process with iwi, regional councils, and industry during the development of policy and drafting of the legislation.

Chapter 1 Active role for government

2. The Prime Minister be invited to consider clarifying which Minister has overall responsibility for aquaculture.

3. Establish an Aquaculture Agency (AQA) within the Ministry of Fisheries as soon as possible.

4. Provide the Minister with powers to insert provision into regional coastal plans.

5. Establish and administer an Aquaculture Fund.

6. Introduce an Aquaculture Levy to maintain the Aquaculture Fund.

7. AQA to develop an Aquaculture Development Strategy to set out the government's policy for aquaculture development.

8. Provide national consistency through National Environmental Standard for aquaculture developed by AQA and MfE.

9. Develop a specific policy on aquaculture within the New Zealand Coastal Policy Statement to better provide for aquaculture development.

Chapter 2 Re-setting aquaculture planning

10. Remove the prohibition on aquaculture outside AMAs, and remove all associated provisions including AMAs, Excluded Areas and Invited Private Plan Changes

11. Provide Aquaculture Zones as an optional planning tool with UAE test and settlement obligations applied at planning stage, with tendering as the default allocation mechanism.

12. Deem existing AMAs to be Aquaculture Zones.

13. Enhance council decision making on plans by:

    - Requiring all Councillors and Commissioners hearing RMA matters be accredited under RMA section 39A.
    - Requiring that at least one member of a hearings panel be an independent commissioner drawn from a list of approved experts.
    - Maintaining a list of accredited independent commissioners who have particular expertise or experience in coastal matters, for use on planning hearings, consent hearings and Boards of Inquiry.

14. Enable a private plan change applicant to receive 80% of aquaculture space created by the plan change (in areas where pre-commencement obligations have been settled).

15. Enable parallel processing of private plan changes and resource consents.

16. Review section 144 of the RMA to ensure aquaculture matters can be called in.

17. Review the appropriate role of the Minister of Conservation in the coastal marine area as part of Phase II of the RMA reforms.

18. Integrate the shellfish water classification process into the new aquaculture regime by ensuring that it occurs in parallel to the RMA and UAE processes.

19. Allow NZFSA to access the Aquaculture Fund to pay for the upfront costs of shellfish water classification.

Chapter 3 Enhancing consents for aquaculture

Legislative amendments

20. Establish an aquaculture consent register under the Fisheries Act.

21. Provide an ability to register a lease or sub-lease of a resource consent.

22. Enable consents to be caveated so they cannot be sold without lender's approval, and link to Personal Properties Security Register.

23. Cross-link the aquaculture consent register to the Personal Property Security Register.

24. Provide a separate consent category for experimental aquaculture

Regulations

25. Make approval for occupation explicit within the coastal permit.

26. Provide a default minimum term of 20 years for aquaculture consents.

27. Enhance coastal permit renewal by:

    - Simplifying the renewal process;
    - Making a new consent for an existing aquaculture activity a "controlled" or "restricted discretionary" activity as a default;
    - Provide that an applicant for a new consent to continue an existing activity is deemed to have applied on the same basis as the terms and conditions of the original consent.

28. Use regulations to ensure all regional coastal plans are flexible enough to enable self-fed and supplementary-fed aquaculture (Chapter 3.3).

29. Provide that consents for aquaculture lapse in 3 years if not given effect.

30. Specify a standard set of information requirements for aquaculture consent applications (including UAE assessments).

Good practice

31. Encourage use of evergreen consents.

32. Provide template consents for different types of aquaculture development.

Enhance process for obtaining a coastal permit

33. Enhance the standing of council hearings for resource consents by limiting the evidence that can be presented in appeals so that new evidence can be presented only with leave of the Court.

Chapter 4 Allocating space for aquaculture

34. Provide Councils with the ability to manage demand by using allocation mechanisms other than "first in, first served".

35. We recommend that the RMA is amended to provide a statutory test to trigger the consideration of alternative allocation tools. This test will be deemed into all coastal plans and will provide councils with the opportunity to override that part of the RMA which currently means that councils must accept and process well prepared applications

36. We recommend that tools (including the following) be deemed into coastal plans by the amending legislation:

- Tendering (including weighted attributes tendering)
- Preferential allocation
- Balloting
- Combining applications and hearing them together
- Rules to change activity status once a threshold is reached

Chapter 5 Cost recovery and charges

37. That cost recovery for processing of resource consents and private plan changes, monitoring, and other council services continue.

38. That coastal planning for aquaculture be paid for through an Aquaculture Fund administered by the Aquaculture Agency.

39. That the Aquaculture Fund be maintained through the introduction of an annual Aquaculture Levy.

40. That the levy be set at a reasonable level of between $100 and $200 per hectare per annum. An appropriate basis for charging for offshore farms would have to be devised

41. That this levy would replace coastal occupational charges for marine farmers, so section 64 of the RMA is amended so that obligations on marine farmers are removed.

42. That the levy is reviewed every 5 years by the Minister.

43. That the broader issue of coastal occupational charges for other occupiers of the CMA be considered as part of RMA Phase II.

Chapter 6 Streamlining interface between aquaculture and fishing

44. Ensure information held by the Ministry of Fisheries on fishing and fisheries resources is made available during the preparation of a coastal plan change and that regional councils are provided with the information.

45. In relation to the UAE assessment during preparation of a plan change, align Fisheries Act and RMA processes (while retaining separate statutory decision-making) with respect to steps and timeframes for notification, submissions, hearings, and announcements of decisions.

46. Repeal the High Court merit appeal on UAE decisions and replace with appeal provisions that match the equivalent RMA appeals, with provision for combined hearings.

47. Provide that in an aquaculture zone where development has not reached any limits set in the plan, an aquaculture consent applicant does not need to address UAE on fishing, unless the plan provides otherwise.

48. Provide a framework for negotiations between affected commercial fishers and aquaculture consent applicants, with a UAE assessment undertaken by MFish if agreement cannot be reached or where applicant chooses to go directly to a UAE assessment.

49. That following a finding of the UAE on commercial fishing, parties involved in negotiating an aquaculture agreement be given three months to register an agreement, with the ability to apply for a one month extension if demonstrable progress has been made but further time is required to secure the agreement.

Chapter 7 Maori Commercial Aquaculture Settlement

50. Provide for 20% of representative space available for aquaculture in Aquaculture Zones to be transferred to the trustee for allocation to iwi

51. Develop, in consultation with iwi and the trustee, the following options for providing 20% of space outside Aquaculture Zones:

- Provide for 20% of space covered by a new resource consent (outside Aquaculture Zones) transferred to the trustee for allocation to iwi.
- Provide for a regional approach using alternative allocation tools.
- Crown may provide for new space “up-front”.

52. Support the amendment in Aquaculture Legislation Amendment Bill (No.2) that enables applicants and iwi, with the assistance of the trustee where iwi agree, to reach agreement on representative space.

53. Consult with iwi and the trustee on a revised aquaculture regime before finalising the policy for legislative drafting.

Chapter 8 Transition arrangements

54. Work with regions to prepare them for transition to the new regime.

55. Fast-track the transition process by deeming through legislation or regulation Aquaculture Zones (where the UAE has been undertaken) in selected regions.

56. Where applications are being processed under old aquaculture legislation, consider decisive action to transition them into the new regime.

57. To address pre-moratorium applications “frozen” under s150B(2) of the RMA, either:

- Deem those applications that applicants wish to proceed as lodged on the first day of our new regime (rather than processed under the old legislation); or
- If some or all of these applications represent a major impediment to an effective re-start for aquaculture, consider extinguishing them by legislation.

1. Active role for government

1.1 Introduction

We are conscious in writing this report that it has been 5 years since the aquaculture reforms were introduced. In that time not a single Aquaculture Management Area (AMA) has been applied for, and not a single hectare of new aquaculture space has been created under the 2004 amendments. We understand the government's desire to re-start the sustainable growth of aquaculture as quickly as possible. That is why we have started with a chapter on actions that the government can take today to simultaneously fix the overall regime *and* re-start aquaculture as quickly as possible.

Consent applicants can be received on day one of the new regime. We estimate that the first new space under the new regime could be approved within a year of enactment.

The following two actions (1.2 and 1.3) should happen immediately.

1.2 Appoint a Minister responsible for Aquaculture

Under the current regime there is no single Minister with formal responsibility for aquaculture. We have too many cooks and no recipe. It is critical to the success of the regime that there is Minister with clear responsibility for the overall coordination of aquaculture policy and regulation.

The TAG recommends that the Prime Minister be invited to consider clarifying which Minister has overall responsibility for aquaculture (hereafter referred to as "the Minister").

1.3 Establish an Aquaculture Agency within Ministry of Fisheries

The TAG identified one of the main problems with the current regime is that it lacks a lead agency within government. Aquaculture cuts across a number of different departmental responsibilities and to date has either fallen between the cracks as a lesser priority or has tended to be a case of decision-by-committee, leading to the proverbial camel we have today.

We recommend that there be a clearly identified responsible Minister and responsible department. These will provide the lead role for government in setting policy and national environmental standards, as well as providing technical support to regional councils planning for aquaculture. This does not alter the statutory functions of regulatory departments, or negate the need for normal inter-departmental co-operation as the need arises.

Purpose

The purpose of the Aquaculture Agency (AQA) is to promote the sustainable economic growth of aquaculture.

Functions

The functions of AQA are as follows.

(a) Policy

AQA will have a policy development and monitoring role. It will be responsible for:

- Providing advice to the Minister.
- Working with other departments on amendments to the RMA and other relevant legislation.
- Working with Regional/Unitary Councils on transition arrangements.
- Developing the necessary regulations.
- Working with the Department of Conservation to amend the New Zealand Coastal Policy Statement (NZCPS).
- Preparing an Aquaculture Development Strategy for the development of sustainable aquaculture.
- Preparing (in consultation with MfE) a National Environmental Standard (NES) for aquaculture.

(b) "Watch-dog" role

AQA will be a national "watch-dog" on the implementation of the Aquaculture Strategy.

(c) Technical support

Chapter 2 sets out the TAG's recommended planning regime. A key part of this is the technical capacity that AQA is able to draw on to provide additional capacity to regional councils when they are planning for aquaculture. This will speed up the planning process through additional expertise and resources without undermining the primary planning role of regional councils. AQA may also provide technical support to councils in complex or large consenting cases where additional capacity is required.

(d) Development

If government wishes to undertake a private plan change it can utilise AQA to undertake the technical work required and then make the request. AQA could also directly apply for aquaculture consents. It may do this alone or in partnership with industry/iwi. This will involve establishing relationships with industry, iwi, Takutai Trust, and other relevant agencies

(e) Referrals to EPA for call-ins

The AQA can make referrals to the EPA for call-ins to a Board of Inquiry for plan changes and/or consents which are considered nationally significant.

(f) Advising and providing technical support to Minister to insert provisions into Regional Coastal Plans .

AQA will advise the Minister on situations where there may be a national interest in inserting appropriate provisions into coastal plans. The Minister will decide whether to refer this to the Minister for the Environment to insert provisions into plans.

(g) Maintaining a list of coastal management experts

The AQA will maintain and keep current a list of coastal management experts which councils and the EPA may draw on for appointment of commissioners.

(h) Administration of Aquaculture Fund

The AQA will be responsible for the administration of the "Aquaculture Fund" (see below). The AQA will not be entitled to access the Aquaculture Fund except with the prior consent of the Minister.

(i) Administration of an aquaculture resource consent register

The AQA will be responsible for developing and maintaining an aquaculture resource consent register (see Chapter 3). It may do this directly or by sub-contracting.

(k) Best practice

The AQA will develop best practice guidelines in conjunction with other relevant agencies.

This workload will require appropriate resourcing. It will be busy once the new legislation is enacted, so it is important that AQA is established and running well before the new legislation commences. For this reason we recommend that work commence as soon as possible on the establishment of AQA.

Composition

The TAG envisages that AQA will be composed of a small core team, with technical functions contracted in as needed. We have settled on this flexible model given the likely variability and the changing nature of the workload for the organisation.

Funding

AQA will be an output class in Vote Fisheries.

1.4 Strengthening the government's development role

Under the new regime the government will have the following tools:

1.4.1 Ability to initiate private plan changes through AQA working with regional councils.

Without a dedicated aquaculture resource central government will not be effective in initiating private plan changes. AQA could access to "working capital" for this process through the Aquaculture Fund, with the consent of the Minister. It should be able to initiate plan changes irrespective of the whether a regional coastal plan is operative.

1.4.2 Ability to make consent applications for aquaculture sites

The AQA should be able to make consent applications for aquaculture space. This will give government the option of applying for space directly should it wish to make new space available promptly, and will enable government to

- Road-test the reforms
- Make space available to iwi

1.4.3 Ability to call-in plan changes and consent applications to a Board of Inquiry

The new provisions in the RMA make it possible for the applicant or council to approach the EPA and ask that a matter be referred to a Board of Inquiry. The AQA will also be able to seek a recommendation for call-in from the EPA. The decision will rest with the Minister of Conservation (the Minister responsible for coastal management).

1.5 Minister to have powers to use statutory regulations for RMA planning

The current law gives the Ministers for the Environment and Conservation powers to direct reviews of relevant RMA plans. We propose that these powers be widened to give Ministerial power to insert appropriate provisions into these plans where there is a national interest in doing so. Because plans are a form of subordinate legislation and rules have the effect of statutory regulation, we would propose that the Ministers exercise any such power by Order in Council in the form of a statutory regulation. Section 360 of the RMA would need to be amended and a requirement to consult should be included. However there would be no appeal rights but submissions could be made to the Regulation Review Select Committee.

This option allows government to draft plan provisions that will be read into regional coastal plans, as were the existing Marine Pollution Regulations. In the regional context this is a new approach to plan development and the exercise of Ministerial powers, but provided government can perform in consultation with interested parties

as necessary it will substantially compress timeframes and gives more certainty to outcomes.

There are some remaining elements that the TAG considers critical to parts of the new regime, that are not able to be included in an NES due to the restrictions of the RMA. These characteristics are set out in Chapter 3 and relate to enhancing coastal permits for aquaculture.

1.6 Aquaculture Fund

One of the greatest barriers to timely planning is a lack of funding. In theory councils may re-coup some of their planning costs through tendering space. In reality the time between the up-front planning costs and any recovery are such that Councils must carry significant "working capital" costs.

The TAG recommend that the current "aquaculture planning fund" be formalised as a contestable Aquaculture Fund which regional councils can access for the purposes of undertaking the technical work required for planning for aquaculture. As noted earlier, the AQA will not be entitled to access the Aquaculture Fund except with the prior consent of the Minister.

Advances from the Fund could be for:

- Planning
- Processing complex/large-scale consents
- Any other technical work necessary for enabling aquaculture (e.g. scientific investigation of environmental effects)

The Fund will be administered by AQA. The Fund will be maintained by:

- Tender revenue where the advances have been made to regional councils;
- An annual Aquaculture Levy (see Chapter 5).

The Fund will create benefits for all farmers (existing and future) by supporting planning that is responsive to their changing needs (e.g. technology and species).

1.7 Aquaculture Development Strategy

The TAG has identified the lack of a coherent, overarching, aquaculture policy framework as a significant impediment to aquaculture development. This is felt acutely in a sector which has complex regulatory arrangements and multiple regulators (e.g. regional councils, the Ministry of Fisheries, and the Minister of Conservation).

The TAG considered a range of options for resolving this problem. We note that it is a common issue in many OECD countries and has led to the establishment of Aquaculture Acts, National Policies and National Strategies in a number of countries, including Australia, Canada, and Norway.

We considered the benefits of developing an Aquaculture Act for the New Zealand situation. While there are benefits (such as providing legislative coherence and a 'hook' on which to hang aquaculture regulations and policies[9]) we were of the view that the complexities of the RMA and Fisheries Act meant that it would be time-consuming to develop an Aquaculture Act that interfaced with existing legislation operating in the CMA.

We then considered a National Policy Statement (NPS) for aquaculture. This has many attractions; particularly that it would have standing under the RMA and would provide a useful link to the New Zealand Coastal Policy Statement. However, the TAG was of the view that developing an NPS would also be time-consuming and therefore did not fit the government's desire for prompt action. We recommend that the development of an NPS for aquaculture be a medium-term objective once the first phase of reform has been implemented. In the meantime, we consider it essential that the NZCPS include paragraphs relating to aquaculture (see 1.9).

In the end the TAG settled on the combination of an Aquaculture Development Strategy, National Environmental Standard for aquaculture (see next section), and some Aquaculture Regulations as the most pragmatic mix of national level instruments for our purposes.

The benefit of an Aquaculture Development Strategy is that it is relatively quick to develop and implement (we envisage it being launched simultaneously with the new legislation) and yet provides the strategic and policy coherence that is currently lacking. The model we have in mind is the *New Zealand Energy Strategy to 2050 – Powering Our Future*[10], which has proven to be a very effective tool for government in the energy sector.

The Aquaculture Agency would prepare the Aquaculture Development Strategy and oversee its implementation. The Strategy should dovetail with the aquaculture sector's strategy[11].

The overarching purpose of such a Strategy would be to promote the sustainable economic growth of aquaculture in New Zealand. It would:

- Formally set out the government's policy for aquaculture
- Provide national guidance to regional councils
- Provide an overarching framework for aquaculture that gives coherence to the variety of different regulators operating under different statutes.

[9] See South Australia model for example – http:/www.pir.sa.gov.au/aquaculture http://www.legislation.sa.gov.au/LZ/C/A/AQUACULTURE%20ACT%202001.aspx
[10] See http://www.med.govt.nz/upload/52164/nzes.pdf
[11] The New Zealand Aquaculture Strategy. See http://www.aquaculture.org.nz/about-us/sector-strategy/

1.8 National Environmental Standard (NES) for Aquaculture

Another gap identified by the TAG is the absence of clear national environmental standards for aquaculture. These would give councils clarity around the environmental parameters for aquaculture development and would provide industry with national consistency in terms of aquaculture management.

These standards could include:

- environmental "bottom lines;
- information standards;
- standardised conditions, and
- allocation tools.

Historically NES development has been slow. We therefore recommend that the development of an NES be given priority and be developed by AQA in consultation with the Ministry for the Environment in parallel to the law reform process.

Monitoring of NES is currently done by the Ministry for the Environment. The EPA may be a more appropriate agency to undertake this task.

Where the NES is incapable of implementing the changes we seek, regulations under section 360 of the RMA should be used.

1.9 Role of New Zealand Coastal Policy Statement (NZCPS)

The NZCPS sets the national policy framework for the coastal marine area to which regional councils must give effect.

The Proposed New Zealand Coastal Policy Statement 2008 included the following policy relating to aquaculture:

> **Policy 18 Crown interest in aquaculture activities**
>
> Policy statements and regional coastal plans shall have regard to the Crown's interest in making opportunities available for aquaculture activities in the coastal marine area, where such use and development would meet the purpose of the Act.

The TAG understands the Minister of Conservation has received a recommendation from the Board of Inquiry convened for the purpose of reporting any changes, and that these recommendations are still being considered.

The current proposed policy does not articulate clearly what the Crown's interest is in aquaculture and is of little benefit, given regional plans are required to give effect to any such policies.

The TAG recommends that government develop a specific policy on aquaculture within the NZCPS. We hesitate to engage in detailed drafting but we think it might look something like this:

"In considering plan provisions and consents relating to aquaculture regional councils shall have particular regard to the Crown's interests in promoting sustainable economic development that improves the wellbeing of New Zealanders. In developing coastal plans and policies, councils shall consider the following:

- Any government strategies for aquaculture
- Potential benefits to the regional (and national) economy from aquaculture development
- Potential benefits from Maori involvement in aquaculture
- The need for aquaculture to be environmentally sustainable
- The suitability of the region for aquaculture development
- Enabling better use of any existing aquaculture space"

2. Re-setting aquaculture planning

The TAG considers that aquaculture planning should continue to take place under the RMA coastal planning framework in order to ensure effective integration with other uses, activities and values in the coastal marine area. However, we recommend a number of enhancements to facilitate timely and effective planning for aquaculture. Most of these enhancements are not specific to aquaculture and should benefit coastal planning generally.

We note that there is no single "ideal" coastal plan for aquaculture. It is important to retain a full range of planning approaches and pathways for aquaculture, so that regions can adopt an approach that best suits local circumstances. In regions with significant demand for aquaculture a plan that makes specific provision for aquaculture is likely to be required, whereas regions with low aquaculture potential should be able to manage aquaculture activity through standard resource consent processes. Even in regions that do not have specific zones or plan provisions for aquaculture, aquaculture development never occurs outside the context of planning provisions of some sort.

We emphasise that a sound regulatory framework is only one aspect of a more enabling planning environment. Guidance on good planning practice and an adequate level of resourcing for coastal plan changes is also crucial.

2.1 Equal treatment for aquaculture planning

The current RMA regime treats aquaculture more restrictively than other coastal activities by prohibiting it outside AMAs. This means that a plan change must be undertaken before resource consents for aquaculture activities can be applied for, significantly increasing costs and uncertainty for aquaculture development in comparison to other activities. The TAG recommends that the current statutory prohibition of aquaculture outside AMAs should be deleted. This would entail amending the RMA to remove the prohibition in section 12A. Consequential amendments would be required to remove associated provisions such as Excluded Areas and Invited Private Plan Changes, which both become unnecessary if the prohibition on aquaculture outside AMAs is removed. Consequent amendments to the Fisheries Act and Maori Commercial Aquaculture Claims Settlement Act would also be required.

The effect of these amendments would be to "normalise" aquaculture in terms of RMA planning processes. Aquaculture would be treated largely in the same way as any other activity (subject to the specific non-RMA requirements of the Fisheries Act and aquaculture settlement). Councils would have access to the full range of coastal planning tools, including objectives, policies and rules. They could choose to provide specific policies and rules for aquaculture in different parts of the coastal marine area (i.e. a broad zoning approach). Councils would retain the ability, through their plans, to prohibit aquaculture (or any other activity) in specific areas, provided that the prohibition can be justified in terms of section 32 of the RMA.

2.2 Full menu of plan change routes

Plan changes related to or affecting aquaculture development include the following:

- changes to provide for an Aquaculture Zone
- changes to other planning provisions that apply to aquaculture (e.g. provisions about species or technologies)
- changes to general coastal plan provisions, e.g. general rules about structures.

In relation to all these types of plan changes, we recommend that the full menu of RMA mechanisms should be available to plan for aquaculture, as for all other activities. These mechanisms are:

- Standard regional council plan change process (RMA Schedule 1, Part 1)
- Standard private plan change (RMA Schedule 1, Part 2)
- Call-in of regional council plan change or private plan change, with decision by Board of Inquiry or Environment Court (decision to call-in taken by Minister of Conservation after considering criteria for national significance).

We also note that Ministers can direct a council to prepare a plan change under RMA section 25A or review a coastal plan under section 25B. This mechanism remains available if the government wishes to ensure that planning for aquaculture is actioned in a particular region.

The repeal of the prohibition on aquaculture outside AMAs means that it is likely that an applicant outside an aquaculture zone will apply for a resource consent rather than a private plan change, although this will depend on the aquaculture provisions of the coastal plan of the particular regional council.

The TAG is keen to ensure that RMA planning, including planning for aquaculture, occurs in a timely manner and results in high quality plans which are supported by local communities. We note that some improvements to the planning process have been made in the Resource Management (Simplifying and Streamlining) Amendment Act 2009 and that further improvements are being considered in other work streams for the Phase II RMA reforms. The enhancements that we propose in our report complement these measures.

2.3 Aquaculture Zones as an optional planning tool

Regional councils, in conjunction with industry and the community, will have the option to use planning methods to provide specifically for aquaculture. Planning methods may range from high level frameworks related to aquaculture (where the UAE and settlement will need to be resolved for each coastal permit) through to specific Aquaculture Zones (where the UAE and settlement have been resolved).

The purpose of an Aquaculture Zone is to actively plan for aquaculture development in regions where there is likely to be greater demand for aquaculture space. A Zone can provide aquaculture developers, local communities and councils with more confidence over where and how aquaculture can develop in that region. Resource consent applications for aquaculture would still be permitted outside the zone, unless otherwise constrained, but would be easier to obtain in a zone because a lot of the issues, including the UAE test and settlement obligations, would have been resolved during the establishment of the zone. The significant characteristics of an aquaculture zone as compared with aquaculture development in any other part of the coastal marine area are as follows.

An Aquaculture Zone differs from an AMA in that the former:

- Is not compulsory
- Is not necessarily exclusive to aquaculture
- Provides greater flexibility as to how much aquaculture may occur in a zone.

Aquaculture Zones could range from very site-specific (similar to current AMAs) through to high level zones where aquaculture is one of a mix of different activities. This provides the flexibility that aquaculture will require as it develops as an industry. For example zones may provide for “rotational farming”.

An Aquaculture Zone will provide for a maximum amount of aquaculture within it. This will be specified both in area and / or in terms of environmental carrying capacity (e.g. biomass limits).

Aquaculture zone	**Elsewhere in CMA**
▪ UAE test is applied to zone during planning. Applicant does not need to address fishing issues when obtaining a resource consent	▪ Fishing impacts and UAE test addressed at the time of the resource consent process
▪ Settlement issues are addressed during planning. 20% of available aquaculture space within the zone is made available for settlement	▪ Settlement issues addressed at the time of the resource consent process
▪ Plan sets out how space for aquaculture will be allocated within zone	▪ Allocation by statutory default (first in first served) unless otherwise provided in plan or other intervention (e.g. regulation)
▪ Aquaculture activities likely to be controlled or discretionary	▪ Aquaculture activities likely to be discretionary or non-complying
▪ Specific plan provisions (including objectives, policies and rules) related to the zone apply to aquaculture applications	▪ General plan provisions, as well as any specific aquaculture provisions (including objectives, policies and rules) apply to aquaculture applications

We recommend that a simple, non-prescriptive empowering amendment be made in order to link the establishment of an aquaculture zone with the undertaking of a UAE test and identification of settlement assets during the planning process.

We consider that the concept of "rewarded effort" should apply in the establishment of Aquaculture Zones, whether by a council or private applicant (including, if desired, central government).

We recommend that existing AMAs should be deemed to be Aquaculture Zones, as this retains a similar level of security for existing consents as was provided in the 2004 reforms (where all existing farms were deemed to be AMAs).

We note that the current deemed AMAs are far more restrictive in terms of both size and specification of particular aquaculture activities (e.g. species restrictions) than the high-level, non-exclusive zones that we envisage. We envisage that over time, as regional coastal plan changes are progressed, old AMAs will be re-specified to become more similar to the flexible aquaculture zone planning tool.

2.4 Enhancing council decision making on plans

In order to enhance the independence and expertise of all council planning hearings, we recommend that the RMA should be amended to require that all commissioners and hearing panel members for hearings on plan changes are accredited under RMA section 39A.

As a matter of good practice (or it could be legislated) at least one member of the panel should be an independent commissioner drawn from a list of approved experts.

A list of approved experts should be maintained by AQA and made available to councils, as well as for use in relation to any called-in coastal plan changes determined by a Board of Inquiry.

This administrative process does not require statutory amendment. Together these changes should result in planning decisions that are more robust and therefore less vulnerable to appeal.

2.5 Enhancing private plan changes

In line with the "rewarded effort" concept, we recommend that an applicant for a private plan change to create an aquaculture zone should be given access to 80% of any resulting aquaculture space. This will require statutory amendment as the current private plan change provisions give an applicant no benefits in relation to the space created.

We note that in regions where there are still outstanding pre-commencement settlement obligations, an Order in Council currently provides that 40% of the space

created by a private plan change is allocated to iwi. The TAG sees the 40% as a disincentive to the private plan change route.

2.6 Parallel private plan change and resource consents

We note that for all activities aside from aquaculture, it is currently possible for a private plan change applicant (or applicants) to apply for resource consents at the same time as requesting the plan change. The two applications can then be processed in parallel, significantly reducing overall timeframes for aquaculture development. Our proposals to repeal RMA provisions relating to AMAs and the prohibition on aquaculture outside AMAs should enable aquaculture applicants for a private plan change to take advantage of the parallel consent process. If additional legislative change is required to further facilitate the use of this route for aquaculture development, then we recommend that this should be pursued.

2.7 Consented areas become Aquaculture Zones where zones are provided for

Some TAG members were also of the view that one of the consenting options that should be recommended to Ministers is that under the consenting regime being recommended by TAG, newly consented areas, for which the UAE test has been completed, should attract the aquaculture zone status. The status would only be conferred if the area is subjected to same objectives, policy and rules that apply in deemed/planned Aquaculture Zones i.e. all Aquaculture Zones in a region should have the same objectives, policies and rules criteria.

2.8 Ensuring aquaculture matters can be called in

The TAG notes the enactment of the amended section 144 giving Ministers the power to call-in matters of “national significance”. We believe this section could be appropriate in some circumstances in order to enable the government to achieve their policy objectives for aquaculture.

We recommend that the drafting of section 144 be examined to ensure that it can be used to call in aquaculture matters.

2.9 Ministerial responsibilities in the CMA

The TAG notes that the Minister of Conservation is currently responsible for calling-in a matter and appointing a Board of Inquiry where the matter, like aquaculture, is related solely to the coastal marine area. We question whether the Minister for the Environment might be the more appropriate Minister, so as to align responsibilities for call-in decisions across the marine and terrestrial environments. However, we note that the issue is complex, as the RMA bundles the Crown’s ownership and regulatory responsibilities with respect to the coastal marine area within the single office of the Minister of Conservation.

The current review of the Foreshore and Seabed Act is also central to any "unbundling" and reallocation of the various interests and responsibilities in the coastal marine area (see Chapter 9).

We echo the recommendation of the Select Committee on the Resource Management (Simplifying and Streamlining) Amendment Bill that a review of the appropriate role for the Minister of Conservation in the coastal marine area should be undertaken as part of the Phase 2 RMA reforms.

2.10 Integrating shellfish water classification into the new aquaculture regime

In the case of bivalve shellfish species (e.g. Greenshell™ Mussels and Pacific Oysters) there is another government department involved before shellfish can be grown, harvested and sold for food. The New Zealand Food Safety Authority (NZFSA) administers the Animal Products Act 1999, the Animal Products (Regulated Control Scheme – Bivalve Molluscan Shellfish) Regulations 2006 and Animal Products (Specifications for Bivalve Molluscan Shellfish) Notice 2006.

This legislation requires the shellfish waters be classified from a food safety perspective and requires:

- A full public health sanitary survey which assesses the actual and potential marine pollution sources under a variety of seasonal and environmental conditions.

- A comprehensive water and shellfish sampling programme undertaken over at least 12 months.

- Appropriate management plans be drafted and agreed to by all agencies.

This classification must occur whenever a new area for shellfish faming is being developed. The process is *in addition* to the usual RMA and Fisheries Act processes. This can add another 12 months to the process for establishing a shellfish marine farm.

There have been instances where approval is given by a Regional Council and the Ministry of Fisheries for an area to be allocated to aquaculture, and then the area fails the basic water quality requirements. It would reduce the time taken to approve a shellfish marine farm if the growing area classification work was done at the same time as the other processes.

Under the current system the cost of the classification process is paid for by industry and depending on the complexity can cost in excess of $30,000. This acts as a first mover *dis*incentive since whoever makes the first application for a new area must bear the costs, and other farmers can free-ride.

In keeping with the simplifying and streamlining themes of our report, we recommend that:

(a) The shellfish water classification process be integrated into the new aquaculture regime by ensuring that it occurs in parallel to the RMA and UAE processes; and

(b) The costs of undertaking this work be paid for through the Aquaculture Fund and then recovered through tender revenue and the Aquaculture Levy.

3. Enhancing consents for aquaculture

3.1 Introduction

This chapter sets out how resource consents can be enhanced in order to deliver the greater certainty that is required to attract investment in the aquaculture sector.

Under the RMA the bundle of consents that is required to undertake an aquaculture activity includes a permit to occupy coastal space. This permit is the authorisation on which the aquaculture sector is built. Up until 1991 this was first a lease and then a licence. Since 1991 under the RMA occupation of the coastal marine area requires resource consent in the form of a coastal permit.

The TAG's main objective with respect to coastal permits for aquaculture has been to ensure that they have the desirable attributes necessary to support long-term investment in the aquaculture industry.

The attributes for coastal permits are set out in this chapter under the following headings:

- Legislative changes
- Use of regulations
- Use of best practice

3.2 Legislative changes

The following attributes for coastal permits will be specified in legislation:

- Improve commercial standing of coastal permits
- Establish an aquaculture coastal permit register under the Fisheries Act
- Establish an "experimental aquaculture" category of coastal permit

3.2.1 Improve commercial standing of resource consents

Advice provided to the TAG indicates that banks are willing to lend to marine farmers on the value of the resource consent, to variable amounts up to 50%. Security is usually taken against the consent and registered on the Personal Property Securities Register. Banks could be further encouraged to lend to aquaculture ventures by establishing the following provisions within the Fisheries Act:

- Creating a central register of aquaculture consents (see below)

- Cross-linking this to the Personal Properties Security Register.

3.2.2 Establish an aquaculture consent register under the Fisheries Act

The TAG recommends that a central register of aquaculture consents should be provided for in legislation. Information on aquaculture consents is currently held

primarily by regional councils. A central aquaculture consent register would serve multiple functions, including:

- A source of easily accessible information on the nature and extent of aquaculture activity, for use in planning processes, including regional planning, fisheries plans, and planning for marine protected areas
- Providing a mechanism to caveat a resource consent so that it cannot be sold without the lender's approval, and to register a notice of discharge
- Providing an ability to register a lease or sub-lease of a consent
- Record the discharge of provisional and final agreements between an aquaculture consent holder and relevant quota owners
- A record of the discharge of settlement obligations with respect to new aquaculture consents.

We recommend that the register should be established under the Fisheries Act to allow access to that Act's provisions in relation to the transfer of functions to an Approved Service Delivery Organisation. This would enable the registry function to be operated by an approved industry-owned organisation. An RMA amendment or regulations would require notification of consents to the authority responsible for the register.

3.2.3 Establish an "experimental aquaculture" category of consent

Some overseas aquaculture regimes provide for different types of consents for different types of aquaculture activity (e.g. spat catching, experimental, small scale trials, larger scale commercial production). The TAG is of the view that it should not generally be necessary for different types of aquaculture consents to be specified in the RMA. For example, it is relatively common for aquaculture developments to be consented under an adaptive management regime, whereby the progression from initial activities (e.g., on-site technology trials) to full production is specified through conditions which provide a framework for staged consent implementation. Progress between stages is dependent on the monitoring of environmental effects and subject to a review of consent conditions. This can all be provided through a single consent. We recommend that the provision of "template" consents for different stages and types of aquaculture consents should be provided through good practice guidance.

However, we consider that consents for experimental aquaculture should be provided for explicitly in the law, in a manner similar to the recent Aquaculture Legislation Amendment Bill (No 2). Consents for experimental aquaculture should be of limited size and duration, with no ability for the consent to be renewed or translated into a standard consent.

A separate statutory provision is required in order to exempt consents for experimental aquaculture from the settlement obligation.

The TAG recognises the fundamental importance of research, science and technology in driving the innovation necessary for the growth of the aquaculture sector and to support the long-term sustainability of the sector. The AQA should work with science providers to ensure that their spatial needs are met for long-term scientific enquiry which do not fit within the parameters of experimental aquaculture as defined above.

3.3 Regulations

The following attributes for consents will be specified through regulation:

- Make approval for occupation explicit within the coastal permit
- Minimum coastal permit term of 20 years
- Enhancing coastal permit renewal
- Increase flexibility of coastal permits
- "Use it or lose it" – reduce the lapsing period to 3 years.

3.3.1 Make approval for occupation explicit within the coastal permit

Our terms of reference asked us to examine the type of occupation right that is necessary to support long-term investment in the industry.

The bundle of consents that is required to undertake an aquaculture activity includes a permit to occupy coastal space. Sometimes this is not made explicit.

In order to ensure national consistency and to support investment certainty the TAG recommends that each consent must be explicit as to the occupation component of the consent.

3.3.2 Minimum coastal permit term of 20 years

Current council practice with respect to the term of a coastal permit for aquaculture varies considerably within a range of 10 – 35 years. The TAG recommends that, in order to encourage investment and sustainable development, regional coastal plans should specify that a consent term for aquaculture should be at least 20 years. Councils would be able to impose a different consent term, but would have to provide reasons for doing so. We note that the need to monitor and manage uncertain or emerging environmental effects during the term of the consent can be managed through appropriate monitoring and review conditions on the consent.

3.3.3 Enhancing coastal permit renewal[12]

The RMA provides that a coastal permit holder for an aquaculture activity has priority rights to apply for a new consent for the same activity on the site, subject to compliance with the relevant regional coastal plan and consent conditions and the use of industry good practice (section 124 and sections 165ZH – 165ZJ).

[12] An alternative term is "re-consenting". We have used the term "renewal" in its common usage rather than any legal usage.

The TAG considers that a more favourable investment environment for aquaculture would be created through the following three proposals:

- Simplifying the renewal process
- Renewal as a controlled activity
- Evergreen consents

These components can be inserted into regional coastal plans through regulations.

Simplifying the renewal process

We are concerned that a full application and assessment of environmental effects is required if a consent holder re-applies for a new consent for an existing activity. This adds cost and time which, in our view, are not balanced by any improvement in outcomes. We therefore recommend that the RMA should be amended to provide the following as a default process for an applicant who wishes to continue the same activity in the same space.

- The consent holder notifies the council of their intention to continue the activity

- On acknowledgement of the notification by the council the applicant is deemed to have lodged an application on the same basis as their current consent terms and conditions

- The applicant may at this time choose to submit any additional information in support of their application. The consent authority may use the "further information" provisions in the Act to request any additional reports

- The consent application is processed in the standard way under the provisions of the current plan.

This proposal could apply in respect of all RMA activities. We note that the resolution of foreshore and seabed issues may have implications for the consent renewal process in the coastal marine area, and that councils should be able to specify applications that would not be subject to the default "deemed application" provision.

Renewal as a "controlled" or "restricted discretionary" activity

We recommend that in most circumstances a new consent for an existing aquaculture activity should be treated as a controlled activity. Regional coastal plans should specify that consents for "occupation and effects associated with the continued operation of a previously authorised marine farm" (or similar description) are a controlled activity. There will be instances when a council should be able to deviate from this default by specifying the matters over which it would exercise discretion (justified under section 32 of the RMA). This means that (a) the application would not be notified unless the plan provides for notification, and (b) the consent would have to be granted provided that the activity complies with the standards and terms set out in the plan.

Evergreen consents (to be done through best practice)

Under an evergreen approach there would be a rolling opportunity to review consent conditions and renew the consent at mid-term or earlier. In that way the consent could provide for a longer effective duration alongside ongoing improvement in managing environmental effects. The consent would always have more than half its term to run, improving investment certainty. We believe that such an approach is already possible under the RMA and do not recommend any specific statutory changes to support it. Instead it could be encouraged through the provision of good practice guidance, including a template evergreen consent.

We emphasise that our suggestions do not equate to an expectation or right of consent renewal. In all cases a consent application needs to be assessed against the relevant provisions of the regional coastal plan.

3.3.4 Increase flexibility of coastal permits

Flexibility of consent use (e.g. the ability to apply for a variation to change species or technology or respond to changing environmental requirements) is not restricted by the Act and is determined primarily by the provisions in the relevant coastal plan.

The diagram in Appendix B illustrates the variety of technologies and species that are utilised in aquaculture.

This diagram illustrates the importance of providing for flexibility within a regional coastal plan. The environmental effects of farmed species divide into two broad categories:

- Self-fed (e.g. mussels and seaweeds)
- Supplementary fed (e.g. salmon and butterfish).

We recommend that all regional coastal plans be flexible enough to enable these two broad categories of aquaculture. Where they are not, we recommend that the full range of tools identified in this report (including regulations and best practice) are utilised to achieve this.

3.3.5 "Use it or lose it" – reduce the lapsing period to 3 years

The TAG notes that consents for aquaculture are valuable assets and that their value should increase if the recommendations in this report are implemented. We are aware of the need to prevent speculation for coastal space where that speculation is unrelated to any genuine desire to develop the space for aquaculture activity.

For that reason we recommend that regional plans should specify a three year default period within which a consent holder should be required to give effect to the consent. This is shorter than the current statutory default of five years for the lapsing of a consent (section 125). Councils would be able to set an alternative lapsing period if they had good reason.

We note that consents for aquaculture that arise from the settlement obligations will not be subject to this "use it or lose it" provision.

3.4 Good practice

Beyond the specific characteristics specified above, the RMA enables other desirable consent attributes which can be achieved through good practice in planning and consenting. The relevant statutory provisions are as follows:

- *Managing environmental effects:* conditions can be reviewed within the term of the coastal permit at times and for purposes specified in the consent, and when regional or national environmental standards have been changed (s128)

- *Transferability and subdivisibility:* a coastal permit can be transferred in whole or in part to another person unless the consent or plan prohibits this, and may be transferred to another site if the consent or the plan allows (section 135)

- *Exclusion:* consent conditions can specify the extent of exclusion (section 108(2)(h).

The TAG considers that these characteristics do not need to be specified in the aquaculture regulations since they are sufficiently specified in the RMA to apply to aquaculture.

3.5 Enhance the process for obtaining a coastal permit

Under our proposals, resource consents for aquaculture can be obtained through the full menu of RMA processes, including:

- Decision by regional council

- Decision by one or more hearings commissioners who are not councillors, if requested by applicant or submitter (section 100A)

- Call-in for decision by Board of Inquiry or Environment Court (call-in decision made by Minister of Conservation after considering criteria for national significance in RMA section 144)

- Direct referral to Environment Court (at request of applicant, with approval of council as provided in section 87C).

In the following two subsections we propose a number of enhancements to these processes.

3.5.1 Improve the quality of applications

If the quality of consent applications is enhanced, the efficiency of the consenting process will improve. We recommend that a standard set of information requirements should be specified for aquaculture consent applications. The same approach could be applied consistently across the country through either an NES or regulations.

3.5.2 Improve the standing of council hearings

Often there is an expectation that a council decision relating to aquaculture will be appealed to the Environment Court. Such an expectation can lead to pro forma statements by applicants and submitters in anticipation of appeals for which greater efforts would be expended. These hearings are wasteful in both time and resources. While direct referral to the Environment Court is now available, we recommend that changes should be made to the RMA which elevate the probative value of evidence produced before council hearings. These changes could apply to all consent hearings.

The problem was partially addressed in the RMA reforms of 2005 which introduced a new section 290A to increase the weight the Court is required to give to the decision which is under appeal. However it does not constrain the Court from accepting arguments and evidence opposing the decision that was never heard by the consent authority whose decision is under appeal. The law requires the Environment Court to hear the matter de novo, notwithstanding that the Court must place some weight on the facts of the decision.

We recommend that the RMA should be amended to ensure that the consent authority hearing has greater standing. To that end the recommendations in Chapter 3 regarding the use of accredited Councillors and at least one independent accredited Commissioner should apply to consent hearings.

We note that applicants and submitters are required to present full evidence at the hearing under the RMA. We recommend that this is drawn to the attention of councils through good practice.

Some changes could be made to the Environment Court appeal process in order to further strengthen the standing of council hearings. For instance:

- Evidence in rebuttal would continue to be able to be given, but any other new evidence which may have come to light subsequent to the consent authority decision should only be able to be submitted with the leave of the Environment Court. Leave would be given only if:
    - The evidence was unable to be obtained prior to the hearing before the consent authority;
    - The evidence submitted has direct probative value to the matters under appeal; or
    - The evidence is produced by a person or party that was not a participant at the hearing (party with an interest greater than the public generally).
- All parties to an appeal who appeared and gave evidence before the consent authority would be required to append their evidence to the notices of appeal or participation (section274 parties) lodged with the Environment Court as relevant information for the Court to consider.

4. Allocating space for aquaculture

The allocation of coastal and marine resources between users is a complex issue. The RMA's focus on managing the effects of activities often results in allocation decisions being made by default rather than as a result of a deliberate or explicit process of resource allocation. There have been signs of change, for example through the specification of tendering as the default mechanism for allocation within AMAs.

Allocation of water space to aquaculture cannot be separated from other allocation decisions in the coastal marine area. The TAG has adopted an integrated approach to the allocation of space to aquaculture and between aquaculture users, consistent with existing RMA tools. Allocation decisions are made at two stages of the aquaculture planning and consent processes:

- Plan stage – allocation between aquaculture and other uses; and
- Consent stage – allocation between aquaculture and other uses and allocation between aquaculture users.

Each of these stages also involves Fisheries Act processes (the UAE test and negotiations) which allocate space between new aquaculture activities and existing fishing activities.

4.1 Allocation between aquaculture and other uses during planning

Under our proposals, the RMA will not require the use of any special planning mechanisms to allocate coastal space between aquaculture and other uses. This is a major change from the current regime in which AMAs are a mandatory planning tool to allocate space for aquaculture in preference to other activities, but with aquaculture being prohibited outside an AMA.

If the prohibitory AMA framework is removed from the RMA, then in regions with low demand for aquaculture standard plan provisions are likely to apply to aquaculture applications as for other activities. This means that allocation decisions will be made following an assessment of the effects of a proposed aquaculture activity on the environment and other uses and values. Regional coastal plans may also include general zoning provisions which specify types of effects that may be appropriate or not in different parts of the region.

In addition to Aquaculture Zones, the TAG notes the availability in the RMA of further existing tools to allocate space between aquaculture and other uses. These tools may be used in regions or areas with higher demand for aquaculture space as a means of providing more certainty in planning for aquaculture.

4.2 Allocation between aquaculture users within an Aquaculture Zone

We envisage that where an Aquaculture Zone is established through a regional coastal plan change, the plan will also state:

- the amount of space within the zone that is to be allocated to aquaculture; and
- the mechanism for allocating that space between aquaculture users.

Within an Aquaculture Zone we recommend that the default mechanism for allocation between aquaculture users should be tendering. Councils are familiar with tender processes and can adopt an approach that suits their specific objectives (for example, through a weighted attribute tender). If councils or a private plan change applicant wish to use an alternative allocation mechanism, this can be specified in the plan change.

The allocation steps in the default tender process would be as follows:

- 20% of the space available for aquaculture would be allocated directly as settlement assets (see Chapter 7);
- The remaining 80% of space would be tendered by the council or, in the event of a private plan change that creates an Aquaculture Zone, by the relevant private party (to the extent that it wishes to dispose of the space);
- Successful tenderers would receive authorisations which would provide the holder with an exclusive right to apply for a resource consent in the area to which the authorisation relates. Authorisations would be transferable and would have a “use it or lose it” condition, except in the case of authorisations allocated as settlement assets.

In addition to providing an allocation mechanism, the benefits of this process are that it:

- serves as a mechanism for recovering some of the costs of establishing an Aquaculture Zone through a plan change;
- provides applicants with an identity in advance of obtaining a consent, making it easier for them to come to arrangements among themselves, including in relation to the provision of settlement assets;
- prevents others from applying for a consent in that space; and
- provides a currency for the settlement.

4.3 Allocation elsewhere in the coastal marine area

The RMA provides a default "first in first served" allocation mechanism for activities in the coastal marine area. The TAG has considered whether returning to such a regime would result in an unhelpful influx of aquaculture applications. This has sometimes been referred to as a "goldrush", but that is a term we do not favour. Demand and competition for aquaculture space is a positive sign of a healthy industry, but excessive demand is unhelpful as is may place strain on councils, it is inefficient for the industry, and can create a backlash within local communities.

Our conclusion is that the conditions which existed prior to the 2004 reforms are unlikely to be repeated in 2009. Many of the hasty applications made in the early 2000s were in response to the imminent threat of a moratorium. At that time, lodging an application for a resource consent was a relatively simple and low cost exercise. This changed in 2005 when the RMA was amended to enable a council to return applications that do not contain an adequate assessment of environmental effects or other required information (section 88(3)). This has reduced the risk of speculative applications.

The TAG also recommends a reduction in the lapsing period for aquaculture consents from 5 to 3 years as a further constraint on speculative applications – see section 3.3.5.

The following section deals with situations where there is high demand for aquaculture.

4.4 Managing demand for aquaculture outside zones

There are two possible methods for Councils to manage high demand. These are:

- Utilising the allocation tools deemed into the coastal plan (see below); or
- Utilising a planning process.

Both of these methods will require a power to temporarily suspend receipt and/or processing of applications.

We recommend section 165D should be modified to give consent authorities who face high demand the ability to apply to the Minister to temporarily suspend the receipt of new applications and/or processing of those already received. Consent authorities would have a set period of time to put in place the appropriate allocation methods or planning processes.

4.4.1 Utilising the allocation tools to process a consent

In regions where councils are not confident that their plan provides an adequate basis for managing aquaculture development given the anticipated level of demand,

we recommend that they have the ability to use allocation mechanisms other than "first in, first served".

We recommend that the RMA is amended to provide a statutory test to trigger the consideration of alternative allocation tools. This test will be deemed into all coastal plans and will be similar in nature to section 28 of the Crown Minerals Act but modified for the purposes of aquaculture. This will provide councils with the opportunity to over-ride that part of the RMA which currently means that councils must accept and process applications.

For example, the test could require that a council has cause to believe that the number or scale of aquaculture applications in a region will give rise to significant cumulative effects.

In order that these allocation mechanisms are available to councils on day one of the new regime we recommend that they be deemed into coastal plans by the amending legislation.

The choice of mechanisms will include the following:

- Tendering (including weighted attributes tendering)
- Preferential allocation
- Balloting
- Combining applications and hearing them together
- Using rules to change activity status once a threshold is reached

4.4.2 Utilise a planning process

In addition to the mechanisms above, councils may decide to utilise a planning process to manage demand. Sufficient time needs to be provided by the Minister to progress a plan change to a stage where it has the status to be effective in managing high demand (see above).

5. Cost recovery and charges

5.1 Introduction

This chapter considers:

- RMA-related charges – consenting/monitoring and planning
- Charging for the occupation of the coastal marine area

5.2 RMA charges

5.2.1 Consenting, monitoring and other related charges – user pays

Cost recovery for processing of resource consents and private plan changes, monitoring, and other council services such as "supervision, monitoring and administration" of consents is already provided for under section 36 of the RMA. Under the current regime applicants are charged for the full cost of their resource consent.

We recommend that this continue.

5.2.2 Coastal Planning – cost recovery

Currently the cost of planning falls either to the applicant for a private plan change, or to the council if it is a council-initiated plan change. Planning is a normal activity for a Council and funded from rates. We are mindful that whatever process is used, the full cost may not be able to be recovered.

Owing to the inability of councils to rate coastal space, councils currently have three possible mechanisms for recovering the costs of planning:

- Utilise rate revenues in the interests of regional development (e.g. as Northland and Bay of Plenty have chosen to do). This recognises that there are both private and public benefits from coastal planning.

- Recover the costs through a tender process (this appears to have been the assumed method under the current law)

- Charge a "coastal occupational charge" (section 64A RMA). This has been an extremely complex and vexed issue for many years and has not been resolved since coastal occupational charges are poorly defined and therefore difficult to apply.

An amendment to section 36 could empower councils to recover costs from a plan change for an aquaculture zone through an extra charge against resource consents applied for in the zone. Such charging mechanisms can be determined under the Local Government Act 2000 through its special consultative process. This should be by way of an annual charge recovering costs over time, possibly throughout the life of

a resource consent. A single up front payment may be too demanding on an applicant's cash flow, at a time before the marine farm has become productive.

The availability of funding for council plan changes could create a perverse incentive, as without further controls there would be no need for a council to limit the cost or maximise the efficiency of the plan change process. Costs will be contained through clear criteria and auditing of the disbursements of the planning fund.

5.3 Charging for the occupation of the coastal marine area

Given that the CMA is owned by the Crown there is a case for the Crown charging marine farmers for the space they occupy in addition to existing RMA charges.

Many countries charge marine farmers for the occupation of public water space. This is usually in the form of some kind of lease (Australia, Canada, Norway) and is normally calculated taking into account other costs and charges.

We recall that under the Marine Farming Act 1971 an annual rent for leases and license fee for marine farming licenses was charged. This regime ended with the enactment of the aquaculture legislation in 2004.

At present the foreshore and seabed is vested in the Crown subject to the provisions of the Foreshore and Seabed Act 2004. We are aware that government is engaged with Maori in relation to a number of matters under the Foreshore and Seabed Act 2004, and also in relation to a review of that Act. We recognise that the outcome of those processes may affect what we propose (see Chapter 9).

5.4 Mechanism for charging – an Aquaculture Levy

The TAG recommends that a new levy be introduced recognising that marine farmers occupy the CMA for pecuniary gain. We propose that the revenue received from this levy be directed to the Aquaculture Fund.

We believe that the introduction of an aquaculture levy for established marine farms should be staged in recognition that it is a new charge and that industry faces difficult economic times.

We will not attempt to detail the methodology for the levy. There are approximately 7,000 hectares of near-shore marine farms in New Zealand. We recommend a modest charge of about $100 - $200 per hectare per annum. This would yield around $700,000 - $1.4 million per annum. An appropriate basis for charging for offshore farms would have to be devised. This would be reviewed every 5 years by the Minister.

We note that the rights associated with occupation for aquaculture will be enhanced as a result of our recommendations (see Chapter 3) and therefore that a modest levy for occupation is fair and reasonable.

Given the introduction of this levy, we recommend that section 64A of the RMA be amended so that coastal occupational charges do not apply to marine farmers.

We recommend that the broader issue of coastal occupational charges for other occupiers of the CMA be considered as part of RMA Phase II.

We are aware of one region (Southland) where coastal occupational charges are in place. Specific transitional provisions for this region will need to be considered.

5.5 Rating of marine space

Some members of the TAG considered more consideration should be given to the option of rating sea-space. The Rating Powers Act already provides for rating "land of the Crown' that is subject to a "lease, license, or other agreement". Coastal permits however to not fall within this definition. The law might be changed so that Crown land in the coastal marine area occupied for private benefit is rateable. This point could equally apply to other occupiers of the coastal marine area.

This was not the majority view of the TAG.

6. Streamlining the interface between aquaculture and fishing (UAE)

6.1 Summary

Ministers have asked the TAG to consider the issue of "Recognition of existing uses, including fishing, which may be displaced by aquaculture development". We have approached this in the context of the government's commitment to developing an effective and enabling aquaculture regulatory regime that is conducive to sustainable economic growth.

The challenge is to address the interface in a way that does not slow down aquaculture development beyond standard RMA processes, but protects the fisheries management regime and Fisheries Settlement where the effect of proposed aquaculture development is undue.

We did consider the option of removing the UAE test but decided this may be too drastic a change and may simply transfer the contest to other parts of the process. Accordingly, we recommend the retention of the UAE test for commercial fishing. It should continue to be applied as a threshold and should address impacts on fishing only.

Effects on fisheries resources will continue to be dealt with under the RMA, as has been the case in law since the 2004 reforms. We note that regional councils already apply the standard RMA requirement to avoid, remedy or mitigate adverse effects, including adverse effects on fishing that are below the level of UAE, and all adverse effects on fisheries resources.

We do recommend a significant redesign of the UAE process (retaining the main components of the test – see Appendix C) so that:

- The Fisheries Act UAE processes are streamlined;
- Fishing information is made available early to support aquaculture planning and consent applications;
- The incentives for quota owners and aquaculture applicants to reach agreement are improved and the transaction costs of the negotiating process are reduced. These changes will significantly reduce the need for government involvement in the interface between commercial fishing and aquaculture.

6.2 UAE at the Planning Stage

6.2.1 Streamlining the UAE process

The Fisheries Act process in respect of the UAE test needs to be streamlined:

- So they are conducted in parallel with the RMA process, with each retaining its separate statutory integrity; and
- So that the two decisions are subject to one combined appeal to the Environment Court (in the case of a Board of Inquiry process the appeal will be to the High Court);

We recommend that the RMA and Fisheries Act processes should be aligned, significantly reducing the length of the planning process. The Fisheries Act process should retain its separate statutory integrity, but should be amended to mimic the RMA process in terms of steps, timeframes and appeal processes. We envisage a single combined notification, hearing on submissions, announcement of final decision, and hearing on appeals. The details of this recommendation are set out in the flowchart on the following page.

Where alternative RMA processes such as a call-in to a Board of Inquiry are used, the Fisheries Act timetable and steps can be adjusted to fit the RMA process. This would have significant implications, particularly in terms of consolidating the various appeal processes. The current Fisheries Act appeal provisions for the UAE decision enable a party to seek a review of the merits of the decision in the High Court (section 186I). This appeal right was inserted in 2004 and to date there have been no court decisions in relation to this provision. Prior to 2004, UAE decisions were subject to judicial review only. Under our proposals the High Court merit appeal provision would be repealed and replaced with new Fisheries Act appeal provisions which match the equivalent RMA appeals.

Where a regional council determines the plan change, the UAE decision would be able to be appealed to the Environment Court, but where the plan change is determined by a Board of Inquiry the UAE decision can be appealed only to the High Court on points of law. The opportunity for judicial review would remain. A further implication of the aligned processes is that where a Board of Inquiry determines the plan change, the Board's decision timeframes (9 months, with possible 9 month extension) will also apply to the Ministry's UAE decision.

While this will speed up the process, there are still some process dependencies. That is, decisions made under the RMA are only effective after the UAE decision has been made. Giving effect to the final decision on the aquaculture zone is dependent on the outcome of the UAE. This may mean some small delays while decisions are processed. In our view, the benefits of this combined process outweigh the costs.

6.2.2 Concurrent RMA and Fisheries Act processes

Flowchart of RMA planning process and Fisheries Act UAE process

RMA RCP process	FA UAE process	*Notes*
Pre-notification Information is gathered and made available for the planning process		*Council and MFish consult to make required information on fishing available via spatial overlays for planning maps.*
Council, with MFish input, prepares proposed plan changes, including location of any Aquaculture Zones (following standard RMA plan change process)	MFish provides input to plan change *(no formal UAE assessment)* 	*MFish provides advice in relation to full scope of fishing and fisheries resource considerations.* *A private plan change application would follow a similar path; the applicant would seek advice from MFish*
Notification of plan change Receipt of submissions, hearings etc on RMA and FA UAE issues		*Fully integrated notification, submission and hearings process*
Regional council (or Board of Inquiry) and MFish each consider all available information under their own statutory criteria make their decisions		
Council amends proposed plan in response to MFish UAE decision.	MFish formally advises council of UAE decision 	
Decision on plan change announced		
Appeals Combined hearings for RMA and FA appeals.		*Appeal rights are determined by RMA process (Environment Court if council decision process; High Court on points of law if called-in)*
Plan change becomes operative following resolution of appeals		

6.2.3 Early availability of fishing information

The availability of a shared pool of accessible information on fishing and fisheries resources would significantly speed up the early stages of plan changes for aquaculture and coastal planning generally. It would also improve integration between coastal planning and fisheries management.

We recommend that RMA Schedule 1 should be amended to require a regional council and the Ministry of Fisheries to work together during the preparation of a coastal plan change to ensure relevant information is available.

Example

Information on the spatial extent of various fishing methods and the main species involved could be shown as an overlay on coastal planning maps or incorporated by reference (under Part 3 of Schedule 1 of the RMA). Where possible, the information should include an indicative assessment of the degree of spatial displacement that a particular fishery can tolerate before a UAE is likely. This would not be a formal UAE assessment, but would be for information purposes only. Information on fishing can be patchy, although recent improvements have been made in the fine-scale reporting commercial fishing effort. Support could continue to be given to improving information on all types of fishing activity, including industry initiatives.

6.2.4 No additional requirements at the consent stage

We propose that in an aquaculture zone the impacts on fishing are addressed once only at the planning stage. Aside from standard consent requirements, there is no need for applicants in an aquaculture zone to undertake any additional processes to address impacts on fishing (provided any specified limits on aquaculture development within the zone have not been exceeded).

6.3 UAE outside an Aquaculture Zone

The TAG proposes that an applicant should be able to address potential undue adverse effects on commercial fishing outside an aquaculture zone by:

- Negotiating with potentially affected commercial fishers to reach agreement that aquaculture can proceed. This is a major change from the current situation in which negotiations take place only after a UAE has been determined, or

- Seeking a UAE assessment on commercial fishing from the Ministry of Fisheries, and

- if the assessment confirms that there is an undue adverse effect on commercial fishing, negotiating with affected fishers to reach agreement.

6.3.1 Option to negotiate with commercial fishing interests prior to a UAE assessment

The steps in the pre-UAE negotiation are:

- The applicant works with affected fishers to reach an agreement. The Ministry of Fisheries provides the parties with catch effort information and any other relevant information

- If an agreement is reached, Ministry of Fisheries is notified. The Ministry ensures all affected fishers are party to the agreement before registering the agreement. No formal UAE assessment will therefore be necessary.

- If the negotiation is *not* successful, the applicant can apply for a formal UAE.

The negotiation only addresses adverse effects on fishing. Wider issues of potential concern to fishers (e.g., impacts on fisheries resources) are addressed in the resource consent process.

6.3.2 Conducting the UAE test

An applicant may request a UAE assessment from the Ministry of Fisheries. They may do so directly or if negotiations are unsuccessful.

The Ministry would carry out the UAE assessment as it currently does. If there is no UAE, then the aquaculture activity can proceed, subject to the resource consent. If a UAE in respect of commercial fishing is found, the aquaculture activity cannot proceed unless an agreement with affected fishers is subsequently registered under the existing provisions of the Fisheries Act.

The Ministry of Fisheries' UAE decision is subject to judicial review by the High Court.

6.3.3 Aquaculture agreements (after a UAE is found)

Under the current Act, an applicant can seek to negotiate an aquaculture agreement with affected commercial fishers once a UAE has been found. The current provisions relating to these agreements[13] should continue, but we recommend that the parties be given three months to register an agreement, with the ability to apply for a one month extension if demonstrable progress has been made but further time is required to secure the agreement (the current provision is six months with an ability to extend for a further three months).

[13] Subpart 4, Part 9A, Fisheries Act 1996

6.4 Customary and recreational fishing

The TAG is aware that the UAE under the current regime applies to *all* fishing. We recommend that this continues. This means that the Ministry of Fisheries continues to be responsible for making an assessment as to whether there are any undue adverse effects for customary fishing and recreational fishing

The Crown has a particular obligation to protect the Fisheries Settlement for customary fishing. We recommend that the applicant would be expected to discuss their proposal with tangata whenua and reach agreement on how to avoid remedy or mitigate any adverse effects on customary fishing.

The TAG notes that under the customary regulations developed as a result of the Fisheries Settlement, iwi/hapu can designate a "rohe moana" and appoint kaitiaki to issue permits for customary fishing within that area. Where these provisions are in place in an area under application, relevant kaitiaki should be contacted. The customary regulations are not fully implemented so in some cases it will not necessarily be clear who should be contacted. We recommend that a good starting point would be to work through the relevant Mandated Iwi Organisation (pursuant the Maori Fisheries Act 2004), who should be able to provide appropriate direction to an applicant.

An amendment to the RMA would provide that if the outcome of this process was not satisfactory, tangata whenua are able to request the Ministry of Fisheries to undertake a UAE assessment in relation to customary fishing. The Crown would pay for the assessment and the granting of the consent would be put on hold until any UAE issues were resolved. If there is a UAE on customary fishing the application would have to be amended to address the UAE, or declined if that is not possible.

6.5 Further work

The TAG discussed the issue of how applicants and fishers could be better incentivized to reach agreement without the need for a formal UAE process.

In the time available we have developed some of these ideas but others remain unresolved. We recommend that government engage with the Seafood Industry (including the Seafood Industry Council, Te Ohu Kaimoana and Aquaculture New Zealand) to advance these ideas.

7. Delivering on the Maori Commercial Aquaculture Settlement

7.1 Introduction

The TAG has been asked to recognise the Government's commitments to its Treaty partner. The Aquaculture Settlement is one such commitment.

The Maori Commercial Aquaculture Claims Settlement Act 2004 sets out a process to ensure that iwi receive 20% of new space. We will not address the issue of pre-commencement space under the Settlement. Our recommendations will not affect the resolution of the remaining Crown obligations for such space.

The rest of this chapter outlines how new space might be delivered under the new regime. Key aspects of the Aquaculture Settlement are outlined in Appendix D.

7.2 New space to iwi – inside Aquaculture Zones

Under the current regime, delivery of the Aquaculture Settlement to iwi is premised on all new space being created in AMAs. Within AMAs, a fixed quantum of space is identified, providing a basis for identifying 20% within which iwi (through the trustee) receive authorisations to apply for resource consents.

Aquaculture Zones created under the proposed regime would continue to provide a basis for identifying and delivering 20% of representative space to iwi. Iwi would continue to have the right to apply for resource consents within that space.

Where a zone is created, the council would be responsible for identifying "representative" space. Where the zone is established through a private plan change, the default would still be for the council to identify 20% of the space that is representative. However, under changes proposed in Aquaculture Legislation Amendment Bill (No 2), iwi (or the trustee with the support of iwi) can negotiate with the applicants to agree on the space that should be made available to iwi. Council would only identify the space if there is no agreement. This seems a sensible approach that will enable applicants and iwi to seek solutions that work for them rather than have councils impose a solution that could then be subject to appeal.

7.3 New space to iwi – outside Aquaculture Zones

The lifting of the prohibition on resource consents outside specially created Aquaculture Zones changes the overall context of the Aquaculture Settlement. As there would be no fixed quantum of space identified for aquaculture outside zones, new space would be created in an incremental way as individual consent applications are lodged and approved.

This situation presents a challenge if iwi are to receive 20% of space that is representative of all new aquaculture space. As space for aquaculture outside Aquaculture Zones will eventually reach a limit, we suggest that iwi will need to be given access to space incrementally – as it is developed in the region. The question is, what is the best way for space to be delivered?

The TAG considers there are a number of options that could be pursued, elements of which are outlined below. These range from delivery of settlement assets by applicants (as under the current regime) to delivery through Crown involvement – or a mix of both.

We recommend these options be further developed in consultation with iwi and the trustee.

7.3.1 Iwi receive twenty percent of each consented area outside Aquaculture Zones

The most direct way of translating the settlement obligation outside Aquaculture Zones is to require 20% of new aquaculture space created by a consent application to be allocated to the trustee for transfer to iwi. The following matters are relevant under this option:

The requirement would be a default

The requirement that iwi receive 20% of new consented space would be a default. However it would not prevent iwi and applicants from negotiating different arrangements, as is expected under the present regime. For instance, they may choose to work together to create a Joint Venture based on the total space created by the application. For iwi – a joint approach provides the chance to benefit from aquaculture development as it evolves in their region. For applicants – having the support of iwi could well strengthen their chances of approval, given that iwi have multiple interests reflected in the RMA and the Fisheries Act.

Joint ventures may not always be suitable and iwi may be faced with a number of scenarios:

- They may receive small parcels of space that are not viable on their own
- They may receive space covered by a consent for one type of farming where they would prefer to farm something else.

Possible solutions for iwi might include:

- Applying to change the conditions on the consent they receive – assuming the relevant space is large enough to create a viable farm
- Selling or transferring the consent to the applicant or another interested party
- Exchanging and recombining assets. For instance we are aware that a significant number of marine farms are under the ownership of a few companies. Where a company is involved in applying for consents to extend more than one farm at a time, it should be possible for iwi and applicants to negotiate practical outcomes that suit both parties. Options could include

having access to an equivalent of 20% of the total area being applied for as farm extensions, but sited on only one of the farms involved.

Identifying representative space

An additional matter that is relevant to the allocation of consented space to iwi is representative space. Councils should still retain the responsibility to identify representative space in these areas where agreements between applicants and iwi are not reached. Retaining this provision should act as a further incentive for agreement.

Need for early dialogue

There would be a need for applicants and iwi – with the assistance of the trustee – to discuss what arrangements might best suit both parties before the applicant commences a formal application process. Ultimately the trustee should confirm that any agreement between applicants and iwi is consistent with the Aquaculture Settlement.

Keeping track of settlement obligations

Elsewhere in this report we recommend that a register of resource consents be established (see Chapter 3). An annotation would need to be included against each resource consent to confirm that the associated settlement obligation has been discharged.

7.3.2 A regional approach to determining access to new space outside zones

There is an opportunity to be seized, especially during the start-up phase of these reforms, for regional agreements which involve iwi and industry. Using alternative allocation tools (see chapter 4), these could be brokered to provide both new space and fulfil the Crown's settlement obligations. This would enable the Government to work with iwi to take a more proactive role in the creation of their settlement assets and could be used alongside the option above.

7.3.3 Provision of new space "up-front"

This approach would rely on the Crown moving to create Aquaculture Zones and would involve allocation of space to iwi in addition to the 20% entitlement. If the creation of such an Aquaculture Zone were given priority in a region, iwi would have the advantage of gaining access to a greater amount of water space early, rather than have to wait.

7.4 Status of settlement space

We note that under the Aquaculture Settlement Act, if a consent within settlement space lapses, expires or is cancelled, the trustee or relevant iwi are to be treated as holding an authorisation to apply for a consent in that area. Authorisations that are settlement assets do not lapse unless they are transferred and cease to be settlement assets, or they are no longer in an AMA.

The Act also provides for the Crown to provide redress if iwi are disproportionately affected by changes to the regional coastal plan (for instance where these changes would prevent consents in settlement space from being renewed).

With the repeal of the provisions relating to AMAs, the intent of the Settlement will be secured by:

(i) retaining the current provision that settlement authorisations in Aquaculture Zones do not lapse

(ii) providing that resource consents obtained by iwi as a result of the settlement do not lapse under the use it or lose it rule, which is intended to prevent speculation.

7.5 Consultation with iwi and the trustee

The TAG is aware that in 2002, iwi lodged a Treaty claim with the Waitangi Tribunal concerning the Government's aquaculture reform process. The Tribunal found that there had been inadequate consultation with Maori. There is a danger that this legislative review, concurrent with the Foreshore and Seabed review, could be similarly challenged if Maori consider they have again not been adequately consulted. We therefore recommend that the Government gives consideration to a consultation process with Maori on the proposed regime before making final policy decisions.

8. Transition arrangements

8.1 Overview

The AMA process is complex and hence costly and time-consuming. Even when government has provided resources (such has been tried with the "regional aquaculture projects" and the assistance of the Aquaculture Implementation Team) the process has still proven to be frustratingly slow. This means there is actually very little government can do under the current regime.

In the transition, we think a good way to achieve a result is to work with a small number of regions which have already undertaken much of the technical and consultation work required to develop aquaculture planning and get them "over the line" by utilising special transitional provisions (including regulations, which deem provisions into regional coastal planning documents).

The re-start needs to be underpinned by a decisive transition process, in which planning progress made by councils to date is protected and fast-tracked.

A number of regions face constraints which include High Court cases and appeals to the Environment Court. While progress on re-starting aquaculture may be constrained until these cases are resolved, much of what we recommend can be done now.

8.2 Processing the "frozen" applications under 150B(2) of the RMA

The TAG is aware of applications that were received by councils and not notified when the moratorium took effect in 2001.

We understand that there may be some hundreds of applications involving some tens of thousands of hectares of space. We understand that the quality of these applications was "mixed".

Whilst we cannot be certain, there is at least the potential that these applications could lead to our proposed new regime being completely ineffective and Ministers' ambitions for aquaculture frustrated for years.

Under the current law these applications will expire in 2014 unless they were covered by an AMA in the meantime. With our recommended repeals, AMAs will cease to exist and this creates a major transition issue. There are a number of options that can be considered to address this issue, for instance:

- Deem those applications, where applicants wish to proceed, to be lodged for first time on the first day of our new regime. This would enable councils to use section 88(3) of the RMA to return applications owing to lack of adequate information and use the alternative allocation tools to process those applications including those for managing high demand and which continue in

an environment of full cost recovery. For example, if the council chooses to use the alternative allocation tools it will over-ride the "first come, first served" approach to processing applications.

- Analysis of these applications may reveal that some or all represent such a major impediment to an effective re-start for aquaculture that they ought to be extinguished by legislation. This will need to be considered on a regional basis.

8.3 Transitional provisions

The range of transitional provisions will include:

(a) Deemed AMAs, or identified AMAs, where the UAE test has been completed, will be deemed to be Aquaculture Zones. Where the AMA has been notified, but the UAE has not been completed, the AMA can continue through the planning process under the existing regime, and assuming the AMA passes the UAE test will automatically become an aquaculture zone where applications can be accepted. While the characteristics of AMAs and Aquaculture Zones are similar, we have proposed a move away from the terminology associated with the 2004 reforms. Once applications currently being processed under transitional arrangements are approved, the areas involved will also be deemed to be Aquaculture Zones.

(b) The change in terminology for the new regime will be reflected in RCPs. This should be able to be done using existing First Schedule provisions of the RMA (Clause 16 and Clause 21).

(c) Special transitional provisions may be required for individual regions such as Canterbury, Environment Bay of Plenty, Northland, Tasman, Marlborough, and Environment Waikato. TAG is recommending that the Aquaculture Agency work with these councils to tailor provisions which suit their individual circumstances.

(d) There may be some applications that are still unresolved from previous aquaculture regimes at the time the new regime comes into force (e.g. some are being considered under the 1993 amendments to the Fisheries Act 1983, which itself has been repealed except for those provisions). Ministers should consider decisive action to resolve these anomalies.

The tools to support the transition will be a combination of legislative amendment and regulations to deem provisions into planning documents.

An example of transitional provisions

The Northland Regional Council is in the appeals phase of Plan Change 4 to the Regional Coastal Plan for Northland which will put in place the Policy and Regulatory Regime for AMAs. One of the elements in the proposed plan, the *Information Requirements for Coastal Permit Applications to Undertake Aquaculture Activities within an AMA,* has not been appealed. These information requirements could potentially be deemed to be the information requirements for aquaculture consent applications in an aquaculture zone.

9. Implications for other reform processes

This chapter sets out the broader implications of our recommendations for other processes which are running parallel to aquaculture reform.

There are three main processes for which this report has implications:

- RMA Reform Phase II;
- Foreshore and Seabed Act review; and
- Review of New Zealand Coastal Policy Statement.

Each is considered below.

9.1 RMA Reform Phase II

This review is one of a number of work streams within Phase II of the RMA reform process.

The following recommendations within this report have implications for the broader RMA reforms in that they recommend amendments to the RMA:

Planning

- Remove prohibition on aquaculture outside AMAs, and remove all associated provisions including AMAs, Excluded Areas and Invited Private Plan Change
- Provide Aquaculture Zones as an optional planning tool with UAE test and settlement obligation applied at planning stage, and default allocation mechanism of tendering authorisations
- Deem existing AMAs to be Aquaculture Zones
- Enable a private plan change applicant to receive 80% of aquaculture space created by the plan change (in areas where pre-commencement obligations have been settled)
- Facilitate parallel private plan change and resource consent route for aquaculture applications

Consents

- Enable consent applications to be put on hold where there is risk of significant cumulative effects (see Chapter 4)
- Provide that an applicant for a new consent to continue an existing activity is deemed to have applied on the same basis as the original application (default)

- Enable consents to be caveated so they cannot be sold without lender's approval, and link to Personal Properties Security Register

- Provide a separate consent category for experimental aquaculture, with more limited UAE process and no settlement obligation

- Enhance the standing of council hearings for resource consents by limiting the evidence that can be presented in appeals so that new evidence can be presented only with leave of the Court

- Enable the Environment Court, in the case of direct referral of a consent application, to refer the application back to the council for determination in specified circumstances

The following could be achieved by: (a) amendments to the RMA (of various types); or (b) changes to regional coastal plans (through various mechanisms including deeming provisions into RCPs and the use of regulations under the RMA):

- Provide a default minimum term of 20 years for aquaculture consents

- Make a new consent for an existing aquaculture activity a controlled activity (as a default)

- Provide that consents for aquaculture lapse in 3 years if not given effect

- Specify a standard set of information requirements for aquaculture consent applications

Charges

- Amend section 64A of the RMA (coastal occupation charges) so that it does not apply to marine farms

- The Aquaculture Levy

- Consider the implications for other activities that occupy the coastal marine area and would normally be subject to coastal occupation charges

9.2 Foreshore and Seabed Act

We are aware that for many Maori there is an essential connection between the Foreshore and Seabed debates and aquaculture. The *Ngati Apa* Court of Appeal decision was the end point of litigation that began with aquaculture issues. The Foreshore and Seabed Act and the Maori Commercial Aquaculture Claims Settlement Act were both enacted in late 2004. While the statutory distinctions between definitions and regimes applying to the foreshore and seabed and aquaculture exist, in popular perception there is often a conflation of issues. For instance in the recent Foreshore and Seabed review, submitters frequently addressed access to the beach, fishing, and marine pollution in addition to the actual

issues at the focus of the review. To an extent the Review Panel's report included those wider issues.

As noted in Chapter 7, the early preparation for the previous aquaculture regime led to the Waitangi Tribunal Claim Wai 953 reported in *Ahu Moana, the Aquaculture and Marine Farming Report* (2002). The Tribunal found that there had been inadequate consultation with Maori. There is a risk that this legislative review of aquaculture, concurrent with the Foreshore and Seabed Review, could be similarly challenged if Maori consider they have again not been adequately consulted. We therefore recommend that the government consults with Maori prior to drafting legislation.

We believe that the aquaculture regime that we are proposing would be unlikely to affect or be affected by the likely outcomes of the Foreshore and Seabed review. Those outcomes could be strengthened property rights or enhanced management participation for tangata whenua with respect to the CMA. While that could affect, potentially, those to whom revenue from coastal charging is disbursed, or which parties are involved with decision making, the regime need not have significant change to accommodate these possibilities.

9.3 New Zealand Coastal Policy Statement (NZCPS)

Recommendations in Chapter 1 are relevant to the NZCPS.

APPENDICES

A. Terms of Reference

Terms of reference from engagement letter

The engagement letter from Ministers contained the following terms of reference:

> "The government is committed to creating an environment that is conducive to sustainable economic growth; developing an effective and enabling regulatory regime for aquaculture is an important part of this wider goal.
>
> Aquaculture reform can not be accomplished in isolation from other government processes or without considering the complexity inherent in operating within the highly contested coastal zone. We encourage you to think about aquaculture in the context of the wider Resource Management Act (RMA) reforms, potential changes to the Foreshore and Seabed Act, and the government's commitment to reducing costs and improving regulatory efficiency. You must also recognise environmental limits, commitments to our Treaty partner, and the diversity of stakeholders that have existing rights and interests in the coastal marine area, and be mindful of aquaculture's links with wider regional coastal planning…
>
> … In developing this report, we ask that you consider the aquaculture regime as a whole, yet focus your report on specific improvements that can be made to the legislation to enable aquaculture development. This should include a general evaluation of costs and benefits to ensure cost effectiveness of any reforms. In the course of your discussions, we suggest that you consider the following key issues:
>
> - The type of planning regime best suited to managing aquaculture in New Zealand
> - Allocation of coastal space for aquaculture versus other competing uses and interests
> - Recognition of existing uses, including fishing, which may be displaced by aquaculture development
> - Allocation of available space between aquaculture interests
> - The roles and responsibilities that central government, local government, and potentially other entities should have in providing for and regulating aquaculture
> - The type of occupation right that is necessary to support long-term investment in the industry
> - Appropriate provision for cost recovery and resource rentals."

Detailed terms of reference

Overview

The Aquaculture Technical Advisory Group (TAG) is appointed to provide independent and strategic advice on proposals for the reform of aquaculture legislation. The TAG will commence on the date specified in the letters of appointment and expire on 30 October 2009.

The broad functions of the TAG are:

i. to generate proposals for reform of aquaculture legislation

ii. to review any advice or proposals Ministers may choose to provide them

iii. to report directly to Ministers through written recommendations and meetings as required.

Policy context

While the TAG is to generate recommendations for reform, in doing so it is to consider and take into account any material provided by Ministers. This material may include:

i. the government's existing decisions on Phase 2 of the Resource Management Act Reforms

ii. Ministers' goals for aquaculture reform

iii. previous aquaculture policy advice to Ministers

iv. any relevant independent reports.

Relationship of TAG to other functions of members

Members of the TAG are not appointed as advocates or representatives of a particular interest or sector group. They are appointed because of their personal expertise and knowledge and are to provide independent, strategic advice.

Views expressed in the TAG will not prejudice views that may be expressed in other positions held by the members.

Working relationship with government officials

Government officials from the Ministry for the Environment and Ministry of Fisheries will provide secretariat support to the TAG and be available to answer questions and provide background briefings.

Government officials will not undertake detailed policy analysis or primary research for the TAG. If the TAG requires work of this kind, it can be commissioned from external consultants and funded by government, subject to the budget for this project.

Information will be provided to the TAG on a confidential basis and may not be shared outside the TAG without prior permission from Ministers.

All considerations of the TAG are to remain confidential to the members and Ministers, although they will be subject to the Official Information Act.

At least one official each from the Ministry for the Environment, the Ministry of Fisheries and the Ministry of Economic Development will be present at all meetings of the TAG except where the chair requests a private session. Officials from other departments may be called upon as required to provide background information or explanations.

Officials will continue to provide independent advice to Ministers, including in response to findings of the TAG.

Meetings of the TAG

It is estimated the TAG will meet for approximately ten full days between the date of appointment and 30 September. The chair will determine if more or fewer meetings are required, and the dates and time allocated for each meeting, subject to the budget for this project.

The TAG will be available for a total of two full days between 30 September and 30 October to discuss their recommendations.

Outputs

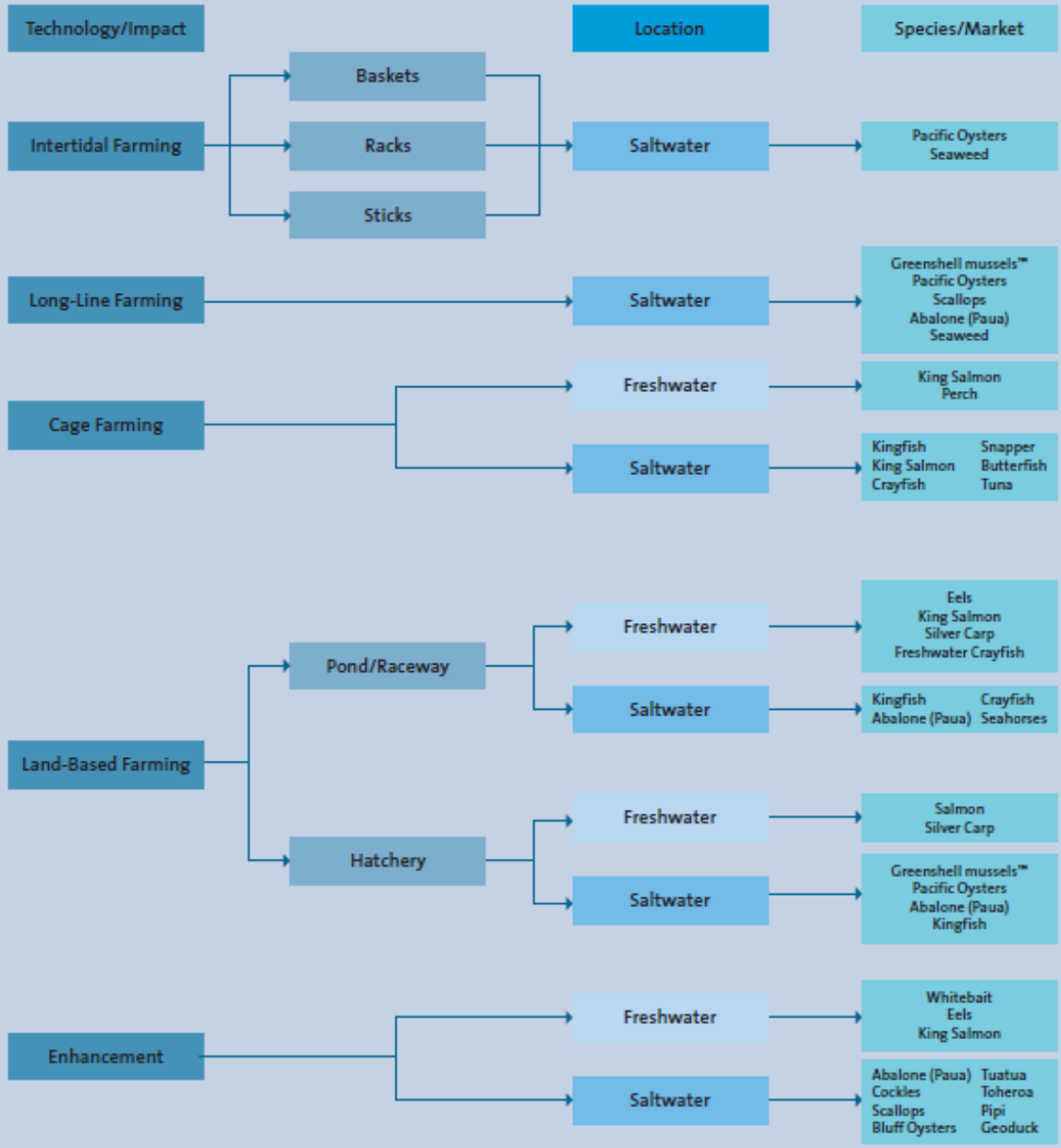
The TAG is to provide recommendations in a written report to Ministers by 30 September on proposals for aquaculture reform.

TAG members will be available until 30 October 2009 to provide oral advice to Ministers on their report.

The report is advisory and Ministers will not be bound by the recommendations of the TAG.

B. Aquaculture Technology Diagram[14]

Figure 8: Aquaculture Technology Diagram



[14] PriceWaterhouseCoopers (2006) *Aquaculture in New Zealand – Market Intelligence Report*, New Zealand Trade and Enterprise

C. Undue Adverse Effects test

The Undue Adverse Effects (UAE) is found in section 186G of the Fisheries Act 1996 and states:

> **186G Matters to be considered before aquaculture decision made**
>
> In considering, for the purposes of making an aquaculture decision, whether an aquaculture management area will have an undue adverse effect on fishing, the chief executive must have regard only to the following matters:
>
> (a) the location of the aquaculture management area in relation to areas in which fishing is carried out:
>
> (b) the effect of the aquaculture management area on fishing of any fishery, including the proportion of any fishery likely to become affected:
>
> (c) the degree to which aquaculture activities within the aquaculture management area will lead to the exclusion of fishing:
>
> (d) the extent to which fishing for a species in the aquaculture management area can be carried out in other areas:
>
> (e) the extent to which the aquaculture management area will increase the cost of fishing:
>
> (f) the cumulative effect on fishing of any previous aquaculture activities.
>
> Part 9A (comprising sections 186C to 186ZL) was inserted, as from 1 January 2005, by section 8 Fisheries Amendment Act (No 3) 2004 (2004 No 104).

We understand these criteria are in issue in proceedings presently before the Courts.

D. Key aspects of Maori Commercial Aquaculture Settlement

- **Iwi are the beneficiaries:** Iwi listed in the Maori Fisheries Act 2004, and who have coastline, are the beneficiaries of the Aquaculture Settlement. Iwi organisations must meet a number of requirements before they can receive their settlement assets. These include appropriate governance arrangements and agreeing with other iwi in their region on how settlement assets will be shared. Settlement assets are initially transferred to the trustee (Te Ohu Kai Moana Trustee Ltd), who is responsible for ensuring that iwi meet the Aquaculture Settlement's requirements.

- **The Aquaculture Settlement is regionally based**: settlement of the Crown's obligations is with the iwi of the region in which space is created. A "region" is the area under the jurisdiction of a regional council. The Maori Commercial Aquaculture Claims Settlement Act also lists particular harbours for allocation purposes.

- **An equivalent of 20% of pre-commencement space is to be provided to iwi:** options include additional new space, purchase of marine farms or cash.

- **Guaranteed access to 20% of all "new" space**: legislation currently requires that iwi obtain 20% of any new space – which under the present regime is space created for aquaculture within AMAs. This obligation is ongoing. We note that this proportion of space is intended to be retained unless iwi decide to allow it to be reduced (for example by selling authorisations or consents). Plan changes that have the effect of reducing the proportion of settlement space relative to other aquaculture space can attract compensation from the Crown.

- **"Authorisations" provide the currency in the case of new space**: the Aquaculture Settlement provides iwi with authorisations to apply for consents in the new space allocated to them.

- **Space allocated for the Aquaculture Settlement must be "representative":** in principle, iwi get space that is broadly representative of productivity, plan rules and reservations – it should be "no less than average". The default process is for councils to identify representative space. However changes contained in Aquaculture Legislation Amendment Bill (No 2) provide an alternative in the case of plan changes that create space in which applicants are known (e.g. changes that create interim AMAs, or Invited Private Plan Changes), providing an opportunity for iwi and applicants to negotiate an agreement.

- **Relatively low cost to Iwi***:* creation of "AMAs" means that much of the necessary investigative work has been carried out during the planning process – and the costs are met by the proponents of the plan change – whether they be the council or applicants.

- **Reasonable certainty and relatively low cost:** consent applications lodged within AMAs have a good chance of success and are relatively low cost compared with the cost of a plan change.