

The Invited Private Plan Change Process for the Creation of Aquaculture Management Areas

An evaluation to inform
implementation



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1.0 Executive Summary

Purpose

The purpose of this report is to outline the statutory framework for the Invited Private Plan Change process to create Aquaculture Management Areas and, subsequently, obtain coastal permits for aquaculture activities in that area. This report will also document the policies and procedures that will need to be developed or undertaken by regional councils when undertaking this process, and will provide interpretation of statutory provisions where required.

This report has been developed with financial support from the Aquaculture Planning Fund administered by the Ministry for the Environment to assist regional councils in the implementation of this approach. Since the commissioning of this report, the political context has changed considerably. A change of government has resulted in a commitment to “overhaul” the statutory provisions that guide the management of aquaculture in New Zealand. The findings in this report may therefore guide regional councils in the implementation of the Invited Private Plan Change process, as well as inform any proposed reform of the aquaculture provisions.

The Invited Private Plan Change process

The Invited Private Plan Change process referred to is that defined by Part 7A Subpart 2 of the Resource Management Act 1991 (s. 165W – 165ZF) and relevant Schedule 1 Part 2 and Schedule 1A provisions. The Fisheries Act 1996 and the Maori Commercial Aquaculture Claims Settlement Act 2004 also guide important steps in the process with regard to the undue adverse effects test, and allocation of authorisations to the trustee respectively.

The Invited Private Plan Change process provides any person with the opportunity to request a plan change to create an Aquaculture Management Area, once an invitation has been issued by the council. This process ensures that 80% of the space created is allocated to the plan change proponent, with the balance (20%) of authorisations being allocated to the trustee. The Invited Private Plan Change process came into effect on the 1st January 2005 as a result of aquaculture reform. No new aquaculture space has been created from new applications since the reforms were undertaken.

The Invited Private Plan Change process begins with the identification of Excluded Areas (non mandatory), followed by an invitation to lodge requests for plan change to create Aquaculture Management Areas. Councils then decide to accept, adopt or reject the request/s (this may include requests for further and additional information and the commissioning of reports). Requests are then subject to an aquaculture decision, taken by the Chief Executive of the Ministry of Fisheries, to assess impacts of the proposal on commercial, customary and recreational fishing. Where necessary, an amendment to the plan change is made to reflect the aquaculture decision and the plan change is notified, submissions received, hearings held and decisions made on the plan change request. Approval of the plan change by the Minister of Conservation is then sought. The Minister of Conservation may also, at that time, exercise any s. 165O RMA functions. The public notices of the offer of allocation of authorisation to the trustee must be published prior to the plan change becoming operative. Allocation of authorisations occurs initially to the trustee (20%),

then to the plan change applicant (80%). Where a reservation related to commercial fishing has been imposed, an aquaculture agreement must be secured with affected parties, prior to the holder of authorisations obtaining a resource consent for aquaculture activities.

The Invited Private Plan Change process contains uncertainty with respect to the outcome. There are five distinct opportunities for the courts to become involved in the process once a plan change request has been lodged.

- a) An appeal may be lodged on the council's decision to reject a plan change request (Schedule 1 cl. 27 RMA)
- b) The aquaculture decision by the Chief Executive of the Ministry of Fisheries may be appealed (s. 186IFA) or judicially reviewed (s. 186J FA)
- c) Appeals may be lodged on decision taken on the plan change itself (Schedule 1, cl. 14. 15 RMA)
- d) The regional council's decision on matters related to s. 9, 10, 11 MCACSA may be appealed (s. 12 MCACSA)
- e) The High Court may become involved in an aquaculture agreement where 90% or more but less than 100% of consent related to the reservation has been obtained by the applicant (s. 186ZF (2) FA).

There are no specific provisions in the current regime to say how overlapping requests for Invited Private Plan Changes are to be reconciled. It is uncertain how this situation could be resolved. It is possible a regional council may adopt a 'preferred' plan change to address this issue, though it is also very unclear how such a selection could be made. Evaluation criteria for resolving overlapping Invited Private Plan Change proposals may be developed, such as the approach taken by the Northland Regional Council. The Aquaculture Legislation Amendment Bill (No. 2) 2008 proposes a solution by establishing the Expressions of Interest phase. This enables the resolution of any overlaps by negotiation, tender or some other method prior to a plan change being formally received. The Bill is, at the time of writing this report, before a select committee.

Conclusions

Analysis of the Invited Private Plan Change process led to the following key conclusions:

The Excluded Areas process provides a useful tool for regional councils when initiating an Invited Private Plan Change process. However, the policy intent of the tool seems unclear, as the provisions do not apply to conventional plan change processes. The "protection" of Excluded Areas from aquaculture proposals may be circumvented by a conventional plan change request.

The process represents challenges to both applicants and regional councils. It has been estimated that the process (excluding the identification of Excluded Areas and any appeals or judicial reviews) could take three and a half (3.5) years under optimal circumstances. This timeframe could balloon to almost three times that for complex or contentious proposals. The costs of the process are discussed in the report.

The Minister of Conservation's s.1650 RMA function may be undertaken during the Invited Private Plan Change process (despite s.1650(6) RMA referring to allocation of authorisations through s.165E, 165F RMA, when allocation of authorisations for the Invited Private Plan Change process occurs in accordance with S165ZF RMA). It is

recommended that the Minister is advised of the intention to offer authorisations when Ministerial approval of the plan change is sought.

The Chief Executive of Ministry of Fisheries' s.165G RMA functions are considered not to apply to the Invited Private Plan Change process. Exactly what was envisaged by this step remains unclear.

The Maori Commercial Aquaculture Claims Settlement Act 2004 guides the process of allocation of authorisations to the trustee when establishing new aquaculture space. Regional councils have the responsibility to identify 20% of new space for allocation of authorisations to the trustee. Space must be representative (based on overall productive capacity; the plan provisions that apply to the space; any reservation for commercial fishing or where the proposal is a staged development or occurs in a specified harbour). The space must also be of an economic size.

It is considered that the criteria for representativeness may be given effect to by councils without undue difficulty. The requirement to ensure that 20% of space for Maori is of an economic size is highly problematic. More analysis would be required before councils attempt to implement this provision. It may be more appropriate to address this challenge through reform of the statutory provision itself. In the event that 20% of space is unable to be identified from the original proposal (in a manner that meets representative and economic size criteria), regional councils may create new space (s. 10 MCACSA), the cost of identification of which, falls to councils.

With respect to funding the process, costs met by applicants includes those associated with: lodging an Expression of Interest and/or plan change request; costs associated with the provision of further, additional information and the commissioning of reports; undertaking First Schedule RMA processes for plan changes (notification, submissions, hearings); and the securing of any aquaculture agreement and subsequent resource consent.

Councils meet the cost of identifying Excluded Areas, development of policy and procedures to support the Invited Private Plan Change process, and notification costs for public notices (call for Expressions of Interest, and requests for plan changes, and of allocation of authorisation to the trustee). The regional council would also bear the costs of any appeals or judicial reviews related to council decisions (identification of Excluded Areas, decision on plan change, and identification of 20% of space for allocation of authorisations to the trustee). The costs of a plan change can be attributed to the applicant irrespective of whether the council accepts or adopts the proposal.

The Ministry of Fisheries and Minister of Conservation bear their own costs in this process. The importance of councils establishing clear funding policy prior to initiating an Invited Private Plan Change is highlighted.

Due to the potentially lengthy and costly aspects of a Invited Private Plan Change process, it was concluded that this process is unlikely to be able to address 'small-scale' issues such as minor extensions or boundary adjustments to existing marine farms, provisions for non-commercial aquaculture (e.g. for cultural purposes associated with a marae), experimental aquaculture, or re-siting of off-site farms.

2.0 Introduction

2.1 Purpose, scope and background to the report

Purpose

The purpose of this report is to outline the statutory framework for the Invited Private Plan Change process to create Aquaculture Management Areas and subsequently obtain coastal permits for aquaculture activities in that area. This report will also document the policies and procedures that will need to be developed or undertaken by regional councils when undertaking this process, and will provide interpretation of statutory provisions where required.

The Invited Private Plan Change process referred to is that defined by Part 7A Subpart 2 of the Resource Management Act 1991 (s. 165W – 165ZF). The Fisheries Act 1996 and the Maori Commercial Aquaculture Claims Settlement Act 2004 also guide important steps in the process with regard to the undue adverse effects test, and allocation of authorisations to the trustee respectively.

Scope

The focus of the report will be evaluating how the Invited Private Plan Change approach may be used in the Canterbury context. Given that the results of this report will be of interest to regional councils throughout New Zealand, central government, industry groups and others, generic implications will also be drawn. Focusing this report exclusively on the Canterbury context, may make it more difficult for the findings to be applied in other regions, and given the national interest (and funding) for this report, identifying implications for both the Canterbury Region, and at a national level is appropriate. Examples from the Canterbury Region will be used to illustrate and discuss scenarios that may be occurring in other regions throughout New Zealand.

The report will include an assessment of those aspects of the Invited Private Plan Change approach as described by the Resource Management Act 1991 (RMA). Consideration will also be given to the provisions of related statutes including Fisheries Act 1996 (FA), Maori Commercial Aquaculture Claims Settlement Act 2004 (MCACSA), Aquaculture Reform (Repeals and Transitional Provisions) Act 2004, Maori Fisheries Act 2004, and the Ngai Tahu Claims Settlement Act 1998 (NTCSA) as appropriate. Consideration will also be given to the recently passed Aquaculture Legislation Amendment Bill 2008. The passage and implications of the Aquaculture Legislation Amendment Bill (No. 2) 2008, which has been introduced to the House and referred to select committee, will also be discussed.

The report will not include an analysis of the identification of Excluded Areas i.e. how this step should or has been undertaken, an evaluation of the policy basis for the tool, nor whether Excluded Areas should be uplifted by public notice following the establishment of Aquaculture Management Areas through the Invited Private Plan Change process. There has been some controversy regarding the diversity of approaches councils are taking with interpreting these provisions. Although the identification of Excluded Areas is not a mandatory step in the Invited Private Plan Change process, once identified, Excluded Areas have significant implications as to

where Aquaculture Management Areas may be established under this process. The process that Environment Canterbury has taken in identifying and publicly notifying Excluded Areas will, therefore, be outlined in the report.

This report will not contain a detailed plan of how Environment Canterbury may proceed down the Invited Private Plan Change process. It will however, outline the steps and considerations that will need to be evaluated when undertaking this process using the Canterbury scenario. For example, the Ngai Tahu Claims Settlement Act 1998 will be evaluated, by way of example, when identifying implications of the Invited Private Plan Change approach. Other settlement statutes throughout the country will not be similarly evaluated.

The report will contain considerable discussion on the allocation of space to Maori as a result of creation of new Aquaculture Management Area space. However, discussion will be focused on the regional council's role in this regard and will not specifically address the Crown's proposals to address the issue of 'pre-commencement' space, except to identify when this process and the Invited Private Plan Change process intersect¹.

Background to aquaculture in Canterbury

Prior to the Resource Management Act 1991, there was little in the way of marine farming in the Canterbury area with a single salmon farm established, and there remained very little interest in the establishment of aquaculture ventures until the late 1990s.

Partly as a result, the Regional Coastal Environment Plan, which was prepared over this period, does not contain separate policies and methods specific to marine farming. Therefore, when the initial application for a mussel farm in Pigeon Bay was received, there was little in the way of policy that could effectively be brought to bear. A key element of Environment Canterbury's decision to approve the farm in part only, related to the effects on natural character. On appeal, a significant decision was made to allow the mussel farm (Pigeon Bay Aquaculture; Hay, Alan and others vs. Canterbury Regional Council C032/99 4NZED209).

In the following years, a large number of applications for marine farms were received by Environment Canterbury. These applications centred on the sheltered bays of Banks Peninsula and in the waters north of the Peninsula, including an application for a large off-shore marine farm in Pegasus Bay. The number and extent of the applications formed part of the perception of a "gold rush" that developed nationally. As a result of regional councils' request, part of the central government response was the Aquaculture Moratorium, which was put in place on the 28th November 2001. Many of the applications that had been lodged were for the bays of Banks Peninsula and the majority of these applications escaped the moratorium and proceeded to obtain consents, either from Environment Canterbury or the Court. There are now 16 aquaculture consents in the Canterbury coastal marine area. In addition, Environment Canterbury sought and obtained a partial lifting of the moratorium to allow part of the large marine farm application in Pegasus Bay to proceed through

¹ Pre-commencement space is any aquaculture space created on or after 21 September 1992 and up to 31 December 2004. This also includes space that is still being created by applications processed under the existing legislation that was lodged and notified prior to 28 November 2001. The Crown has an obligation to ensure that the trustee is provided with space (or equivalent) in the coastal marine area to the equivalent of 20% pre-commencement space for aquaculture activities (s. 22 Maori Commercial Aquaculture Claims Settlement Act 2004).

the consents process. This 2500 ha mussel farm now has resource consent, though advice from the Ministry of Fisheries on an aquaculture decision is still pending.

Prior to the moratorium, Environment Canterbury was developing a plan for the management of aquaculture, principally around Banks Peninsula. Initial work for this Plan had centred on the formation of an industry interest group and an extensive community-focussed consultation under the title, "Sharing Our Sea". The industry interest group had been invited to jointly submit a "wish list" of sites and locations. They agreed that this wish list should form the basis of the public consultations. In addition, an independent consultant was hired to undertake consultation with Tangata Whenua in relation to those holding mana whenua over parts of the Coastal Marine Area. A report was produced, "Defining Aquaculture Management Areas from a Ngai Tahu Perspective" (Natural resources Unit, Te Runanga o Ngai Tahu October 2002), and this report was endorsed by all papatipu runanga. The "Sharing Our Seas" process was eventually curtailed by the 2004 reforms and the Council's subsequent decision to progress down the Invited Private Plan Change process. The Ngai Tahu report recommendations were later considered in the work on defining Excluded Areas.

The Regional Coastal Environment Plan was adopted by Canterbury Regional Council in June 2004 and the current plan became operative in November 2005. The plan has a policy to maintain a number of bays of Banks Peninsula and areas designated as Areas of Significant Natural Value in their natural state, free of additional structures including marine farms, unless they cause only minor adverse effects. It does provide for minor expansions of existing marine farms at, or adjacent to the existing locations and temporary relocation for various reasons. Erection and placement of such a structure is not a prohibited activity and is classified by the rules in the plan as a non-complying activity. The establishment of Excluded Areas means that these small-scale extensions may only be achieved through a conventional plan change process.

The Resource Management Act 1991 provides several different approaches to creating Aquaculture Management Areas. In April 1995, the Council has resolved not to proceed with a Council-initiated plan change to create Aquaculture Management Areas in the region, but resolved instead to proceed down the route of the Invited Private Plan Change². As part of this, Environment Canterbury consulted on and notified a number of Excluded Areas under S164W, subpart 2, Part 7A Resource Management Act.

It was within this context that Environment Canterbury successfully applied for funding from the Aquaculture Planning Fund³ to investigate policies and procedures for an Invited Private Plan Change approach.

² While the Resource Management Act 1991 refers to the "Privately Initiated Plan Change" approach, the Aquaculture Legislation Amendment Bill (No. 2) 2008 proposes to amend this to "Invited Private Plan Change". This proposed terminology will be used throughout the report.

³ <http://www.mfe.govt.nz/withyou/funding/aquaculture-planning-fund.html>

2.2 Legislative history to management of aquaculture

Historical regime

Prior to the passage of the Resource Management Act 1991, aquaculture was largely controlled by the Ministry of Fisheries under the Marine Farming Act 1971, which provided for the issuing of leases and licences to manage marine farming. Non-fishing matters such as navigation safety, effects on other marine activities and the approval of structures were handled under the Harbours Act 1950. With the introduction of the Resource Management Act in 1991, the statutory requirements for marine farms were extended to include the need to secure a coastal permit for the structure/s and for the occupation of space associated with the marine farming activity.

Following the closing-off of the Marine Farming Act 1971 provisions in 1992, marine farming was administered through the Fisheries Act 1983 permitting system (involving either a marine farming or spat catching permit) along-side the requirements of the Resource Management Act 1991. This phase established a dual but non-integrated approach to management of aquaculture.

'Gold rush' triggering the need for reform

During the 1990s, marine farming grew at an exponential rate with demand for water space increasing rapidly. As a result of this increase in demand for space, it became apparent that the existing regime was unable to manage the level of interest in establishing aquaculture space. The main concerns related to: increased delays for marine farm applications for new space; the rising costs of processing of those resource consent applications; and communities becoming increasingly concerned that the possible effect of marine farms was not being fully recognised or managed. Other issues included: submitter fatigue; costly delays in developing regional coastal plans; local moratoria; and little strategic direction with respect to location of marine farms to deal with cumulative effects.

In response to the shortcomings of the then existing legislative regime, government began with a public discussion document in August 2000 in seeking to establish the policy for reform. Following consultation with stakeholders, an agreed policy basis for reform was confirmed in November 2001, with the final decisions on the reform being made in July 2004. Government introduced an immediate moratorium on new applications commencing 28 November 2001, while the new statutory regime was developed. In March 2002, the Resource Management (Aquaculture Moratorium) Amendment Act 2002⁴ came into force initially establishing a two-year moratorium. The moratorium was subsequently extended to 31 December 2004 to ensure that the aquaculture provisions being developed were consistent with the foreshore and seabed policy. During the moratorium, alignment between the aquaculture reforms and the Treaty of Waitangi principles were also considered leading to the provision of 20% allocation of space to Maori through the Maori Commercial Aquaculture Claims Settlement Act 2004. These provisions were developed to be consistent with The Treaty of Waitangi (Fisheries Claims) Settlement Act 1992, which settled Maori

⁴ The purpose of the Act was to:

- (a) to repeal the Marine Farming Act 1971 and provide for transitional matters relating to the repeal; and
- (b) to repeal certain provisions in Part 4A of the Fisheries Act 1983 and provide for transitional matters relating to the repeal; and
- (c) to provide for transitional matters relating to the ending of the moratorium under the Resource Management Act 1991

claims to commercial fishing, clarified Maori rights to customary or non-commercial fishing, and discharged the Crown's obligations in respect of Maori commercial fishing interests under the Treaty of Waitangi.

Aquaculture reform 2004

The aquaculture reform programmes stated purpose was ...*"to enable the sustainable growth of aquaculture and enable the cumulative environmental effects are properly managed while not undermining the fisheries regime or the Treaty of Waitangi settlements"*, and was given effect through amending five existing Acts through the following:

- a) Resource Management Amendment Act (No. 4) 2004;
- b) Fisheries Amendment Act (No. 5) 2004;
- c) Conservation Amendment Act (No. 3) 2004;
- d) Biosecurity Amendment Act (No. 3) 2004;
- e) Te Ture Whenua Maori Amendment Act (No. 3) 2004.

Two new Acts were also created:

- a) Maori Aquaculture Commercial Claims Settlement Act 2004 and
- b) Aquaculture Reform (Repeals and Transitional Provisions) Act 2004

The key aspects of the reforms may be summarised as follows:

Requirement for integrated management and a requirement for Aquaculture Management Areas - A key aspect of the 2004 reforms was that aquaculture is to be managed in an integrated manner by regional and unitary councils through a single process for aquaculture planning and consents through the Resource Management Act. Councils were given a clearer direction and responsibilities for managing environmental effects of aquaculture. Aquaculture Management Areas were created as a zoning tool for spatially managing where aquaculture could occur with the restriction that aquaculture is unable to occur in areas outside "Aquaculture Management Areas". The reform enabled Aquaculture Management Areas to be created by conventional plan change processes undertaken by the Council or a private applicant, or through the Invited Private Plan Change process. No coastal permits for aquaculture activities could be issued in the coastal marine areas outside the already established or newly created Aquaculture Management Areas.

The transitional provisions enabled certain marine farm leases and licences, Resource Management Act coastal permits and coastal plans provisions, and some existing applications to be deemed Aquaculture Management Areas. Interim Aquaculture Management Areas were also provided for, during the reforms, for situations where councils had progressed some way down the track to identifying areas where aquaculture could be undertaken. While a number of pre-reform marine farms in the Canterbury region have been deemed Aquaculture Management Areas, there are no provisions for interim Aquaculture Management Areas within the Regional Coastal Environment Plan.

Undue adverse effects test - The reforms provided that the implications of establishing Aquaculture Management Areas on commercial, recreational and customary fisheries be managed at the Aquaculture Management Area level through the undue adverse effects test (Fisheries Act 1996), prior to those areas being formally acknowledged in a regional coastal plan. Previously, this evaluation was

undertaken at the individual farm level through the provisions of the Fisheries Act 1983.

Processing of applications - The effect of the moratorium was that no new applications for aquaculture activities would be received or processed during the moratorium period. The moratorium also extended to the processing of all resource consent applications for aquaculture activities that had been received but had not been notified, or where decisions on notification had yet to be taken. This was to allow the new regime to be established, and to give regional councils opportunity to create the new frameworks necessary for implementation. Those applications that had already been notified by regional councils prior to the 28 November 2001 continued to be progressed in accordance with the pre-reform legislation. A summary of how applications are processed is outlined below

Applications			
Old regime	New regime	ARA⁵	Relevant information
Lodged with council and not notified before 28 November 2001. On hold.	Application is 'frozen' and can only proceed if within an AMA ⁶ .	Section 47	These applications were caught by section 150B (2) of the Resource Management (Aquaculture Moratorium) Amendment Act 2002. If a plan change is notified defining an AMA, and the applications are outside an AMA in that plan, they are cancelled. In the event of there being no plan defining AMAs, applications will be cancelled by 31 December 2014 (ARA section 47).
Notified by council and partially processed.	Continues to be processed under the (then) current RMA provisions, and the Fisheries Act 1983, and is then transitioned into the new regime.	Section 50	The RMA ⁷ permit is considered and if issued, then the applicant should seek the relevant fisheries permit. If this is issued, the consent holder is deemed a registered fish farmer and the fisheries permit area becomes a deemed AMA (refer ARA sections 20/21).
Consent granted by council and seeking Fisheries Act permit.	Continues to be processed under the Fisheries Act 1983 and is then transitioned into the new regime	Section 52	The relevant fisheries permit is issued. The consent holder is deemed a registered fish farmer and the fisheries permit area becomes a deemed AMA (refer ARA sections 20/21).

Source: <http://www.mfe.govt.nz/publications/rma/aquaculture-info-new-regime-jan05/aquaculture-new-regime-jan05.html>

In the Canterbury context, authorisation was sought and obtained for a partial lifting of the moratorium to allow part of large marine farm application in Pegasus Bay to proceed. This 2500ha mussel farm has been given resource consent though aquaculture decisions from the Ministry of Fisheries are still pending.

⁵ Aquaculture Reform (Repeals and Transitional Provisions) Amendment Act 2004

⁶ Aquaculture Management Area

⁷ Resource Management Act 1991

Giving effect to Treaty of Waitangi provisions – The reforms include the creation of the Maori Commercial Aquaculture Claims Settlement Act 2004, which provides for a full and final settlement of aquaculture interests since September 1991. This Act also provides a process for the Crown to address Treaty responsibilities with respect to pre-commencement space (associated with historically created ‘aquaculture space’).

Case law

One significant piece of Resource Management Act case law that has occurred following the 2004 aquaculture reform is the SMW Consortium Limited vs. Tasman District Council (W034/06) decision in which the Court held that applications for mussel farms could be made under the Proposed Tasman Resource Management Plan despite the activity being prohibited under the transitional plan, i.e. that applications could be made for aquaculture activities in areas that were not approved in the coastal plan as Aquaculture Management Areas.

2.3 Recent amendments

The finding of the Courts in the 2006 SMW Consortium Limited vs. Tasman District Council decision had not been anticipated by government when drafting and passing the aquaculture reform provisions. Accordingly, the **Aquaculture Legislation Amendment Bill 2008** primarily dealing with the implications of the SWM Consortium Limited vs. Tasman District Council was passed into law on 24 September 2008, clarifying the policy intent of the aquaculture reforms. The amendment ensured that applications for the occupation of the coastal marine area for aquaculture activities cannot be made unless they relate to Aquaculture Management Areas in operative regional coastal plans. The Bill also cancelled any applications made after 9 May 2006 (date of the SMW decision) that do not relate to Aquaculture Management Areas in operative regional coastal plans.

The Aquaculture Legislation Amendment Bill (No. 2) 2008 was introduced into parliament on 24 July 08 and had its first reading on 23 September 2008. This Bill is an omnibus bill which proposes to amend the Resource Management Act 1991, the Fisheries Act 1996, the Maori Commercial Aquaculture Claims Settlement Act 2004 and the Aquaculture Reforms (Repeals and Transition Provisions) Act 2004, to correct problems with the current law and improve its operation. The Bill seeks to:

- provide an opportunity for the negotiation of an aquaculture agreement with relevant commercial fishers, where a permit (for applications lodged prior to 1 January 05) would otherwise be declined;
- establish technical amendments on timeframes for review of deemed consents, details for lodging aquaculture agreements and definitional issues under the Maori Commercial Aquaculture Claims Settlement Act 2004;
- enable councils to hold an Expression of Interest phase when conducting an Invited Private Plan Change process to establish Aquaculture Management Areas to identify spatial overlaps, and allow negotiation or amendment of proposals to address those overlaps. Where negotiation fails, the Bill proposes that financial tender will be used to choose between Expressions of Interest that relate to the same space. The Bill clarifies that councils may choose between competing requests where it does not use an Expression of Interest phase;

- provide a process for experimental aquaculture to take place outside Aquaculture Management Areas for a maximum period of 5 years with no right of renewal;
- provide that environmental monitoring (using marine organisms to monitor state of the environment) is not an aquaculture activity.

This Bill has been referred to the Primary Production Select Committee and submissions were received on the Bill until 5 February 2009.

To date, while Aquaculture Management Areas have been expanding around the country as pre-reform applications are processed, no new space for aquaculture has been created through conventional or Invited Private Plan Changes process established by the 2004 reforms.

2.4 Report structure

The report begins by describing the Invited Private Plan Change process. This includes documenting each of the steps of the process from the initial consideration by regional councils of whether to identify Excluded Areas, through to the obtaining of resource consent once an Aquaculture Management Area is established. The Expressions of Interest step (currently the subject of the Aquaculture Legislation Amendment Bill (No. 2) 2008) is included in this discussion. An estimate of the time taken to execute the process is provided. Attention is drawn to some of the challenges the process presents to both applicants and councils.

Section 3.2 discusses the Expression of Interest step more fully, along with discussion on how overlapping applications to establish Aquaculture Management Area may be managed under the current regime.

The Maori Commercial Aquaculture Claims Settlement Act 2004 provides criteria for regional councils to use when identifying space for allocation of authorisation to the trustee. These criteria are identified, discussed and suggestions for interpretation supplied in section 3.3. Implications of regional councils' responsibilities to identify space are drawn.

The chapter on funding (section 3.4) explores the cost implications for undertaking the Invited Private Plan Change process for applicants, regional councils and the Crown. An estimate of costs for implementing the Invited Private Plan Change process, under a simple scenario, is included.

The extent to which the Invited Private Plan Change process may be used to address historical issues such as: the need for minor extensions or boundary adjustment to existing marine farms; management of off-site farms; and providing for experimental aquaculture are assessed in section 3.5.

In addition to conclusions being drawn throughout the report, section 4.0 draws out the main findings and implications of the report, and highlights how the findings of this report may inform future aquaculture reform proposals.

3.0 Identification and Discussion of Key Policy Issues

3.1 The Invited Private Plan Change Process

3.1.1 Introduction and background

The purpose of this section of the report is to:

- a) Identify the process which is required to be undertaken when establishing Aquaculture Management Areas through the Invited Private Plan Change process established under the current regime, and the subsequent issuing of coastal permits for aquaculture activities in those areas;
- b) Identify the proposed amendment through the Aquaculture Legislation Amendment Bill (No. 2) 2008 establishing an Expressions of Interest stage, and the implications for the Invited Private Plan Change process;
- c) Identify areas where policy guidance or process documentation will need to be developed by regional councils.

The purpose of this exercise is to provide sufficient clarity to what is potentially an ambiguous process, to give industry confidence to engage, and council a sound basis for decision-making. Given that an Invited Private Plan Change process has not been previously undertaken, the legislation remains untested. In order for regional councils to establish and run a smooth process, clarity around the statutory process is required. In some instances, ambiguity with respect to the process may require the development of policy to guide interpretation of the Act, and the decision-making of council.

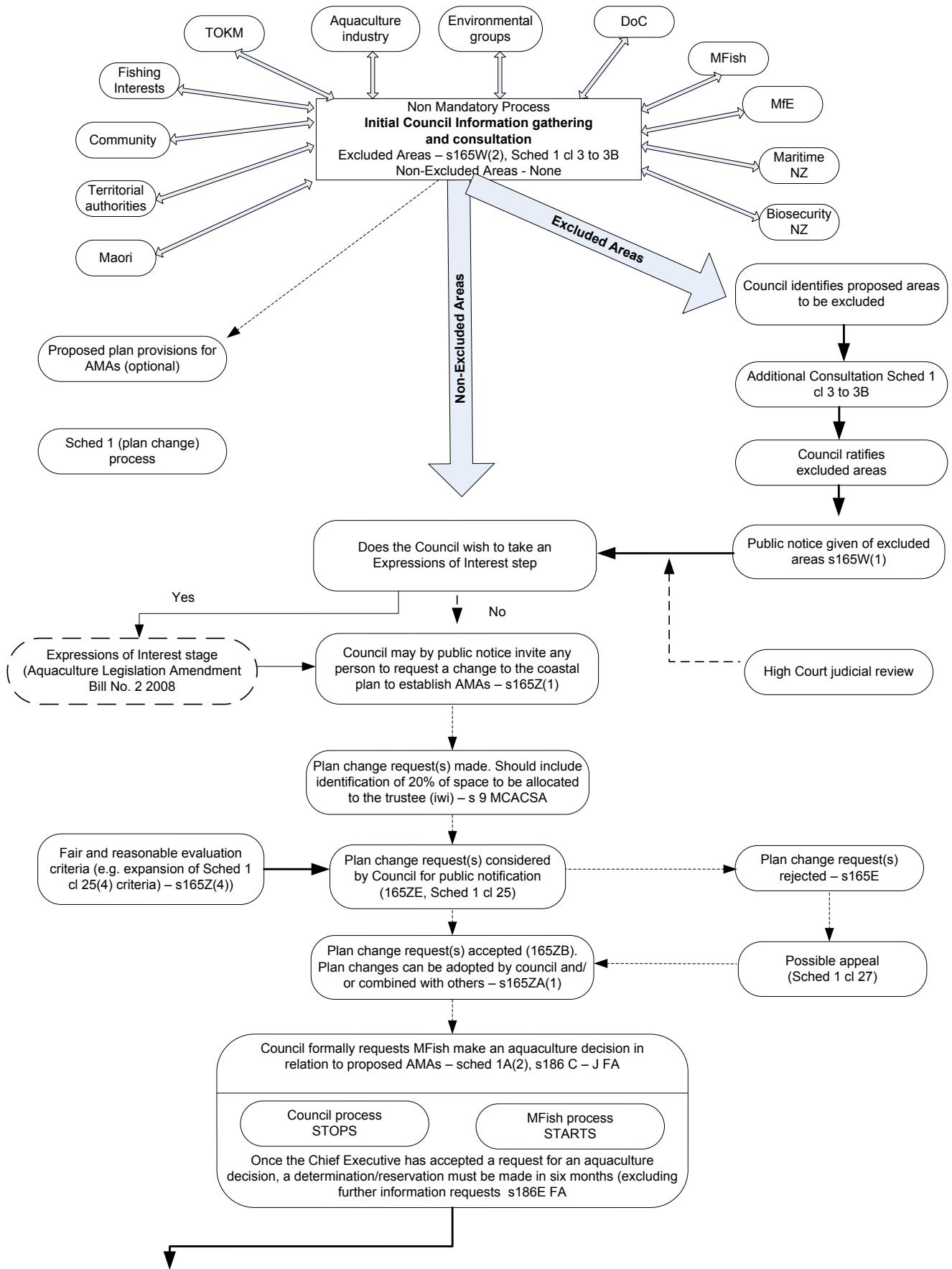
Summary of provisions

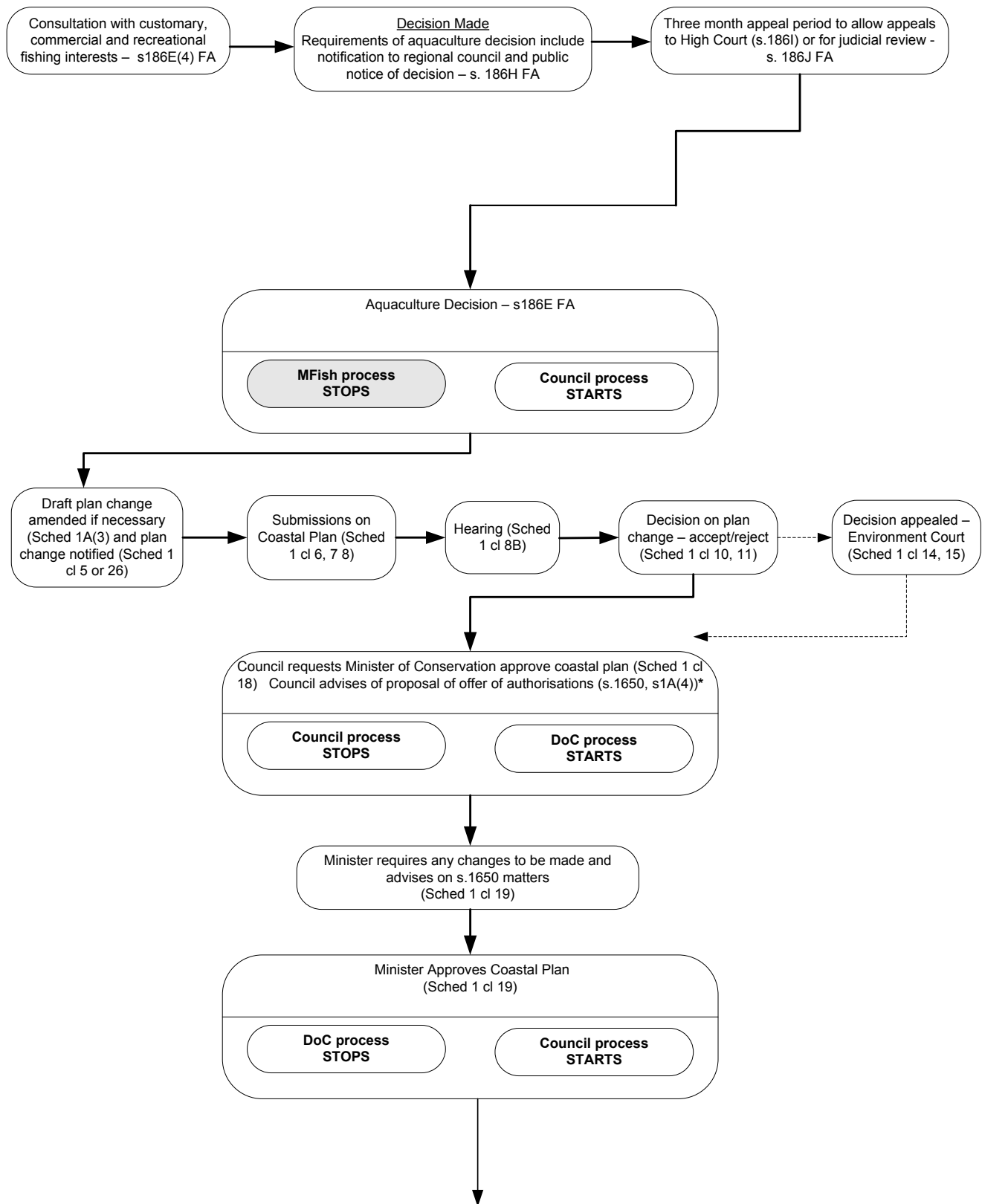
The process establishing Aquaculture Management Areas through an Invited Private Plan Change process is outlined in Schedule 1 part 2 clause 21 – 29 and Schedule 1A of the RMA, except as modified by sections 165W- 165ZF (as directed by section 165Z(2) RMA). Part 1 of the First Schedule, that directs the process for preparation and change of plan, also applies to the specific provisions of schedule 1A (Schedule 1A (1) (1) RMA). Schedule 1 clause 29 outlines modifications to the Schedule 1 process where a request is accepted under clause 25(2) (b) RMA.

Diagram 1 illustrates the statutory steps of the Invited Private Plan Change process in its entirety, from the identification of Excluded Areas through to the process of obtaining coastal permits for aquaculture activities in the newly created Aquaculture Management Areas. At the time of the writing of this report, the Aquaculture Legislation Amendment Bill (No. 2) 2008 containing provisions establishing the Expression of Interest stage was at select committee stage but had not yet been passed into law. Given the relatively advanced stage of the Bill, the Expressions of Interest stage will be discussed based on the current wording of the Bill. The Expression of Interest step is illustrated in the diagram below with dotted lines only indicating that this is not yet a statutory provision.

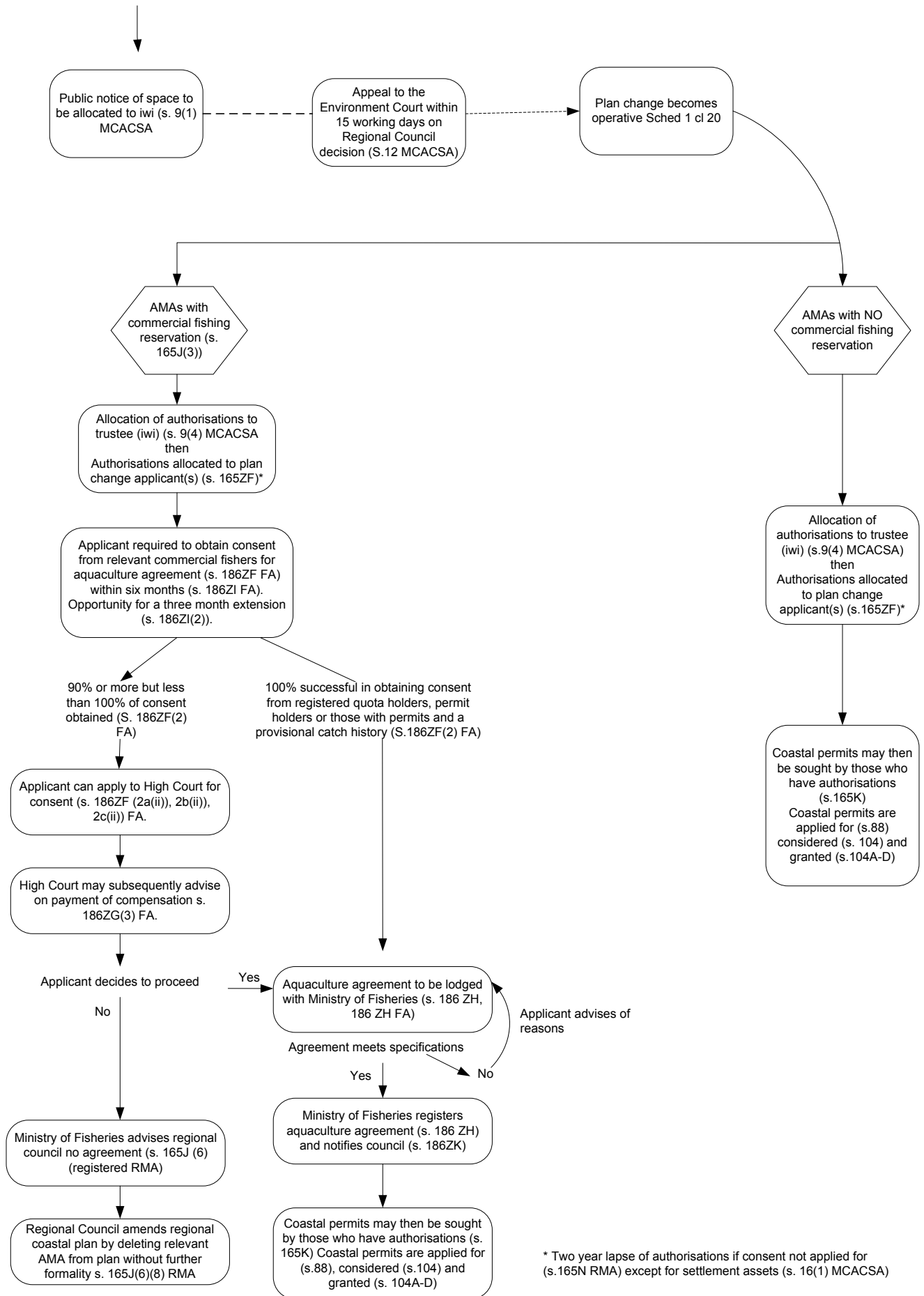
In the diagram, references to statute are to the Resource Management Act 1991 unless specified otherwise. FA = Fisheries Act 1996 and MCACSA = Maori Commercial Aquaculture Claims Settlement Act 2004.

INVITED PRIVATE PLAN CHANGE PROCESS





* See report for full discussion on section 1650 RMA



* Two year lapse of authorisations if consent not applied for (s.165N RMA) except for settlement assets (s. 16(1) MCACSA)

3.1.2 Outline of the steps in the Invited Private Plan Change process

The following section discusses in more detail each of the steps of the Invited Private Plan Change process illustrated above. For referencing purposes and to assist explanation, aspects of the process have been identified and numbered (steps 1 – 20). This numbering system has been used in this chapter and again when discussing funding aspects of the process (section 3.4). It should be noted that the numbering used in the steps is to guide the reader through this report, and they do not have direct links to statutory provisions. The steps described are not necessarily sequential and may occur simultaneously, e.g. policy development procedures in steps 2 and 3. Refer to Appendix 1 which indicates how the numbering system employed below relates to the diagram above.

Step 1 Excluded Areas process

Prior to issuing an invitation for requests for an Invited Private Plan Change, regional councils must make a specific decision as to whether or not one or more Excluded Areas should be identified in the part of the coastal marine areas that relates to the invitation(s. 165Z (1A)(b) RMA). While not mandatory, a council may then identify Excluded Areas by public notice (s. 165W (1) RMA) in which requests to change a regional coastal plan, under Part 7, subpart 2 of the RMA (i.e. the Invited Private Plan Change process) in order to undertake aquaculture activities may not be sought or accepted (s. 165X RMA). Before identifying Excluded Areas, councils must comply with the consultative requirements outlined in clauses 3 to 3B of Schedule 1 RMA. These clauses outline the parties that must be consulted (including Ministers of the Crown, local authorities, tangata whenua) and the manner in which this consultation should occur.

By stating that a Council “may” identify an Excluded Area in a plan, section 165W (1) RMA empowers a Council, provided the public consultation requirements specified in s165W(2) RMA are met. The duty to undertake public consultation is only triggered if the Council proposes an Excluded Area, as section 165W (2) RMA limits the scope of consultation to circumstances where an Excluded Area is proposed. If the Council considers that such controls are not necessary, it will not need to exercise the power set out in section 165W (1) RMA, and will therefore not be required to commence public consultation.

Section 165Z (1A)(b) RMA requires councils to issue an invitation for a private plan change after the Council has decided whether or not to create Excluded Areas within the coastal marine area covered by the invitation. The purpose of this section is to describe events which must occur prior to the issue of an invitation. Because this section is not an empowering provision, on its own it cannot create a specific obligation on a council to publicly consult on the issue of whether or not to propose an Excluded Area.

As Environment Canterbury has already identified Excluded Areas, additional policy work in this area will not be undertaken. A summary of the decisions taken that led to Environment Canterbury identifying Excluded Areas, and a preference for the use of the Invited Private Plan Change process as a means of establishing Aquaculture Management Areas in the Canterbury region is found in section 3.5.2 of this report. The approach that regional councils have taken to identification of Excluded Areas varies around the country. For example, many councils have not yet identified

Excluded Areas, while Auckland Regional Council has proposed a comprehensive approach to identification of these areas.

Step 2 Expressions of Interest policy development phase

Step 4 Notifying the invitation for Expressions of Interest

A full discussion of the Expressions of Interest stage and the policy and management implications arising from this proposed step is included in section 3.2 of this report.

It should be noted that the current statutory regime does not contain any specific provisions for managing requests for plan changes to create Aquaculture Management Areas that overlap. Without a means to resolve overlapping applications, councils do not have a clear process to resolve this issue, should it arise. In addition, applicants may invest in research for a plan change request that overlaps with another proposal, resulting in a potential loss of investment. Provisions in the Aquaculture Legislation Amendment Bill (No. 2) 2008 will address this gap. In the event that the Bill is not passed, the Expressions of Interest step will not exist in the process. In this circumstance, the process will proceed directly from the considerations of Excluded Areas to the invitation issued under s. 165Z (1) RMA. Provided that the Bill is enacted, councils will have the choice to either use the Expressions of Interest step or proceed directly to invitations for plan change requests. It is recommended that (if enacted) the Expressions of Interest step is used in the event that overlapping applications are received. The Expressions of Interest step is important as it will have implications for allocation of space, as it establishes the applicant's right to subsequently apply for a plan change request.

Environment Canterbury has already decided to go down the Invited Private Plan Change route rather than directly offer aquaculture authorisations by tender or other method. However, tenders may still eventuate when the proposed legislation is enacted (Aquaculture Legislation Amendment 2008 (No. 2) 2008).

The Aquaculture Legislation Amendment 2008 (No. 2) 2008 has proposed an Expressions of Interest phase before a regional council invites private plan changes to provide a process whereby spatially overlapping requests may be resolved. This would have to occur prior to a call for the submitting of applications for private plan changes. This resolution process must include a tender system unless, either the parties resolve the matter themselves by negotiation, or a fair and reasonable alternative is adopted by the Regional Council.

Step 3 Process and procedures development

The Regional Council under Section 165Z (4) RMA must establish a process that is “fair and reasonable in the circumstances” when carrying out functions of inviting lodgement of requests for private plan changes (s. 165Z (1) RMA) and processing requests subsequently received (clause 25 (1) of Schedule 1 of the RMA⁸).

With respect to inviting requests for a plan change, the matters to be considered in developing a process that is fair and reasonable include:

- a) the time made available for requests to be received;
- b) the type of information that is expected to be lodged as part of the request to satisfy Schedule 1 clause 22 RMA ;
- c) clarification of the applicant’s responsibilities for consultation to be undertaken in formulating the request, including for example, consultation with Maori and the trustee on the identification of 20% of space for allocation to the trustee;
- d) the manner in which the applicant could satisfy general consultation requirements as outlined in Schedule 1 clause 2, 3, 3B RMA;
- e) the management of information received from the applicant by the Council, particularly given the likely commercial sensitivity of such information.

Some of the challenges to establishing policy procedures will include the uncertainties councils will have with regard to the level of engagement that may occur once Expressions of Interest are called for. For example, it will be unclear when planning the process how many overlapping applications may be received and how long they may take to be resolved by negotiation or by tendering or other methods.

For an example of the information requirements, for plan change applicant’s seeking to establish Aquaculture Management Areas, refer to Appendix 5, which contains extracts from the council decision: Regional Coastal Plan for Northland, Proposed Plan Change 4 Policy and Regulatory Regime for Aquaculture Management Areas.

⁸ 25. Local Authority To Consider Request

(2) The local authority may either—

- (a) Adopt the request, or part of the request, as if it were a proposed policy statement or plan made by the local authority itself and, if it does so,—
 - (i) The request must be notified in accordance with clause 5 of this Schedule within 4 months of the local authority adopting the request; and
 - (ii) The provisions of Part 1 of this Schedule must apply; and
 - (iii) The request has effect once publicly notified; or
- (b) Accept the request, in whole or in part, and proceed to notify the request, or part of the request, under clause 26.

(3) The local authority may decide to deal with the request as if it were an application for a resource consent and the provisions of Part 6 shall apply accordingly.

(4) The local authority may reject the request in whole or in part, but only on the grounds that—

- (a) The request or part of the request is frivolous or vexatious; or
- (b) The substance of the request or part of the request has been considered and given effect to or rejected by the local authority or Environment Court within the last 2 years; or
- (c) The request or part of the request is not in accordance with sound resource management practice; or
- (d) The request or part of the request would make the policy statement or plan inconsistent with Part 5; or
- (e) In the case of a proposed change to a policy statement or plan, the policy statement or plan has been operative for less than 2 years.

(5) The local authority shall notify the person who made the request, within 10 working days, of its decision under this clause, and the reasons for that decision.

With respect to processing requests for plan changes as a result of the invitation extended under s. 165W RMA, regional councils must also develop procedures to decide:

- a) whether it will adopt all or a part of any request for a private plan change, as if it were a proposal made by the local authority itself; and proceed to notify this in accordance with Schedule 1 clause 5 RMA; or
- b) whether it will accept a request, in whole or in part, and notify the request in accordance with Schedule 1 clause 26 RMA; or
- c) whether it will reject a request in whole or in part, on the grounds set out in clause 25 (4) of Schedule 1 RMA.

The Council is required to notify the requested plan change within 10 working days of reaching a decision on how the request will be handled (cl. 25(5) Schedule 1 RMA).

Step 5 Request for private plan change notified and applications received

The Regional Council may by public notice invite any person to request a change to a proposed/regional coastal plan to establish an Aquaculture Management Area (s.165Z). This invitation may include all, or parts of, the coastal marine area over which the council has jurisdiction.

In the event that the Aquaculture Legislation Amendment Bill (No. 2) 2008 has not come into effect, this step would proceed directly from the Excluded Areas process described in step 1, though development of process and procedures described in step 3 would still be required.

In the event that the Aquaculture Legislation Amendment Bill (No. 2) 2008 becomes law, once the Expressions of Interest phase has been concluded, the Bill requires that the Council must notify the person whose Expression of Interest has been accepted and the last day on which they may lodge a request to change the plan (s. 61 Aquaculture Legislation Amendment Bill (No. 2) 2008, which provides for the insertion into the RMA of s. 165ZFI). This request must be rejected if it:

- a) Is given to the Council after the specified date; or
- b) Does not relate to the same space as specified in the Expression of Interest; or
- c) Is inconsistent with the Expression of Interest to which it relates.

It is the applicant's responsibility to lodge a request for a plan change consistent with the processes and procedures specified by the Council consistent with the RMA.

Part 2 of Schedule 1 of the RMA specifies the form of a request and Section 165C states how an Aquaculture Management Area is to be specified in a regional coastal plan. Section 165ZB provides that only 80% of such an Aquaculture Management Area may be authorised for use by the person(s) requesting the change.

Decisions on information related to the request

- | | |
|--------|-------------------------------------|
| Step 6 | Information Decision |
| Step 7 | Submitter supplies more information |
| Step 8 | Commissioned reports |

Schedule 1 cl. 22 RMA outlines the form in which the request for a plan change must be made. The requirements for the request include:

- a) the request must be in writing;
- b) explain the purpose of, and reason for, the proposed change to the plan;
- c) contain an evaluation under Section 32 for any objectives, policies, rules or other methods proposed;
- d) description of environmental effects anticipated, taking into account the provisions of Schedule 4, in a level of detail that corresponds with the scale and significance of the actual or potential effects anticipated.

The Regional Council must determine, within 20 working days, whether it has sufficient information about a request and may require more information in accordance with Schedule 1 cl. 23 RMA. Further information may be obtained, where the information is appropriate to the scale and significance of the effects anticipated, to enable the local authority to better understand:

- a) The nature of the request with respect to the effects on the environment or;
- b) The way effects may be mitigated;
- c) The benefits, costs, efficiency and effectiveness; and any possible alternatives to the request;
- d) The nature of consultation undertaken.

The opportunity for the Regional Council to request additional information within 15 days of receipt of the further information supplied, is also stipulated (cl. 23(2) Schedule 1 RMA). Within 15 working days of receipt of further or additional information, or within 20 working days of the request for a plan change (where no further or additional information is requested), a report may be commissioned (cl. 23(3) Schedule 1 RMA).

The applicant must be advised by the local authority of the reasons for requests for further or additional information or for commissioning of reports. The applicant may choose to refuse to supply further or additional information. In the event that the applicant refuses to supply further or additional information, the local authority may reject the request on the basis that there is insufficient information to consider or approve the request (Schedule 1 Part 2 clauses 23(6)).

Establishing clear guidelines for information would assist the applicant in preparing requests and lower the likelihood of the need for provision of further or additional information, or possible rejection of the request in the event that this material is not provided.

Step 9 Request modification

Schedule 1 clause 24 RMA allows for the modification of the request by the Regional Council with the agreement of the person who made the request. Modification of the request must be as a result of further or additional information, commissioned reports or other relevant information.

Clarification as to when modification of a request may be undertaken will not be the subject of discussion in this report. Any modification is only undertaken with agreement of the applicant (Schedule 1 clause 24) and will vary in a case-by-case basis.

Step 10 Decision to adopt, accept or reject

Following formal receipt of the request or all required information or modification of the request (whichever is the latest), Schedule 1 Part 2 clauses 25 (2, 3, 4) outlines options for how the local authority may progress the request. Options include⁹:

- a) adoption of the request (in whole or in part)¹⁰;
- b) acceptance of the request (in whole or in part)¹¹;
- c) rejecting the request in whole or in part.

The grounds upon which a request may be partly or entirely rejected are limited to where instances stipulated by s 165ZE and cl. 25 Schedule 1 RMA:

- a) *The request or part of the request is frivolous or vexatious; or*
- b) *The substance of the request or part of the request has been considered and given effect to or rejected by the local authority or [Environment Court] within the last 2 years; or*
- c) *The request or part of the request is not in accordance with sound resource management practice; or*
- d) *The request or part of the request would make the policy statement or plan inconsistent with Part 5; or*
- e) *The Regional Council is preparing a change to establish an Aquaculture Management Area in the same area of its region; or*
- f) *More than 1 person has requested a change to establish an Aquaculture Management Area in the same area of the region and the Council has adopted another request.*

The Resource Management Act provides further guidance to the adoption and acceptance of requests in section 165ZA and 165ZB with respect to adopting and combining requests. Councils may choose to adopt a request (or part of a request) and combine it with others where it may assist in allocating space of economic size to the trustee, or allows more effective management of cumulative effects in Aquaculture Management Areas, or for more effectively planning aquaculture activities. The person who made the request may appeal to the Environment Court decisions made by the Council as to how the request will be handled (Schedule 1 clause 27).

Policy and procedures have to be developed to make decisions under this step. A recommended set of policy and procedures is set out below:

- 10.1 Apply the tests set out in Section 25(4) of Schedule 1 of the RMA. If it passes these tests, proceed to 10.2, otherwise reject the proposal.
- 10.2 Check that the proposal conforms with the model plan change prepared for this purpose (or is otherwise considered acceptable).
- 10.3 Check that all the required information has been satisfactory provided in accordance with an information schedule.

⁹ In the instance of plan change request to create Aquaculture Management Areas, it is not appropriate to consider the request as an application for resource consent.

¹⁰ When a request is adopted, it is as if the proposal was made by the regional council itself, and the plan change is notified in accordance with First Schedule Clause 5 RMA

¹¹ When a request is accepted, the regional council prepares the request in consultation with the applicant and the plan change is notified in accordance with First Schedule Clause 26 RMA

- 10.4 If 10.2 and 10.3 checks are both met, adopt the proposal and go to step 11(a).
- 10.5 If either 10.2 or 10.3 checks are not met, accept the proposal rather than adopt it, and go to Step 11(b).

Step 11(a) Adopt the proposed private plan change

The Council processes the proposal as its own. This decision to adopt rather than accept may be made on the grounds set out in Section 165ZA (1) of the RMA. Such grounds are that it will assist the Council:

- a) in allocating space of an economic size to the trustee; or
- b) in addressing cumulative effects more effectively; or
- c) in more effective planning for aquaculture.

Even though the Council adopts a proposal, it can still specify that authorisations for aquaculture are to be allocated to the person(s) making the original request as well as the allocation of space to the Te Ohu Kai Moana Trustee Limited (the trustee) under the Maori Commercial Aquaculture Claims Settlement Act 2004.

Step 11(b) Accept the proposed private plan change

Step 11(b) assumes that the Regional Council decides to accept rather than adopt a request. Section 26 of Schedule 1 of the RMA provides that the Regional Council prepares the requested change in consultation with the person requesting it. As with Step 11(a), the Regional Council must specify in the plan change that authorisations for aquaculture are to be allocated to the person(s) making the original request as well as the allocation to the trustee.

Step 12 Ministry of Fisheries aquaculture decision

Once a regional council has decided to adopt (in part or in whole) or accept (in part or in whole) an application, this decision must be notified to the Chief Executive of the Ministry of Fisheries (s. 165ZC RMA) and the person who made the request (Schedule 1 Part 2 clauses 25 (5) RMA).

Prior to the notification of the plan change, an assessment of the undue adverse effects on fishing is required to be undertaken by the Chief Executive of the Ministry of Fisheries (Schedule 1A clause 2) through making an aquaculture decision. The procedures guiding the assessment of undue adverse effects on fishing (including judicial review) are provided in section 186C – J Fisheries Act 1996.

Section 186D FA specifies the circumstances under which regional councils may request the Chief Executive to make an aquaculture decision. The Chief Executive is unable to make aquaculture decisions in some circumstances (s. 186F FA). Upon accepting the request, the Chief Executive has 6 months to make a determination¹²

¹² *determination, in relation to an Aquaculture Management Area, means a decision by the chief executive that he or she is satisfied that the Aquaculture Management Area will not have an undue adverse effect on fishing* (s.186C FA)

or reservation¹³ or both in relation to different parts of the areas under request (s. 186E (1)). The Chief Executive may request information from the Regional Council or any fisher whose interests may be affected (s. 186E (2) FA) and must consult and consider any submissions made by those with a commercial, customary or recreational interests that may be affected by the proposal.

In making an aquaculture decision, the Chief Executive is limited to the matters outlined in s. 186G as follows:

- 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.*

Of relevance to regional councils are the requirements for the aquaculture decision specified in s. 186H. These include administrative requirements that the decision must: be in writing; define the areas to which the decision relates; provide reasons for the decision; and be notified to the regional council. Of particular interest is s.186H (d) FA which specifies that:

- (d) *if the decision is a determination based on a rule in a regional coastal plan or proposed regional coastal plan that relates to the character, intensity, or scale of the occupation of the Aquaculture Management Area for aquaculture activities,—*
 - (i) *specify the rule; and*
 - (ii) *state that the rule may not be revoked or amended until the chief executive makes a further aquaculture decision in relation to the area affected by the revocation or amendment;*

Additional information requirements of the Chief Executive when making a reservation are specified in s. 186H (2) FA. Public notification provisions are specified in s. 186H (3) FA.

Following the notification of the aquaculture decision, an appeal may be lodged within 3 months by persons who either requested the decision (regional council or the plan change applicant), those who were, or ought to have been, consulted by the Chief Executive when making the aquaculture decision, or any person who has an interest in the decision greater than the public generally (s. 186I (1) FA). The High Court takes decisions in relation to these appeals.

In addition to an appeal on the decision described above, any person may seek a judicial review of the decision within the same 3 month period, post notification of a decision (s. 186J FA).

¹³ *reservation, in relation to an Aquaculture Management Area, means a decision by the chief executive that he or she is not satisfied that the Aquaculture Management Area will not have an undue adverse effect on fishing (s.186C FA)*

Step 13 Pre-notification plan change

The effect that the assessment of the undue adverse effects on fishing has is outlined in schedule 1A (3). In summary, where a reservation has been made about customary or recreational fishing, these areas must be deleted from the Aquaculture Management Area (Schedule 1A clause 3(1)). Where the Chief Executive makes a reservation about commercial fishing, or a determination, these details must be noted in the plan (Schedule 1A clause 3(2)). The effect of a reservation about commercial fishing depends on the management regime of the species that the reservation relates to (Schedule 1A clause 3(3)-(4)) influencing how this reservation is acknowledged in the plan.

Step 14 Notification, submissions, hearing and decisions

Once the 3 month period provided for appeals and judicial review of the aquaculture decision has expired (Schedule 1A clause 5, s. 186I, 186J FA RMA), the Council must notify the proposed change to the regional coastal plan in accordance with Schedule 1 clause 5 (or 26) RMA, depending on whether the request has been adopted or accepted. When a regional coastal plan is proposed, the regional council must supply a copy of proposed plan to the Chief Executive of the Ministry of Fisheries (Schedule 1A, clause 6 RMA).

Following the notification of the plan change, the plan then proceeds through the standard First Schedule process of submissions and further submissions, dispute resolution, hearings and council decisions (Schedule 1 clause 6-8, 8AA, 8B, 10, 11 RMA).

Step 15 Environment Court appeal process

Decisions on the plan taken by the regional council may be subsequently appealed (Schedule 1 clause 14, 15 RMA).

Step 16 Minister of Conservation approval and s. 165O RMA functions exercised¹⁴

The proposed regional coastal plan, once adopted for reference to the Minister of Conservation by the regional council, should be forwarded to the Minister of Conservation for approval (Schedule 1 clause 18 RMA). Approval of the plan by the Minister of Conservation is undertaken consistent with Schedule 1 clause 19 RMA.

With respect to the role of the Minister of Conservation, as prescribed by section 165O RMA, it is clear that this role does apply to the Invited Private Plan Change process as this is clarified explicitly through s. 165ZF (4) RMA.

Section 165O RMA empowers the Minister of Conservation to give directions relating to the allocation of space. Based on the recommendation of the Minister of Conservation, directions may be given by the Governor-General by Order in Council to direct a regional council to: not proceed with a proposed allocation of space; or to do so only in a manner which gives effect to specific matters (such as allocation methods used, maximum term of the coastal permit available for allocation or the

¹⁴ Minister of Conservation intervention in the process via an Order in Council is not something that is within the Council's mandate to control. However, it will be important to outline implications for regional council processes.

allocation of authorisations for specific spaces). The Minister of Conservation may make recommendations consistent with two purposes:

- a) *to give effect to Government policy in the coastal marine area:*
- b) *to preserve the ability of the Crown to give effect to any of its obligations under any agreement in principle or deed of settlement between the Crown and any group of Maori claimants or representative of any group of Maori claimants in relation to a claim arising from, or relating to, any act or omission by or on behalf of the Crown or by or under any enactment before 21 September 1992 (s. 165O (2) RMA)*

An Order in Council does not affect: any allocation of authorisation advertised; a plan approved; or a coastal permit application (s. 165 (8) RMA). The purposes for which the Minister of Conservation may intervene in the Invited Private Plan Change process are broadly defined, in particular the opportunity to give effect to Government policy in the coastal marine area. It is not possible therefore to predict whether the Minister will intervene, nor the nature of that intervention. Regional councils are unable to proactively plan for this step in the process.

While the need to give effect to this provision is clear, the difficulty seems to be how effect should be given. Section 165O (6) RMA requires regional councils to give the Minister of Conservation not less than 4 months notice of an offer of authorisation under sections 165E and 165F RMA. It has been concluded that (while not questioning the requirement to advise the Minister), authorisations associated with the Invited Private Plan Change process do not get allocated under sections 165 E and 165F (as specified in s. 165O RMA), but rather s. 165ZF RMA. This conclusion is drawn on the basis that s. 165E and 1665F are located in Subpart 1 of Part 7A of the RMA. Subparts 1 and 2 of Part 7A RMA relate to the alternative means by which the creation of Aquaculture Management Areas may be undertaken, and are generally self-contained unless specified otherwise. S165ZF (4) RMA contains clarification of the provisions contained in Subpart 1 that do relate to available space in a Aquaculture Management Area established through the Invited Private Plan Change process. These provisions include section 165J (1), (3), and (5) to (9) and sections 165K to 165O RMA. (Note that s. 165E and 165F RMA are not specified).

The RMA also requires that any Order in Council must be made either before the plan is notified, or that the Minister approves that plan under s. 165O (4) RMA. The Minister is only authorised to make a recommendation within 3 months of receiving notification from the regional council of the offer of authorisations (s. 165O (7) RMA).

While it is clear that offers of authorisations as a result of an Invited Private Plan Change do not occur under s. 165 E, 165F RMA, the intention of s. 165ZF(4) RMA seems to be to provide the Minister of Conservation with an opportunity to make a direction under subpart 1 and 2 processes through s. 165O (6) RMA.

It has been concluded therefore, that it may be appropriate for the Minister of Conservation to be advised of the intention to offer authorisations at the time that the Council requests the Minister of Conservation to approve the changes to the Coastal Plan (in accordance with Schedule 1 cl. 18 RMA). This has been illustrated on the diagram accordingly. It is noted that achieving an Invited Private Plan Change itself (Ministerial sign-off) does not result in offer of authorisations under those sections. However, in terms of s. 165ZF RMA, authorisations are to be offered to the plan change proponent as soon as practicable after the plan changes are made and the requirement of the Maori Commercial Aquaculture Claim Settlement Act 2004 have been satisfied. Note that, under this scenario, this would mean that the allocation of

authorisations would not occur until four months after the Minister had approved the plan change.

It is possible that an amendment to the legislation may be required to clarify this point. Regional councils should consult with central government, prior to undertaking an Invited Private Plan Change, to clarify how to best comply with this provision.

Step 17 Notification of space to be allocated to the trustee and appeal provisions

Public notification by the regional council of 20% of the new space for allocation to the trustee must be undertaken before the plan becomes operative (s. 9(1) MCACSA). Allocation of space to the plan change applicant should quickly follow (s.165ZF (2) (3) RMA).

Once 20% of the new space for allocation to the trustee has been publicly notified by the regional council, an appeal may be lodged within 15 working days (s. 12 MCACSA). This appeal may relate to any decision by the regional council under s. 9, 10 or 11 MCACSA. Appeals may be taken by:

- a) an iwi aquaculture organisation,*
- b) recognised iwi organisation; or*
- c) any other person who has an interest in aquaculture activities in the region concerned greater than the public generally (s. 12(1) MCACSA).*

Step 18 Plan change becomes operative

The plan is publicly notified to be operative under Schedule 1 clause 20 RMA.

Step 19 Aquaculture agreement

Where there is reservation about commercial fishing, the applicant needs to get consent from the relevant commercial fishers to secure an aquaculture agreement (s. 186 ZF Fisheries Act 1996). The High Court may intervene where 100% of consent is not granted, provided the applicant has secured 90% or more of that consent (S186 ZG Fisheries Act 1996). The agreement must then be lodged with the Ministry of Fisheries for registration (S186 ZH and S186 ZI Fisheries Act 1996). Once registered, the Ministry of Fisheries must then notify the regional council of the details of the aquaculture agreement (s.186 ZK Fisheries Act 1996).

Where a reservation about commercial fishing has been made, obtaining an aquaculture agreement is imperative as no person can obtain a coastal permit to occupy space for aquaculture activities in an Aquaculture Management Area subject to reservation in relation to commercial fishing, except the person who has obtained an aquaculture agreement (S. 165K, s. 165J (3) RMA). Where an authorisation lapses, as outlined in s. 165N RMA, or an aquaculture agreement is not reached, section 165J (5)-(8) RMA requires the deletion of that (part of) Aquaculture Management Area from the regional coastal plan. Authorisations associated with settlement assets are exempt from this two year time frame for the lapse of authorisations (s. 16(1) MCACSA).

An authorisation does not guarantee that a coastal permit will be subsequently granted (s. 165L RMA). Authorisations may however be transferred and the regional council formally advises of the transfer (s. 165M RMA).

Step 20 Resource consent

Once an authorisation has been granted and the regional coastal plan is operative, those holding authorisations may seek coastal permits for aquaculture activities in the Aquaculture Management Area (s. 88 RMA). The process of consideration and granting of coastal permits is outlined in sections 104 and 104A-D RMA respectively.

At the time of applying for resource consent, the applicant must supply information in the prescribed form and manner; and include, in accordance with Schedule 4 RMA, an assessment of environmental effects in such detail as corresponds with the scale and significance of the effects that the activity may have on the environment (s.88 (2) RMA).

3.1.3 Estimated time to undertake process

An estimation of the amount of time required for each step in the process is illustrated in Appendix 1. It should be highlighted that this assessment is an estimate only and provides a range of times that each stage may take. The time involved in establishing Aquaculture Management Areas using the Invited Private Plan Change process depends on a number factors including the following:

- a) Whether or not Excluded Areas are identified and the complexity involved in this process;
- b) The procedures developed to manage the Expression of Interest phase and the time needed for any overlapping applications to be resolved;
- c) The comprehensiveness of the plan change proposal, the requirement for further and additional information and the time it takes for the applicant to respond to those requests, and the process of obtaining a commissioned report;
- d) Whether appeal or judicial reviews are undertaken throughout the process, and the time taken to resolve these at each occasion;
- e) The complexity of the application and the time taken to proceed through the Schedule 1 process;
- f) Whether or not an aquaculture agreement is required to be negotiated.

3.1.4 Discussions and conclusions

The aquaculture reforms that came into effect in 1 January 2005 attempted to provide a more integrated approach to aquaculture management. Clarity around regional council and Ministry of Fisheries roles was provided and the aquaculture decision on undue adverse effects was brought forward in the process. The Invited Private Plan Change process (along with the opportunity to identify Excluded Areas) was also created to provide a more systematic means of establishing Aquaculture Management Areas.

Comprehensive reform has however, resulted in some uncertainty for applicants and councils alike with respect to the Invited Private Plan Change process. The process itself does not assure applicants of a particular outcome. In addition, in places, the

provisions of the various Statutes lend themselves to ambiguous interpretation, creating further uncertainty. Both these aspects are discussed more fully below.

Issues associated with the Expressions of Interest phase or that relate to the allocation of space to the trustee are discussed in sections 3.2 and 3.3 respectively.

Uncertainty of outcome

The process of establishing Aquaculture Management Areas using the Invited Private Plan Change process is clearly a lengthy one, involving a complex interaction of several statutes. An application to create new aquaculture space will commit the applicant to considerable investment of time and capital (see section 3.4 for costs estimates). While the initial investment involved is considerable, it is the uncertainty of a desired outcome that will likely be of concern to many prospective applicants. An application to establish an Aquaculture Management Area using the Invited Private Plan Change process can be frustrated, or stalled completely, at numerous times during the process as discussed below.

There may be a time delay before an applicant can lodge an Expression of Interest (provided the Aquaculture Legislation Amendment Bill (No. 2) 2008 is passed), or a request for a plan change, while councils undertake the Excluded Areas process, and prepare the necessary policy and procedures. The decision on Excluded Areas may be judicially reviewed.

Once an application for a plan change has been lodged (and the applicant is committed to the process), there are five distinct opportunities for the courts to become involved in the process as follows:

- a) An appeal may be lodged on the council's decision to reject a plan change request (Schedule 1 cl. 27 RMA)
- b) The aquaculture decision by the Chief Executive of the Ministry of Fisheries may be appealed (s. 186I FA) or judicially reviewed (s. 186J FA)
- c) Appeals may be lodged on decision taken on the plan change itself (Schedule 1, cl. 14, 15 RMA)
- d) The regional council's decision on matters related to s. 9, 10, 11 MCACSA may be appealed (s. 12 MCACSA)
- e) The High Court may become involved in an aquaculture agreement where 90% or more but less than 100% of consent related to the reservation has been obtained by the applicant (s. 186ZF (2) FA).

In addition to the appeal and judicial review opportunities associated with the aquaculture decision, further uncertainty exists with respect to the aquaculture decision. The aquaculture reforms have brought the consideration of undue adverse effects on fishing much earlier in the process. This allows the applicant to consider if they would like to proceed down a plan change process in the event that a reservation affects their proposal. In the event that an application is subject to a commercial fishing reservation, and the applicant proceeds through the process, that part of the proposal may be completely stalled by a failure to secure at least 90% consent from affected fishers. The "89% showstopper" (where the applicant is unable to secure sufficient level of consent to have access to High Court procedures) offers the applicant no avenues to progress the matter, and the authorisation for that space will eventually lapse.

Further uncertainty is introduced for the applicant through the Minister of Conservation's s. 165O RMA functions, which cannot be anticipated by the applicant.

The Minister's recommendations may include requiring the regional council to not proceed with a proposed allocation of space; or to do so only in a manner which gives effect to specific matters (such as allocation methods used, maximum term of the coastal permit available for allocation or the allocation of authorisations for specific spaces). This may clearly impact on the applicant's proposal.

The process also introduces uncertainty for regional councils in particular with respect to their role in identifying 20% of space for allocation to the trustee. Given the ambiguity of the statutory provisions to ensure that the space is representative and of an economic size, any regional council decision is vulnerable to appeal. This is discussed more fully in section 3.3.

Uncertainty in drafting of statute

There have been a number of areas where the provisions of the statute are not clear. Areas where ambiguity exists include the following and are discussed below:

- a) s. 165O RMA Power of the Minister of Conservation to give direction relating the allocation of space;
- b) s. 165G RMA Chief executive to be notified of proposed allocation;
- c) s. 165J RMA allocation of space in Aquaculture Management Areas for aquaculture activities subject to reservation relating to commercial fishing;
- d) notification provisions for accepted or adopted decisions;
- e) policy intent of Excluded Areas.

(a) s. 165O RMA

Two difficulties emerge with this section, the seemingly inappropriate reference to s. 165E and 165F RMA as the means by which notice of offer of authorisations would be undertaken (instead of s. 165ZF RMA) and uncertainty as to when in the process regional councils should advise the Minister of Conservation in accordance with s. 165O (6) RMA.

This matter has been discussed fully in section 3.1.2. In summary, the Minister's s. 165O RMA functions can be exercised during the Invited Private Plan Change process, and that notification is suggested to occur when the regional council forwards the regional coastal plan to the Minister for approval in accordance with Schedule 1 cl. 18 RMA. Central government may provide additional guidance on this section.

(b) s. 165G RMA

Section 165G RMA requires that the regional council must, where there is space subject to a commercial fishing reservation; give the Chief Executive not less than 6 months' notice of:

- a) *an offer of authorisations under section 165E:*
- b) *the date on, and from which, applications for coastal permits for the occupation of space for aquaculture activities may be made in accordance with the regional coastal plan or this Act:*
- c) *the operative date of the regional coastal plan or a change to a regional coastal plan that provides for an Aquaculture Management Area. (s. 165G (2) (a) – (c) RMA)*

The council is also required to give not less than 6 months' public notice of those same matters.

It has been concluded that the s.165G (2) RMA, described above does not apply to the Invited Private Plan Change process. This conclusion is reached on the basis that s. 165G RMA is contained within subpart 1 of Part 7A RMA, not subpart 2 which deals with the Invited Private Plan Change process. In addition, S165 ZF RMA deals with allocation of authorisations associated with Invited Private Plan Change. In particular s. 165ZF (4) RMA, which draws attention to those sections in subpart 1 which do apply (s. 165J (1), (3), (5 - 9) and s.165K - 165O RMA), does not explicitly mention the application of section 165 G RMA.

As an aside, it seems unclear what chief executive functions should be exercised if this step is undertaken. There does not appear to be a requirement for a role for the Chief Executive at this point in the process.

(c) s. 165J RMA

It is noted that the other section referred to by s. 165ZF (4) RMA as applying to the allocations arising from the Invited Private Plan Change include section 165J RMA. That section refers to the allocation of space subject to reservation relating to commercial fishing. The incorporation of this section into the Invited Private Plan Change process, however excluded subsection (2) and (4) of s. 165J RMA. Those sections restrict a regional council from allocating authorisations except to holders of aquaculture agreements under the Fisheries Act. Given that subsection 165J (6) RMA (which requires amendment of coastal plans to delete areas of Aquaculture Management Areas that are not subject to aquaculture agreements) is retained, the exclusion of subsection (2) and (4) seems somewhat perplexing.

(d) Notification provisions for accepted or adopted decisions

There appears to be some inconsistency in the Resource Management Act with respect to how the notification of decisions accepted or adopted is undertaken. Section 165ZC RMA refers to accepted or adopted plan change requests being notified in accordance with Schedule 1 cl. 25 RMA, while the First Schedule clause 25 (2)(a)(b) RMA refers to adopted requests being notified in accordance with clause 5 of that schedule, and accepted requests being notified in accordance with clause 26.

(e) Policy intent of Excluded Areas

While this report has not focused extensively on the process of identifying Excluded Areas, it is worth noting that the policy intent of Excluded Areas seems unclear. These publicly notified provisions (determining where requests for plan changes to create Aquaculture Management Areas may not be received) do not form part of the regional coastal plan, and only have effect with respect to requests received under the Invited Private Plan Change process. While there may be an understandable expectation among the community that Excluded Areas are 'safe' from aquaculture proposals, any applicant may lodge an application for space identified as an Excluded Area using a conventional plan change approach. While the conventional plan change approach does not provide for preferential allocation of authorisation for the newly created space to the plan change applicant, King Salmon and Marlborough District Council are undertaking novel approach to overcome these provisions.

Uncertainty regarding the question of approach

The current legislation creates a multiple-step approach to the creation of Aquaculture Management Areas and the subsequent issuing of resource consent to undertake aquaculture activities in those areas. The question arises as to when particular decisions on the detail of the overall proposal are best undertaken: at either the plan change stage, when Aquaculture Management Areas are created; or later, during the assessments undertaken for the resource consent process.

It is considered good resource management practice that decisions such as species type farmed, discharges occurring, structures and other activities undertaken within the Aquaculture Management Area are assessed once only in the process, not twice.

The approach taken in this report is to 'front load' the application, meaning that many of the detailed decisions on, not only the boundaries for the Aquaculture Management Area, but also the types of activities to be undertaken in this space, are considered during the plan change itself. This gives the applicant, all other interested parties and members of the public, certainty as to the nature of the proposal, and makes the process of subsequently obtaining consent less problematic (non-notified and controlled or restricted discretionary status). Stipulating what activities may be undertaken within an Aquaculture Management Area also provides certainty for the plan change applicant and Maori, which may be important where aquaculture area boundaries are adjoined.

The estimation of costs of the process (see section 3.4.8 of this report), the manner in which requirements for information provision are specified, and model plan change developed in this report have been developed on the basis of a front load approach to establishment of Aquaculture Management Areas.

One of the disadvantages of the front loading approach is that some important aspects of the aquaculture activity will be detailed in the plan itself, frustrating a possible future desire to alter farming practices, undertaking experimental aquaculture or move to an alternative species for example. Depending on how specific the original plan change has been, a second plan change may be required to allow a marine farmer to diversify activities within the established Aquaculture Management Area. This clearly does not provide an adequate level of flexibility for the aquaculture industry to evolve and diversify where possible. Once an Aquaculture Management Area has been established (space allocated), it is the management of effects within that space that is important. Accordingly, the mock plan change provided (see Appendix 3) includes a rule that provides that the activities undertaken within an established Aquaculture Management Area may be altered as a discretionary activity, thus avoiding the need to change the plan to achieve a similar outcome.

3.2 Managing Expressions of Interest

3.2.1 Purpose

The purpose of this section is to:

- a) Outline the statutory provisions that are in place now to manage the situation where spatially overlapping proposals for private plan changes have been received by a regional council after inviting private plan change proposals.
- b) Outline the statutory provisions that are expected to be in place after the passage into law of the Aquaculture Legislation Amendment Bill (No. 2) 2008. Along with other matters, new provisions are intended to manage the situation where spatially overlapping Expressions of Interest have been received by a regional council during the Expressions of Interest phase. (This phase is the proposed step that may be utilised prior to formally inviting private plan changes).
- c) Identify and discuss options for how councils would proceed under current legislation in the situation where spatially overlapping proposals for private plan changes have been received by a regional council after inviting private plan change proposals under s. 165Z RMA.
- d) Identify and discuss options for how councils should proceed through the Expression of Interest phase under the proposed legislative amendments to the point at which an Expression of Interest is accepted and a proponent can request a plan change to establish an Aquaculture Management Area (s. 165ZFA to 165ZFI RMA as proposed to be inserted by the Aquaculture Legislation Amendment Bill (No. 2) 2008).

This section will include providing some interpretation and guidance on implementation of the proposed provisions and identifying considerations for selecting between alternative options for proceeding, (i.e. deciding between either calling for requests (under s.165Z (1) RMA), or calling for Expressions of Interest (under proposed s.165VA RMA). It will also include some options in the event that an Expression of Interest round results in overlapping applications that are not able to be resolved by negotiation. It will consider the criteria that could be used to resolve spatial overlaps. (The possible methods allowed are financial tendering or other unspecified fair and reasonable methods that can be adopted after following the special consultative procedures under the Local Government Act 2002.)

3.2.2 The current statutory provisions

Occupation of a coastal marine area for the purpose of an aquaculture activity can only take place in an Aquaculture Management Area and as authorised by a coastal permit (s. 12A RMA). Aquaculture Management Areas may be created through a regional council making a change to its existing coastal plan or making a new coastal plan conventionally, either of its own volition or in response to an application following invitations for submission of a private plan change, or by Invited Private Plan Change.

For conventional plan changes, a regional council may tender authorisations to occupy an Aquaculture Management Area for aquaculture activities by public notice or offer authorisation by public notice using another allocation method that is

provided in its coastal plan (s. 165E RMA). The tender or offer of authorisations is subject to a 6 month notice period, for the Ministry of Fisheries (s. 165G RMA) to consider reservations relating to commercial fishing. Ngai Tahu also have the preferential right of purchase of a representative 10% of any coastal marine area subject to an authorisation if the authorisations are tendered (s. 165R RMA).

A regional council has a right to reject, or to accept, or to renegotiate any authorisation offered by tender or other method (s. 165S RMA). 50% of any tender monies must be paid to the Crown (s. 165U RMA) and the tender monies retained by the regional council must be applied to achieve the purpose of the RMA in the coastal marine area (s. 165V RMA).

Invited Private Plan Changes

In addition to the process outlined in the paragraphs above for conventionally created Aquaculture Management Areas, a regional council may by public notice invite private plan changes to establish an Aquaculture Management Area, (s. 165Z RMA). Before doing so, it may identify Excluded Areas where requests for plan changes to create an Aquaculture Management Area cannot be accepted (s. 165W RMA).

In addition to the provisions of subpart 2 of Part 7A RMA, the normal provisions in Schedule 1, Part 2 RMA dealing with plan change requests apply, as do the provisions of Schedule 1A RMA relating specifically to aquaculture activities, which deal with undue adverse effects on fishing and the role and the reservation powers of the Ministry of Fisheries.

A regional council may modify the request with the agreement of the applicant (Schedule 1 cl. 24 RMA) and may then adopt, accept or reject the request (schedule 1 cl. 25(1) and (2) RMA). Rejection of the request may be done on the procedural type grounds set in Schedule 1 cl. 25 (4) RMA. Rejection may also occur if the area is subject to a proposed Aquaculture Management Area being prepared by the regional council or where it has adopted a request by another person for the same area (s. 165ZE RMA).

The regional council may adopt the request or part of it, or combine it with other requests if it helps to allocate space of economic size to Te Ohu Kai Moana Trustee Limited (The trustee), to deal with cumulative effects or to more effectively plan for aquaculture activities (s. 165ZA RMA).

Accepting the request does not necessarily mean that the regional council will ultimately proceed with the proposed plan change. This is because it will be publicly notified and subject to a hearing of submissions about its merits or otherwise.

There are no specific provisions in the existing RMA that say how overlapping requests for Invited Private Plan Changes are to be resolved. A decision to reject or to only partly accept a request for a private plan change is appealable to the Environment Court (Schedule 1 Cl. 27 RMA).

3.2.3 Legislation proposed in the Aquaculture Legislation Amendment Bill (No. 2) 2008

This Bill, amongst other matters, sets out a system under which spatially overlapping applications for Aquaculture Management Areas received in relation to the Invited Private Plan Change process can be resolved prior to the formal submissions of the plan change proposals. The proposed Expression of Interest phase would not apply to conventional plan change proposals.

A new step in the Invited Private Plan Change process for creating Aquaculture Management Areas is proposed where a regional council may call for Expressions of Interest in requesting changes to the regional coastal plan to establish and use an Aquaculture Management Area (proposed s. 165VA RMA). No person can then request a private plan change unless they are a holder of an accepted Expression of Interest (proposed s. 165VA (9) RMA).

The Expression of Interest must specify the area for which the Aquaculture Management Area is to be requested and any other information required by the Regional Council (proposed s. 165ZFB (1) RMA). The public notice calling for Expressions of Interest must specify any charges or fees for the process that must be paid by the person submitting the Expression of Interest, and the process to be used to resolve overlapping Expressions of Interest (proposed s. 165ZFB(1) and (2) RMA).

An Expression of Interest may be rejected by the regional council if it does not comply with the requirements set out in the public notice (proposed s. 165ZFC RMA). It may also be rejected if it has been received after the closing date, not accompanied by the appropriate fees or is frivolous or vexatious.

The process is intended to deal with Expressions of Interest that relate wholly or partly to the same space. If the Expression of Interest does not involve such an overlap, it must be accepted by the council (proposed s. 165ZFI RMA). The applicant can then request a private plan change. This is dealt with as for any Invited Private Plan Change under the current legislation, but without the need to resolve overlapping claims for the same space (s 165Z RMA).

If two or more Expressions of Interest relate wholly or partly to the same space, the proposed legislation sets out the procedures for resolving this conflict (proposed s. 165ZFD RMA). Firstly the persons involved are given the opportunity to negotiate and resolve any overlaps. Expressions of Interest may be amended or withdrawn and the regional council must accept consequential Expressions of Interest that do not then contain overlaps (proposed s. 165ZFE RMA).

If overlaps cannot be resolved through negotiation, tenders for the space to the extent that they overlap must be called for by the regional council unless it has a fair and reasonable alternative process that has been adopted following the use of the special consultative procedure in the Local Government Act 2002 (LGA) (proposed s. 165ZFF RMA). With a partial overlap, the tender process applies to only the part that overlaps, not the balance of the space involved in the original Expression of Interest. A tender process requires acceptance of the highest tender and the associated Expression of Interest (proposed s. 165ZFG RMA). Fifty percent of tender monies are to be paid to the Crown with the remainder to be applied to achieving the purpose of the RMA in the coastal marine area (proposed s. 165ZFH RMA).

Any alternative system of dealing with overlapping claims that cannot be resolved by negotiation must be determined in advance using the special consultative procedures in the LGA. These procedures provide for public notice and public hearings and regional council decisions on any submissions (proposed s. 165ZFF RMA).

3.2.4 The existing process for Invited Private Plan Changes - options and discussion

How a regional council deals with overlapping private plan changes under the current Invited Private Plan Change process is uncertain. Such decisions may be directed by relevant policies in the regional policy statement or the regional coastal plan (s. 165H RMA), but in the absence of such policies, each proposal would have to be accepted and evaluated on its merits in an open hearing or hearings. There is a duty to adopt the most efficient and effective allocation mechanism (s. 165I RMA).

A regional council could adopt any private plan change proposal rather than accept it. This would pre-empt other overlapping private plan change proposals and preclude them from proceeding. However, the policy for making such a choice of the proposal to adopt is equally uncertain, and as yet unspecified.

Northland Regional Council has developed evaluation criteria that may be used to assist in resolving overlapping Invited Private Plan Change proposals. The evaluation proposed is in two stages. Details of the criteria for both stages can be found in the Northland Regional Council publication “Threshold Test for Invited Private Plan Change Requests”, which was adopted in April 2008 and is available on the Northland Regional Council website. The system in Northland applies under the existing legislative regime and may not continue after the Aquaculture Legislation Amendment Bill (No. 2) 2008 is enacted.

Stage one is a threshold test where the private plan change proposal is tested against the basic requirements of Schedule 1 clauses 21 to 24 RMA along with 12 other matters relating to consultation, sound planning, consistency with previous decisions, the existing regional plan and the purpose of the RMA; and overlaps or conflicts with other existing or authorised aquaculture activities. Stage two is the evaluation of the merits of one proposal relative to other proposals for the same space.

The Stage-two criteria includes: the competence of the invitee to complete the plan change process; the invitee’s experience and ability in relation to viable commercial aquaculture ventures; and a range of other technical, environmental, economic, consultative and management matters. There are a total of 27 separate matters that need to be considered in Stage 2.

The relative weighting of each item in the Northland list of criteria is to be decided at the time of notification of the invitations and included in the public notices.

3.2.5 The process for private plan changes proposed in the Aquaculture Legislation Amending Bill (No. 2) 2008 - options and discussion

An Expressions of Interest phase can be undertaken by the regional council where it has not (previously) invited requests for private plan changes in relation to the same space and after consideration has been given to whether Excluded Areas should be identified (proposed s. 165ZFA RMA). A regional council cannot go through this process at the same time as inviting private plan change proposals under the existing legislative provisions for the same area.

The proposed legislation provides no additional guidance as to which areas are to be subject to this phase and the selection of which parts of the coastal marine area should be offered for Expressions of Interest is similarly problematical. As with tenders for space, all or any of the area outside of the identified Excluded Areas may be offered for Expressions of Interest. Again, it may be that some areas such as enclosed bays or harbours can be readily identified, but suitable areas of open sea or exposed coast are not readily be selected without knowledge of aquaculture and coastal condition that are difficult for regional councils to obtain. As for the option of directly inviting private plan change proposals for an area, offering all areas outside the Excluded Areas and existing or approved marine farm areas for Expressions of Interest would allow individuals from the aquaculture industry, who have the expertise and knowledge, the task of selecting the best areas. Alternatively the non-Excluded Areas may be subdivided in some way and then offered separately under this process.

The invitation to propose plan changes has to occur once any overlapping or conflicting applications have been resolved. This resolution can be by negotiation between the parties, by financial tender or by an alternative process. The alternative process must be fair and reasonable and must be adopted using the special consultative procedures in the Local Government Act 2002.

Conflicting claims

It is noted that the proposed system is intended to resolve overlaps but not necessarily conflicting claims. It may well be that one proposal conflicts with another proposal occupying adjacent space because of matters such as nutrient capture, pollution, species incompatibility or other reasons. These matters need to be dealt with at the stage the private plan change proposal is considered, but they could, and ideally should, be negotiated at an earlier stage. The undue adverse effects process undertaken by the Ministry of Fisheries, under the Fisheries Act 1996 (Section 186G) and the RMA (Schedule 1A cl. 2), takes into account the effects on existing aquaculture ventures but not potential aquaculture ventures. The cumulative effects of multiple proposals to create Aquaculture Management Areas will need to be considered by regional councils.

Overlapping Expressions of Interest – negotiation

The remainder of this discussion relates to Expressions of Interest that relate wholly or partly to the same space. If the Expression of Interest does not involve such an overlap, it must be accepted by the council and dealt with as for any Invited Private Plan Change under the current legislation.

There is nothing in the proposed legislation that gives guidance on how negotiations to resolve overlaps are to be conducted. Such matters could be set out as regional

council adopted policy and procedures rather than simply leaving it up to the parties themselves. This could cover such matters as information exchange, provision of meeting venues, facilitation, recording of decisions, suggesting solutions, mediation or chairing of meetings.

Overlapping Expressions of Interest – tender

If overlaps cannot be resolved through negotiation, tenders for the overlapping spaces must be called for by the regional council unless it has adopted a fair and reasonable alternative process using the special consultative procedures in the LGA. As for tenders associated with directly Invited Private Plan Change proposals for an Aquaculture Management Area under existing legislation, the highest tender must be accepted. The number of Expressions of Interest that overlap can in theory increase the number of separate tenders that must be sought in an exponential manner (three overlapping Expressions of Interest could require up to 4 separate tender situations, four overlaps 10, and so on).

The tender process has the advantage of enabling a decision on the successful tender for the overlapping space to be made quickly. It also has the advantages that there is a strong incentive for parties to negotiate a resolution of overlaps to avoid having to pay tender monies and to have a more certain outcome. The same disadvantage for the region as the existing situation is that 50% of tender monies must be paid to the Crown. Another disadvantage is that there is no guarantee that the subsequent private plan change will be accepted or adopted by the regional council. The possibility that applications will come to a “sudden end” after the tender stage, may deter marine farmers from becoming involved and incurring the initial expenses and fees. Even accepting or adopting the proposed plan change does not necessarily mean that the regional council will ultimately proceed with it. This is because it will be publicly notified and subject to a hearing of submissions about its merits or otherwise. The application fees and expected subsequent costs together with the tender amounts may deter many potential tenders. Having tenders as the deciding mechanism should negotiation fail, may be a deterrent to meaningful negotiations where well-resourced applicants are participating.

Overlapping Expressions of Interest – alternatives

Alternative systems of dealing with overlapping claims, which cannot be resolved by negotiation, will typically involve the application of point scoring system that compares one proposal with another. Such a scoring system must be fixed in advance. The Northland system discussed above is one such system. A modified system may be chosen to suit the characteristics of both the region as a whole and/or the particular coastal space involved. The relative weight of each factor may be set in advance or decided (in advance of notification) on a case-by-case basis as in Northland.

Most regional councils will be familiar with tender systems for supply of goods and services that involve a two envelope system with a sealed tender price opened after the scoring of the qualitative factors. A system will typically involve fixed weights for each factor including price. The highest ranking applicant under each category is typically awarded 100% of the factor score available for that category, with the other applicants awarded a percentage of this score based on their relative merits. After all of the qualitative scores are calculated and added together, the same system is then applied to the tender price, but on a non-subjective basis because the score can be determined exactly by mathematic calculation. This then gives an overall total for each applicant through which the successful tender can be chosen.

One possible problem with a purely qualitative scoring system is that a potential applicant may be able to assess their own chances of success relative to any other applicant. The applicant with the highest expectation of success will then have a disincentive to negotiate with others to resolve any overlaps.

Development of an alternative to tendering requires the development and public notification of a set of policies and procedures, together with associated regional council approvals. This has to be an open process based on the decision making principles set out in the LGA (sections 76 to 83), with the regional council being willing to change the methodology on the basis of submissions received.

Potential applicants may prefer such a system where there is more certainty about the process that will be followed. They can make their own judgements about their likelihood of success.

Other alternatives to tender or weight attributes could include ballots or some form of random selection. However, the uncertainty about such a system may also deter potential applicants.

3.2.6 Observations on the proposed provisions in the Aquaculture Legislation Amending Bill (No. 2) 2008

The exact wording of Aquaculture Legislation Amendment Bill (No. 2) 2008 is currently being considered by select committee, and may be amended by this process (or not passed into law at all). However, it is useful to make some observations on the implications of aspects of the Bill on how implementation may be undertaken by regional councils.

A summary of the provisions is contained above. The purpose of this section is to identify aspects of the Bill that are considered to be ambiguous or otherwise more difficult to implement.

Using a fair and reasonable process

Where the Expressions of Interest stage is not used in the Invited Private Plan Change process, s. 165Z (4) RMA provides that a “fair and reasonable process” be established when the council is issuing invitations for plan changes and when deciding how the request will be dealt with.

The Aquaculture Legislation Amendments Bill (No. 2) 2008 provides for a more limited requirement to establish a “fair and reasonable process”. The proposed s. 165ZFF (3) RMA requires the regional council to use a “fair and reasonable process” when establishing an alternative means (to tendering) for managing Expressions of Interests that continue to overlap following industry negotiations. Once the Expressions of Interest have been accepted (including those that have been accepted at the initial round where no overlap exists, accepted following resolution of overlaps following industry negotiation, or accepted following tendering or an alternative means where industry negotiations have failed), proposed s. 165ZFI RMA requires that s. 165Z (2) and (3) RMA apply. These provisions clarify that the accepted Expressions of Interest will be managed through the same statutory process as requests for Invited Private Plan Changes, had the Expressions of Interest phase not been used.

The difference emerges in that the Aquaculture Legislation Amendment Bill (No. 2) 2008 does not require that s. 165Z (4) RMA be given effect to when managing Expressions of Interest. This means that the council does not have to (by statute) establish a “fair and reasonable” process for Expressions of Interest when making decisions on how to progress the requests under Schedule 1 cl. 25 (1) RMA.

References to the “same space”

In discussing those areas where Expressions of Interest overlap, the Aquaculture Legislation Amendment Bill (No. 2) 2008 uses inconsistent and undefined terms.

Typically the term used to describe the location where Expression of Interest overlap is “the same space”. This phrase by the Aquaculture Legislation Amendment Bill (No. 2) 2008 for the following proposed RMA sections: s. 65ZFD; s. 165ZFE; s. 165ZFF; and s. 165ZFI. Often this term is used within the context of the phrase “... relate wholly or in part to the same space”.

Proposed section 165ZFE (1) RMA departs from this convention by referring to “... the space concerned...”

Difficulties in interpretation may arise in relation to proposed s. 165ZFE (6) RMA which states:

(6) However, the regional council must refuse substituted Expressions of Interest if they relate to the same space.

This proposed section could be interpreted in two ways: that substituted Expressions of Interest must be rejected if they relate to the space where the original overlap occurred; or, that substituted Expressions of Interest must be rejected if the revised Expressions of Interest continue to overlap over the same (previous) or another common space.

It is contended that the term “same space” as used in the Aquaculture Legislation Amendment Bill (No. 2) 2008 is spatially, not temporally focused, i.e. that the overlapping nature of any Expressions of Interest is described relative to the particular stage in the process under consideration. This means that a revised Expression of Interest could be accepted over the ‘same space’ which originally triggered the need for negotiation, where the other (previously overlapping) Expression of Interest of another party has been revised away to an alternative location.

Proposed section 165ZFE (7) RMA clarifies that this is a sensible interpretation.

*If, as a result, of Expressions of Interest being substituted or withdrawn, an Expression of Interest no longer relates to the same space as any other Expression of Interest, then the regional council must accept the Expression of Interest and **section 165ZFI** applies accordingly:*

Possible iterative nature of process for resolving overlapping applications

The Aquaculture Legislation Amendment Bill (No. 2) 2008 essentially supplies one opportunity for resolution of overlapping Expressions of Interest by establishing a process where those parties whose applications have spatial overlaps are advised on

the nature of the overlaps only, and given a date by which revised Expressions of Interest must be lodged.

It is noted that very limited information is required to be given to the parties who need to undertake a substitution of their Expressions of Interest for those areas where overlap occurs. Information is not provided on other Expressions of Interest in the proximity of the overlapping applications that have been accepted outright.

It is conceivable that where multiple Expressions of Interest exist, a substituted Expression of Interest may inadvertently overlap with an Expression of Interest that has been previously accepted (as the negotiating parties are not made aware of these other Expressions of Interest). The Bill does not provide for the possible need for a process of an iterative nature when forming acceptable Expressions of Interest in popular locations.

Situations could also arise where negotiating parties could agree to mutually withdraw from the common 'same space' and both submit revised Expressions of Interest in alternative locations. It is possible a party not acting in good faith could renege on this agreement and submit an Expression of Interest in the originally overlapped space, which the other party could remain unaware of until after the closure date.

Parameters for what a revised Expression of Interest may include

The Aquaculture Legislation Amendment Bill (No. 2) 2008 leaves the process of negotiation largely unspecified. It is up to the persons concerned to determine how any negotiation may be undertaken, what information will be disclosed to the other party, and what form any resubmitted Expressions of Interest may take.

In particular, the Bill does not specify that a resubmitted Expression of Interest must be of a similar spatial scale to the original proposal. This may result in creative use of the second opportunity to lodge (revised) Expressions of Interest. This may not necessarily be problematic as all matters are subject to Resource Management Act plan change requirements in any case.

It is unclear if councils, therefore, should develop policies to guide the registration process, or the form that re-submitted Expressions of Interest should take.

3.3 Allocation Of Authorisations To The Trustee

3.3.1 Purpose

The purpose of this section is to

- a) Outline the statutory provisions as they relate to allocation of space to the trustee with respect to the Invited Private Plan Change process;
- b) Identify statutory criteria to be utilised when determining allocation of space to the trustee as part of the Invited Private Plan Change process;
- c) Clarify the responsibilities of the regional councils and the Crown with respect to allocating space to the trustee;
- d) Determine either how these allocation criteria may be interpreted in a generic sense or, recommend a process that could be undertaken on a case-by-case basis to determine allocated space in accordance with statute where an Invited Private Plan Change process is undertaken.

3.3.2 Background of statutory provisions and criteria for allocation of space

The Maori Commercial Aquaculture Claims Settlement Act 2004 (MCACSA) provides for the settlement of Maori claims for aquaculture space, and assigns responsibilities to either regional councils or the Crown depending on when the Aquaculture Management Areas (or marine farm), from which a Maori allocation must be made, was first sought to be established.

The responsibilities of various parties in the creation of new space for aquaculture activities (such as through the Invited Private Plan Change process), have been stipulated in section 7- 18 of the MCACSA, which provides for the allocation of authorisations to the trustee for 20% of new space in Aquaculture Management Areas.

Section 8 of the MCACSA notes that:

Sections 9 to 18 do not apply to an Aquaculture Management Area in a regional coastal plan if—

- (a) the plan was notified before the commencement of this Act; and*
- (b) to the extent that the rules in the plan provide for space in the Aquaculture Management Area to be available for the transfer of coastal permits for aquaculture activities.*

The focus of this report is on the creation of new Aquaculture Management Areas via the Invited Private Plan Change process. As these areas have yet to be created, section 8 is not relevant, and the provisions of the MCACSA that provide for the allocation of authorisations to the trustee (section 9 – 18) must be given effect to.

Any issues to do with addressing allocation to Maori for Aquaculture Management Areas created prior to the commencement of the MCACSA (termed pre-commencement space) is the Crown's responsibility and managed under S 19 – 31 MCACSA. While the Crown can direct regional councils through an Order in Council to identify an additional 20% of the new space available for application for coastal permits or allocation of authorisations (S25(1) MCACSA), this does not apply to

Aquaculture Management Areas created as a result of an Invited Private Plan Change process (s. 25(6) MCACSA).

Section 9 of the Maori Commercial Aquaculture Claims Settlement Act states:

Before a regional coastal plan or a change to a regional coastal plan that provides for aquaculture activities in new space becomes operative, the regional council must, by public notice, identify 20% of the new space for allocation to the trustee.

The MCACSA then provides guidance as to how the identification of new space for allocation to the trustee is to be undertaken by requiring that, wherever possible, new space identified by council for allocation to the trustee must be representative (s. 9 (3)). The MCACSA also requires that the new space created under section 9 must be of an economic size (s.10 (1)). Further guidance on the meaning of representative is provided, with respect to any space subject to a reservation relating to commercial fishing(s.9 (6) MCACSA), what regional council must have regard to when identifying representative space(s. 9 (7) MCACSA), and how staged development and harbours are to be considered(s.11 MCACSA).

Section 9 (6) MCACSA provides that where any new Aquaculture Management Area contains space that is subject to a reservation relating to commercial fishing (s.186C Fisheries Act 1996), the *“representative space allocated to the trustee must include 20% of the new space that is subject to the reservation and that is representative of all the new space subject to a reservation.”*

In identifying representative space, regional councils must in accordance with section 9 (7) of the MCACSA have regard to:

- (a) *the overall productive capacity of the new space available for applications for coastal permits or the allocation of authorisations; and*
- (b) *the provisions of the plan that relate to the new space available for applications for coastal permits or the allocation of authorisations.*

In the event that a staged development of an aquaculture marine area is to occur, or is to occur in a harbour as defined in Schedule 2 of the MCACSA, *then the public notice given by the regional council must identify 20% of the new space separately for each stage of the staged development or harbour* (s.11(a) MCACSA), the space identified must be representative for each stage of the stage development or harbour (s.11(b) MCACSA), and allocations for that space must be allocated to the trustee(s. 11 (c) MCACSA) . Section 11 also contains guidance as to how the interim identification of space as part of staged development is to be managed (s. 11 (2 and 3 MCACSA).

Section 10 MCACSA stipulates how the economic size criteria may be met under various circumstances. In instances where it is not possible to create space meeting the criteria in section 9 that is of an economic size then *“the regional council must identify new space that is of an economic size even though the new space is not representative”* (S10 (2) MCACSA). Section 10(3) MCACSA provides *“However, if it is not possible for a regional council to comply with subsection (2), the regional council must identify new space that comprises a single area.”* With respect to productivity, section 10(4) stipulates that *‘New space identified under subsection (2) or subsection (3) must not have less than average productive capacity compared with the new space it was originally intended to be representative of’.*

Of particular interest to councils are the appeal provisions provided for in s. 12 (1) MCACSA which allows appeals on regional council decisions under section 9, 10, and 11 MCACSA within 15 working days of the public notice given under s. 9(1) MCACSA.

The MCACSA also outlines the need for timely action by the council in allocation of new space to the trustee (s. 9(4)).

3.3.3 Crown's responsibilities to address the issue of 'pre-commencement' space

It is important to note the distinction here, between the regional council's responsibilities for the identification of space for allocation to the trustee (where new space is created), and the Crown's responsibilities to address the allocation required to account for space previously set aside for aquaculture activities (pre-commencement space).

The Crown's responsibility to allocate to Maori space, or the financial equivalent for "pre-commencement space", is outlined in s. 19 – 31 of the MCACSA. The Crown may require not more than an additional 20% of space in newly created areas (in addition to the 20% identified by regional councils). This may be undertaken through an Order in Council on the recommendation of the Minister of Fisheries, and authorisations allocated to the trustee under section 25(1). However, this procedure may not be undertaken through the Invited Private Plan Change process (s.25 (6)).

There appears to be no provision made for Maori interests and aquaculture activities via individual Iwi Claims Settlement Acts. For example, the Ngai Tahu Claims Settlement Act 1998 (NTCSA) provides Te Runanga o Ngai Tahu with a preferential right to purchase a portion of the authorisations (10%), which are subject to tender offered by the Minister of Conservation (s. 316 NTCSA). The provisions of the Ngai Tahu Claims Settlement Act 1998 are limited to tenders offered by the Minister of Conservation pursuant to section 157 of the Resource Management Act 1991. Section 157 forms a subset of Part 7 of the Resource Management Act 1991 which explicitly does not apply to applications for coastal permits to authorise the occupation of the coastal marine areas (s. 151AA RMA). In 1 January 2005 s. 151AA RMA was inserted to clarify that Part 7 did not apply to applications for coastal permits to authorise the occupation of the coastal marine area and section 152 (1)(a) was simultaneously repealed¹⁵.

Part 7A of the RMA section 165E, 165F and 165ZF (for allocation of authorisations from privately initiated changes) are the specific provisions that apply with respect to authorisations for the purposes of aquaculture for conventional and private plan changes respectively.

Further, when creating Aquaculture Management Areas through the Invited Private Plan Change process, the allocation of authorisations is predetermined by statute (applicant (80%) and the trustee (20%)). Technically, space may be momentarily "available" in the process once the Minister of Conservation has approved the changes to the regional coastal plan, which creates the Aquaculture Management

¹⁵ Repealed Resource Management Act *S 152 (1) (a) Occupy, within the meaning of section 12(4), any such land for any period exceeding 6 months; or*

Area, and prior to the authorisation being issued to the trustee and the applicant. However, in reality, this space is already destined for the trustee and the applicant in the ratio prescribed by legislation. This offer of authorisation accounts for 100% of the newly created space and thus none is available for tendering.

It is concluded, therefore, that the coastal tendering provisions of Ngai Tahu Claims Settlement Act 1998 do not apply to the creation of Aquaculture Management Areas and the authorisations associated with that space under the Invited Private Plan Change process.

The Crown may choose to intervene in the regional council process with the Minister of Conservation use of an Order in Council issued by the Governor-General (s. 165O and Schedule 1A section 4 Resource Management Act 1991). This step cannot be anticipated by councils, and policy guiding possible responses to such an initiative will not therefore be proactively developed.

It is worth noting that S 315-320 Ngai Tahu Claims Settlement Act 1998 provisions do not appear to have been amended at the time the coastal tendering provisions of the Resource Management Act were amended in January 2005. Therefore, while the Ngai Tahu Claims Settlement Act 1998 contains preferential tendering provisions, these provisions cannot be applied to the Invited Private Plan Change process for the creation of aquaculture space. Ngai Tahu preferential tendering for other forms of coastal tendering still exists.

Regional council responsibility to address allocation of space to the trustee

As indicated in the discussion above, regional councils are formally responsible for the identification of 20% of space for allocation to the trustee that meets the criteria of “representativeness” and “economic size”.

While statutes direct that the responsibility for the identification of space for allocation to the trustee sits with council, it will be critical for council, iwi, plan change applicants and the trustee (Te Ohu Kai Moana) to work closely together early in the process. While the legislation provides the key parameters that must be met when undertaking this task, there is considerable ambiguity around how those terms may be interpreted.

Conclusions

Based on the summary above, the Invited Private Plan Change process will therefore require policy development for those matters relating to new space for aquaculture activities only (s. 7 – 18 MCACSA). Clarification of how the Crown’s responsibilities for claims settlement may interface with this process are not required as the Crown is not able to engage in the Invited Private Plan Change process for the purpose of settlement of claims for pre-commencement space. Iwi preferential rights to purchase space are also precluded in the Invited Private Plan Change process.

The Minister of Fisheries (on behalf of the Crown) is responsible for leading initiatives to address allocation of space to Maori for “pre-commencement space” before December 2014. An early agreement in principle for resolution of the pre-commencement space (1992-2004) for the South Island and Coromandel was reached between the Crown and Iwi in October 2008. The Maori Commercial Aquaculture Claim Settlement (Regional Agreements) Amendment Bill 2009 has been introduced to assist in giving effect to this agreement, and the need to address pre-commencement space issues generally.

3.3.4 Interpretation of allocation criteria

This section of the report will identify those statutory provisions guiding the allocation of space to the trustee that need interpretation, and will outline guidance for how they should be interpreted and applied. The details of the issues requiring attention will be outlined with respect to the relevant provisions of the MCACSA in the order that they generally appear. Note that due to the ambiguity of the MCACSA, the potential for diversity of interpretations among council and others engaging with the statute. The suggested criteria below seek to guide how the statutory provisions could be interpreted, but are not of themselves legally binding.

3.3.4.1 Identify 20% of new space for allocation to the trustee (s. 9(1) MCACSA)

The identification of new space for allocation to the trustee is a function of regional council under the MCACSA. However, the process for identifying this space is not stipulated in statute. The Council's expectation of the applicant when lodging a request for an Invited Private Plan Change needs to be developed. To some extent, this will be described in the information requirement for applicants when lodging a plan change request. However, due to the complexity of the task, and the number of participants (council, iwi, plan change applicant and the trustee), the process of developing the final details of the allocation of space to the trustee will likely be at least as important as the final conclusions formed. This is particularly relevant due to the ambiguous nature of the criteria used to define the space (discussed below), the likely need for a negotiated agreement to be reached between the parties, and the opportunity to appeal (s. 12(1) MCACSA).

3.3.4.2(a) Representativeness of space - overall productive capacity

The MCACSA stipulates the need for new space identified under s. 9(1) MCACSA to be representative of all the new space being established in the region through the change to the regional coastal plan (s. 9(3) MCACSA). While, "representative" is not defined by the MCACSA, guidance is given as to the factors that council must have regard to when determining whether space is representative:

- (a) the overall productive capacity of the new space available for applications for coastal permits or the allocation of authorisations; and*
- (b) the provisions of the plan that relate to the new space available for applications for coastal permits or the allocation of authorisations (s. 9(7) MCACSA).*

Interpretation of s. 9 (7) (a) will be provided in this section and s. 9(7) (b) in the section 3.3.4.2(b).

"Productive capacity" is a term which appears to have been borrowed from economic theory. This term is used in economic theory to describe the maximum possible output that can be achieved with the factors of production used. Translating this to an aquaculture context, the equivalent of the factors of production are the characteristics of the coastal marine area environment (e.g. water clarity).

The concept is also used in s. 10(4) MCACSA as follows:

New space identified under subsection (2) or subsection (3) must not have less than average productive capacity compared with the new space it was originally intended to be representative of.

In order to assist in the interpretation of s.9 (3) (a) MCACSA, scientific criteria have been developed to assist the determination of the overall/average productive capacity of the space (put another way, the quantity of product capable of being produced/yielded from an area by weight according to species type). Refer to Appendix 2.

The factors that have been described in Appendix 2 are those that could affect the growth rate and hence productivity of the cultured organism. Those factors do not consider environmental sustainability or the marketability/quality of the end product. Good water quality, i.e. low concentrations of faecal indicator organisms and very low concentrations of contaminants such as metals and organic residues, is important for the marketability of a species. The legislation is focused on the 'raw' productive capacity of the space, not the marketability of that product. This marketability/quality factor will be addressed in discussions on "economic size". The criteria have been developed on a species basis, recognising that the type of conditions that influence productivity of a particular site will vary from species to species. The selection of factors is also made (based on particular species groupings) on the assumption that, generally, plan change applicants will be seeking to create Aquaculture Management Areas for a particular use, e.g. mussels, rather than a general bid for space. Where generic applications are received, a generic set of criteria to assess productive capacity will be required.

It is important to be aware that, when assessing productive capacity of a particular space, the factors (as described in Appendix 2) may vary across that space, particularly where a spatially large or environmentally diverse site is being evaluated. Sampling methodology will need to be developed to ensure that the variations across the space are detected and that a fair allocation of space to the trustee is achieved.

These criteria will also apply in the event that councils have to identify new space consistent with s. 10(4) MCACSA and s.165C(1)(b) RMA - the new space created for allocation to the trustee has "*not less than average productive capacity compared to the new space it was originally intended to be representative of*".

Note that it is considered that the "overall productive capacity" (s. 9(7) MCACSA) and the "average productive capacity" (s. 10 (4) MCACSA) are comparable terms and that the same criteria developed may be applied to assessment of each.

3.3.4.2(b) Representativeness of space - plan provisions

Section 9 (7) (b) MCACSA requires council to have regard to:

- (b) *the provisions of the plan that relate to the new space available for applications for coastal permits or the allocation of authorisations*

when identifying whether space is representative. In having regard to "the plan provisions that relate to the new space", the following interpretation of section 9 (7) (b) is made:

- “The plan” is not defined and is presumed to be referring to the applicable regional coastal plan relevant to the new space. However, as the MCACSA does not specify that the relevant provisions are those of the regional coastal plan only, where other plan provisions may also apply to the new space, these too should be considered where relevant (e.g. a regional plan controlling discharges to air).
- “The provisions” – this include the objectives, policies, rules of the plan/s as they relate to the new space.
- “Relate to the new space” – it is considered that the reference to “new space” restricts the scope of plan provisions to those plan provisions that apply to the space within the boundaries of the Aquaculture Management Area being created, i.e. that the plan provisions must relate directly to the space. It not considered appropriate to interpret section 9(7) (b) to include those plan provisions that relate to the new space by association, for example, the land (and associated zoning provisions) adjacent to the marine farm where aquaculture service facilities are established for example.

This evaluation will need to be undertaken on a case-by-case basis for each Aquaculture Management Area sought to be created. In many instances, it is likely that the plan provisions will equally impact upon the entirety of the new space, removing the need to consider representativeness issues. However, potentially for very large proposals or where the new space may cross ‘management zones’, representative issues may arise with respect to plan provisions. If this is the case, allocation of space to the trustee will need to be undertaken in a manner that reflects these differences equitably.

3.3.4.2(c) Representativeness of the space - commercial fishing reservation

How the effects of a reservation relating to commercial fishing must be treated when identifying a representative area for allocation to the trustee are also specified in the MCACSA (s. 9(6)):

If new space in an Aquaculture Management Area includes space that is subject to a reservation relating to commercial fishing, the representative space allocated to the trustee must include 20% of the new space that is subject to the reservation and that is representative of all the new space subject to a reservation.

Essentially, where a commercial fishing reservation is in effect in an Aquaculture Management Area, the effect of that reservation must be apportioned spatially, so that the space that is allocated to the trustee must include a 20% proportion of the space subject to that reservation. The holders of authorisations for the newly created space (the plan change applicant and Maori), will eventually seek to establish an aquaculture agreement. The MCACSA does not prescribe the relationship between the two groups holding the authorisations during their interaction with the affected commercial fishers. Presumably some level of coordination would be an efficient way forward, but this is not required.

3.3.4.2(d) Representativeness of the space - harbours and staged development

Section 11 MCACSA specifies how new space will be identified for allocation to the trustee in the event that the new Aquaculture Management Areas include harbours or a staged development. In summary, section 11 (1) MCACSA provides that separate public notices must be issued when identifying 20% of the new space for allocation to the trustee (under s.9 (1) MCACSA), for each of the separate stages. Allocations to the trustee for each of the staged allocations must be representative (consistent with s. 9(3) MCACSA) and the allocation of authorisations to that space must be issued in a timely manner (s. 9(4) MCACSA).

Recognising that the timing or other aspects of the staged development may alter during the process, s. 11(2)(3) MCACSA provides that notification of the identification of space in accordance with s. 9(1) MCACSA is to be treated as interim, and that the regional council must not allocate authorisations (for that space) where circumstances have changed.

For clarification, the MCACSA defines staged development as:

“... provision in a regional coastal plan or the Resource Management Act 1991 for space in an Aquaculture Management Area to become available for application for coastal permits or allocation of authorisations on a date later than the operative date of the regional coastal plan”.

This means that the provisions of section 11 MCACSA do not apply where a developer may choose (for economic or other reasons) to delay the full development of space in which authorisations or resource consent are held, or to undertake development progressively.

Harbours subject to section 11 provisions are defined in Schedule 2 of the MCACSA and include specific harbours in the North Island and in the Marlborough Sounds.

There is no specific guidance in the MCACSA on the relationship between (a) provisions for staged development (which essentially provides for staged notification of identification of 20% of space for allocation to the trustee) and (b) the requirement that areas identified be of an economic size. It is concluded that, provided the total area for allocation to the trustee of any staged development under consideration is of an economic size, section 10(1) is satisfied. It is recognised that the parcels of space individually notified as interim allocations may not alone be of an economic size, but collectively s.10(1) MCACSA criteria is satisfied.

3.3.4.3 Economic size (s. 10 MCACSA)

Section 10 (1) MCACSA states:

The new space identified under section 9 must be of an economic size

It is also feasible to combine a representative 20 % from more than one new aquaculture space allocations to create an economic sized space. Such a combining of allocations to the trustee can only be done if the private plan change requests are adopted by the regional council and similarly combined for the purpose of processing them.

The fact that one or more allocations considered separately may give rise to allocations of uneconomic sizes means that the combined allocation for the trustee need not be representative of one form of aquaculture, if several different forms of aquaculture are being proposed through private plan changes. All that is required is that the productivity of the area be equal to or above average productivity of the proposed areas. It is noted that negotiations with the trustee is of key importance in the process in any case.

Section 9 of the MCACSA enables the “new space” to be made available for the allocation of authorisations (plural) to the trustee rather than necessarily a single authorisation. This strongly indicates that the legislation envisages that new space can be created to accommodate the 20% from each of multiple authorisations. Section 165ZA of the Resource Management Act 1991 also provides, as one of the criteria for combining private plan change requests, that it will assist the council in allocating space of an economic size to the trustee. This also indicates that combining authorisation in a new space is envisaged in that MCACSA.

If the council establishes new space for the purpose of meeting the economic size requirements, the costs of doing so will fall on the council, and not on the applicants. This could act as a disincentive for the council to adopt and combine private plan change applications. However, costs are not one of the three criteria set out for the council in making such a decision. Not adhering to these principles could mean a breach of the MCACSA and /or natural justice and make the council subject to judicial review.

Criteria for economic size

The question arises as to what determines an economic size for an aquaculture venture? When identifying factors for assessing productive capacity (refer section 3.3.4.2(a)), any factors that may influence the quality (as opposed to the quantity) of the product produced were set aside. These types of considerations are relevant, however, when determining economic size. The factors that determine the minimum economic size of an aquaculture enterprise are both physical (including biological) and financial.

The minimum (and optimum) economic size of an aquaculture venture depends on:

1. The species to be farmed, (e.g. finfish or shellfish) and the factors that determine the productivity of those species in the location of the Aquaculture Management Areas (see productivity criteria in Appendix 2)
2. The type of farm ownership, (corporate or individual required level of return, and the associated servicing costs)
3. The proximity to markets and processing facilities, landing sites and other infrastructure
4. The management experience and expertise
5. The management regime employed, e.g. stocking densities and production cycles and technology utilised
6. Access to the site for harvesting and maintenance
7. Factors that may limit productivity or marketability of product such as:
 - Possible contaminant sources from run-off from urbanised areas or from agriculture
 - Likelihood of contamination from algal blooms
 - Impact of associated species such as predators and parasites

There are physical limits to how small a marine farm can be. For shellfish that are filter feeders relying on water movement past the location of the shellfish, holding area is more important than the size of the unit. For other shellfish that feed off seaweed or need to move to locate feed, the marine farm needs to be large enough to accommodate movement of the shellfish. However, scallop farming has been undertaken in other countries by attaching the scallops to lines. This has not been successful in New Zealand because of the high labour and capital costs and the fouling of the lines by mussels.

For crustaceans and other organisms such as crayfish, kina or lobsters, food supply and shelter may be the determining factors. For finfish, some may be bottom feeders, some feed off seaweed and some need space to move and grow depending on the type and size of the fish. For finfish, there is a need to accommodate growth of the fish by transferring the fish to additional cages of lower fish density. It would not be economically viable to operate a single cage system. Farming of kingfish has been attempted with poor results because the adult fish need very large areas if they are to grow to a marketable size. More success has been had with tuna and salmon. Experimental farms are being investigated for butterflyfish and grouper.

The financial factors leading to minimum sized unit include the capital and labour costs of establishing and servicing a marine farm. There are fixed costs and possible economics of scale associated with the production costs of the enterprise to consider. The need to provide a minimum amount of product marketing and processing is also a financial factor determining minimum economic size.

An economic minimum size could be determined if the cost of the production cycle for different farm sizes could be determined accurately together with the net revenue associated with selling the products. However, in practice, this is not feasible with the limited New Zealand information available and the range of factors described above affecting productivity and profitability. A search of economic and aquaculture literature has shed some light on the economic nature of aquaculture, but has provided little guidance on minimum economic sizes of aquaculture ventures. Given the absence of defined economic sizes for all types of aquaculture, an evaluation will need to be taken on a case-by-case basis at the time the allocation of space to the trustee is identified. This is particularly important as the potential identification of new space for allocation to the trustee rests on this test (s. 10(2, 3) MCACSA).

It is recognised that the difficulties in applying some of the criteria identified above to assist the determination of economic size, for example, managerial experience may not be known.

In conclusion, it is considered that having 'economic size' as a criterion is inherently difficult to assess, or quantify in a defensible manner. Given that regional council decisions may be appealed with respect to s. 9, 10, 11 MCACSA matters, this criterion is considered highly problematic. Even if criteria are able to be agreed upon to define economic size (as suggested above), information about those criteria may often not be known or quantifiable making the regional council decision vulnerable to appeal.

Small farm examples

A more practical way of determining minimum economic size may be to jointly consider the issue by discussing it with marine farmers who own or operate some of the relatively smaller marine farms in Canterbury and elsewhere. There are a number of very small mussel farms in Canterbury and a small salmon operation. Even smaller mussel farms exist in the Marlborough Sounds. (There are small salmon farms on irrigation canals but the nature of their environment is too different from the coastal environment for their example to be useful.) Personal communications have been made with interests associated with two such small Canterbury marine farm operators.

One of the smallest Canterbury mussel farms is located in Menzies Bay on Banks Peninsula. This farm consists of two sets of eight lines of about 14 buoys holding suspended mussel lines. The farm occupies about 6 hectares of ocean space. The servicing of this farm is undertaken on contract to other marine farmers nearby and a harvesting and reseeded contractor. The small nature of the farm means that harvesting and reseeded is done at the same time by the contractor. The contractor comes from the Marlborough Sounds where there are numerous established mussel farm service agencies. The economics of this farm are marginal.

For finfish we can use the example of the small stand-alone salmon farm in Akaroa Harbour, also on Banks Peninsula, run by Akaroa Salmon. This farm has marine farm licences to occupy two sites, one in Lucas Bay of 1.759 hectares and one in Titoki Bay of 2.937 hectares, just under 5 hectares in total. It also requires additional areas for mooring lines and anchors. It consists of up to fifteen salmon cages rearing salmon from fry through to harvesting size. The farm employs about twenty four full-time employees. It also operates outlet stores and processing facilities in the nearby Christchurch City. At a start-up stage the farm was smaller, occupying between 1.2 and 3 hectares with up to 4 or 5 cages. Another firm in the Marlborough Sounds (King Salmon) has approval to operate a similar sized farm but has not proceeded because of the physical constraints of the consented site.

Discussion

Mussels

Obviously a stand-alone small mussel farm of one quarter of the size of the one described above would not be economically sustainable on its own (one quarter being twenty percent of the Aquaculture Management Area relative to an eighty percent allocation of the Aquaculture Management Area). The fact that the servicing, harvesting and reseeded is done on contract means that a small representative farm running alongside the larger one could be just as economically viable as the larger one. All that would be needed would be the agreement of the parties (the main farm owner, the small farm owner and the contractors). Agreements would be needed in order to put in place arrangements to service all the mussel lines from both farms at the same time and to proportionately share the costs.

Revenue would similarly need to be proportionately shared. This should not be a significant issue because the 20 percent has to be representative anyway. Establishment of such an adjunct farm should also occur simultaneously with the larger one to minimise capital investment, but this is not absolutely necessary.

Salmon

If the minimum size for a salmon farm representing 20 percent of an Aquaculture Management Area was equivalent to the start-up stage of salmon farm described above, then the Aquaculture Management Area established for such a purpose would have to involve four times that start-up size. This would result in the farm growing eventually to between 16 and 20 cages in total for both the applicant and the trustee, which would still be a relatively small venture in the world and New Zealand context.

For salmon therefore, a stand-alone farm occupying one quarter the area of a new farm in a newly established Aquaculture Management Area could possibly be of an economic size, particularly if it could act as an adjunct to an existing farm. To take account of economies of scale, a better outcome could be achieved through an allocation of a 20 percent share in the new farm. With such a shareholding agreement, it would be much more feasible to allocate representative space to the trustee at a 20 percent level. A much large space would not then need to be allocated.

For mussel farms, and probably for other shell fish, such as scallops or oysters, there is quite a low threshold for economic viability because of the servicing arrangements that can be put in place. This would still be dependent on reaching satisfactory agreements amongst the parties involved.

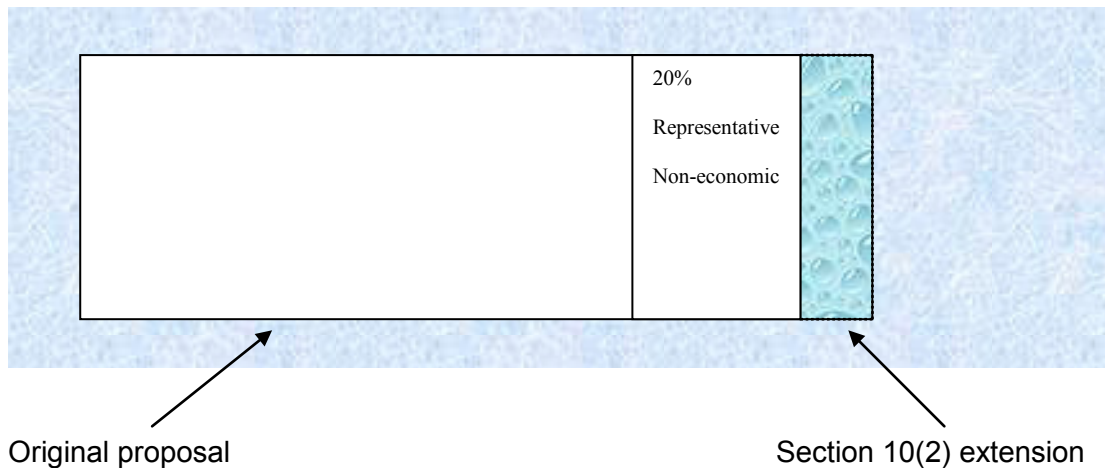
For salmon and other finfish, it is less likely, but still possible, that 20 percent of an Aquaculture Management Area for a new aquaculture venture the present size of the Akaroa Salmon farm would yield an economic unit. It may be that a slightly larger area would need to be allocated, possibly by combining the 20 percent from more than one Aquaculture Management Area resulting from a private plan change. Alternatively, a shareholding agreement could be negotiated in such a way as to make the trustee's allocation economically viable. There would still be some uncertainty associated with a decision of this sort.

For other finfish, crustaceans or other organisms such as crayfish, kina or lobsters, no conclusion have been reached in the absence of information on existing ventures.

3.3.4.4 Creation of a new space to satisfy s. 9(1) under s.9 (2) MCACSA

The previous sections have discussed the identification of 20% of space for allocation to the trustee from the original proposal. Where it is not possible to create a space that meets specified criteria for representativeness and economic size, regional councils may create new space in accordance with s.165C (1) RMA for the purposes of satisfying s. 9(1) of the MCACSA.

Where it is not possible to identify 20% of the space for Maori from the original proposal that satisfies the economic criteria, the regional council has the responsibility to "identify a new space that is of an economic size, even though the new space is not representative" (s. 10 (2) MCACSA). By implication, in a practical sense, it is likely the step described by s. 10 (2) MCACSA) may result in the extension of a boundary for the space to be allocated to the trustee to ensure that economic size criteria are met as illustrated below (not to scale):

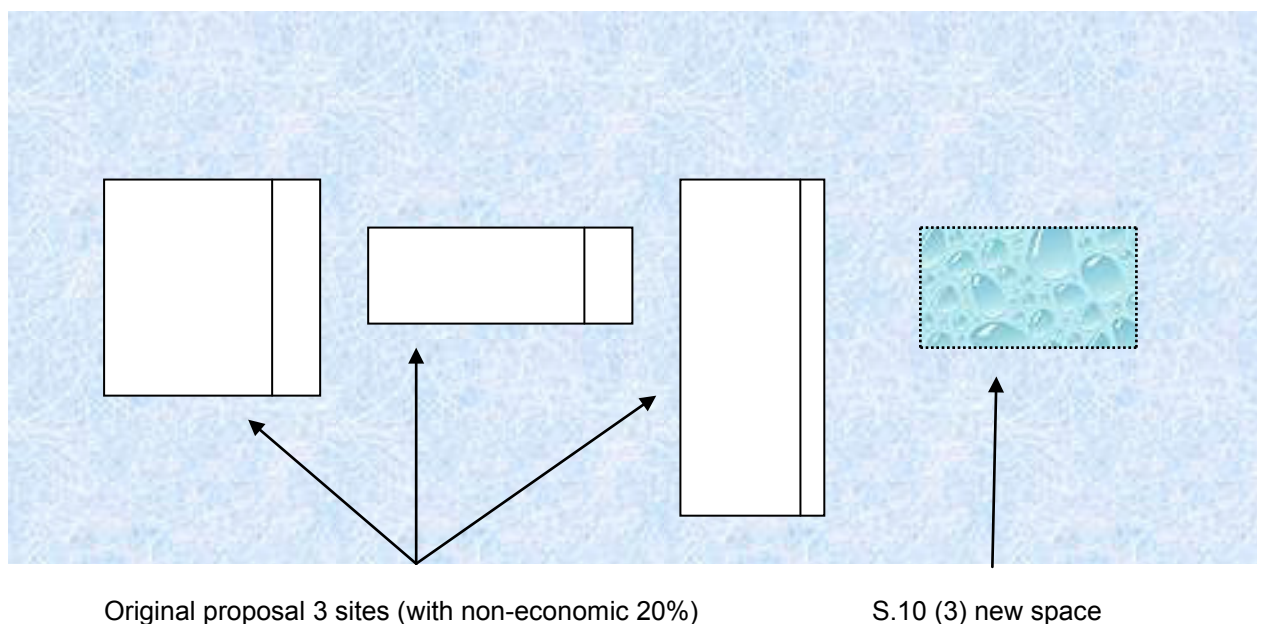


Implementation of s. 10(2) MCACSA would result in the creation of new space for allocation to the trustee, to augment the area previously identified (20%) in the original proposal. The addition creates an economically viable space that may not necessarily be representative of the area of the original proposal.

Section 10(3) MCACSA provides that where it is not possible for the regional council to comply with s. 10(2) MCACSA, “the regional council must identify new space that compromises a single area”.

This provision may apply in circumstances such as where the original proposal for the marine farm is located in such a way that extending the boundary in the manner illustrated above is not possible (due to physical restrictions for example where a marine farm area occupies an entire small bay).

Other circumstance that s.10 (3) could apply is a single plan change application containing multiple sites. In this example, 20% of each of the individual sites would not be economically viable, but combining the 20% equivalent into a single area results in an economically viable space for allocation to the trustee (as illustrated below).



Implications and complications

Usually, space allocated to the trustee must be representative and of an economic size. Section 10 (4) MCACSA provides that any new space created under s. 10(2) or S10(3) “must not have less that average productive capacity compared with the new space it was originally intended to be representative of”. However, section 10 does not explicitly identify the need for new space created under s.10 (2) and s.10 (3) to be considered representative on the basis of provisions of the plan that apply to the space. It is uncertain whether this is an intentional deviation of the requirements for space, or an oversight when drafting the MCACSA.

The MCACSA is clear in making it the regional council’s responsibility to ensure that 20% of space, meeting representative and economic criteria, is identified for allocation to the trustee. In an ideal scenario, a plan change proposal would be received (and accepted or adopted) by the Council that has already identified 20% of the space that meets the economic and representative criteria. In this situation, ideally, the plan change proponent would have consulted with Iwi and the trustee in formulating the 20% proposal.

Where it is considered that the original 20% proposal by the plan change applicant does not meet the economic and representative criteria, the Council may only reject the request consistent with s. 165ZE RMA. It is more likely the Council would identify new space using s. 10 (2) or s. 10(3) MCACSA. If this is the case, the costs of undertaking the research to identify new space would appear to fall to the Council, including the costs of providing information necessary for the undue adverse effects test undertaken by the Ministry of Fisheries. Council funding policy may be amended to specifically address this point.

A plan change applicant would likely be motivated to seek to avoid areas in which a reservation related to commercial fishing may be imposed, so as to avoid the costs of securing an aquaculture agreement. The council in selecting an additional or new space under s. 10(2) or s. 10(3) MCACSA respectively would not be similarly motivated. While the council would need to meet the costs of generating information for the plan change itself and the undue adverse effects test, the costs of securing any possible aquaculture agreement would fall to the holder of the authorisations (in this case Maori).

It is unclear when in the Invited Private Plan Change process, the identification of new space under s. 10(2) and s. 10(3) MCACSA should occur. It clearly must be undertaken prior to the council publicly notifying the intention to offer allocation of authorisations of 20% of space to the trustee. Where council is creating new space, this space must be subject to aquaculture assessment by the Ministry of Fisheries. It would seem sensible then for councils to identify s. 10(2) or s. 10(3) MCACSA areas prior to requesting the Ministry to make an aquaculture decision. This should be borne in mind when councils are planning the Invited Private Plan Change process prior to embarking on the process.

In the event that new space is identified for Maori by councils in accordance with s. 10(3) MCACSA, it is unclear what happens to the 20% of space from the original proposal that will not consequently be allocated to Maori (as the new space identified pursuant to s. 10(3) MCACSA is for this purpose). This 20% of space appears to be unable to be allocated to the plan change applicant as s. 165ZA (3) (a) RMA and s.165ZB (1) both specify that whether requests are adopted or accepted, the person

who requested the plan change are to receive an authorization of 80% of available space requested by the person (or within an Aquaculture Management Area) respectively.

Clearly, this 20% of space associated with the original proposal which does not meet economic size criteria should be allocated in some way. It is unclear whether this could be allocated by tender by councils to assist in covering costs of identifying new space, or alternatively should be allocated to the plan change applicant preferentially, or allocated or resolved in some other way.

3.4 Funding of the Invited Private Plan Change Process

3.4.1 Introduction and background

The purpose of this section is to:

- a) examine and clarify the funding of the regulatory process of establishing, through the Invited Private Plan Change process, new aquaculture ventures in the coastal marine area under the Resource Management Act 1991 and the Local Government Act 2002;
- b) provide an estimate of the costs associated with seeking to establish an Aquaculture Management Area through the Invited Private Plan Change process.

This section does not cover the option of publicly offering authorisations for aquaculture provided for in Section 165E of the RMA and any associated tender process or other method of allocation.

New aquaculture ventures in the coastal marine area can only be established within available space in Aquaculture Management Areas. The Aquaculture Management Areas must be established through provisions in a regional coastal plan. Such provisions can only be put in place by: a regional council making a change to the regional coastal plan; through an Invited Private Plan Change for which requests to change the plan must be made (invited) by the regional council; or when an individual or organisation undertakes a conventional plan change.

This section indicates that there are ways to lower the planning costs for establishing new aquaculture ventures under the Invited Private Plan Change process. Such measures (some covered elsewhere) include:

- a) clear documentation of policy and procedures by Environment Canterbury, (including a detailed specification of the information required with a private plan change request - see the Appendices to this report),
- b) model plan changes (including draft regional policies and plan rules providing for new aquaculture activities as permitted, controlled or restricted discretionary activities and associated notification and information requirements - see the Appendices to this report),
- c) passing of Government legislation to deal with overlapping claims - The Aquaculture Legislation Amendment Bill (No. 2) 2008,
- d) model evaluation reports for the proposed plan changes required under Section 32 of the RMA - see the Appendices to this report,
- e) acceptance by Environment Canterbury that it should adopt and combine multiple applications to reduce costs, and
- f) passing of Government legislation providing that adopted plan changes are not subject to references to the Environment Court other than on points of law - The Resource Management (Simplifying and Streamlining) Amendment Bill 2009 (the merits of a proposal and the effects on the environment are then not relevant matters for appeal. Of course, they are matters for consideration at the plan hearing).

3.4.2 The Invited Private Plan Change process

Funding options will be examined with respect to each of the steps in the Invited Private Plan Change process as described in section 3.1 of this report. See Appendix 1 for a diagram which illustrates the relationship of the steps (1 – 20) to the overall process.

Step 1 Excluded Area process

The Regional Council goes through the process of identifying any Excluded Areas. For Canterbury, this has already been completed and funded through general rates. There is provision for recovery from future private plan change applicants under Section 36 (1) (ca)¹⁶ of the RMA, but recovery of such sunk costs is unlikely to be attempted.

The cost for this process has already been incurred and funded from general rates. It would require a policy change to decide to recoup these costs from future private plan charge applicants. No Environment Canterbury charging policy action is recommended.

Step 2 Expressions of Interest policy development phase

The Expressions of Interest phase proposed by the Aquaculture Legislation Amendment Bill (No. 2) 2008, establishes a process to resolve applications for the creation of aquaculture space that overlap, prior to accepting formal plan change requests.

The costs of this phase, involving development of procedures and advertising would be met, at least initially, by general rates. A possible source of revenue could be tender proceeds if a tender system was adopted in accordance with proposed legislation. Such revenue would be only 50% of tender monies and would only apply where there were overlying claims. As with existing tender monies received under the RMA, 50% of the tender monies would go to the Crown and such tender monies are not refundable. If a pre-plan tender process was to be used, the regional council's 50% could, as a matter of policy choice, be used to defray subsequent costs. However, from a cost reduction point of view, it would be preferable that the aquaculture industry resolves conflicting claims for space itself, or some other fair and reasonable process be developed and used.

As part of this process, and before the regional council invites the Expressions of Interest, it must decide how it will deal with overlapping Expressions of Interest that do not get resolved by negotiation. This is the focus of section 3.2 of this report.

Whilst in theory, the costs of this process of dealing with overlapping claims other than by a tender process could be recovered from the future private plan change applicants as "preliminary" costs under Section 36 (1) of the RMA, in practice this will be at a cost to Environment Canterbury. A policy is required for dealing with overlapping claims. Because of the uncertainty over costs for potential applicants all through the private plan process, it is recommended that the additional costs and the

¹⁶ 36 (1) A local authority may from time to time, subject to subsection (2), fix charges of all or any of the following kinds:

(ca) charges payable by persons seeking authorisations under Part 7A, for the carrying out by the local authority of its functions in relation to the allocation of authorisations (whether by tender or any other method), including its functions preliminary to the allocation of authorisations:

leakage from the region involved in a tender system is avoided if possible (50% of tender monies received go to the Crown).

A “fair and reasonable” process would need to be found in the case that a negotiated settlement cannot be reached amongst competing parties (if not, a tender system must be adopted). Such a procedure could, for example, be to accept a preferred Expression of Interest for an area of overlap on the basis of some assessment criteria, and reject those that have a less favourable assessment (see the section 3.2 of this report).

There is no present policy to recover the costs of this process. No Environment Canterbury charging policy action is recommended. Any revenue derived from a tender process would most likely be absorbed as a means of defraying Environment Canterbury costs incurred to date.

Step 3 Processes and procedures development

The regional council under Section 165Z (4) of the RMA must establish a fair and reasonable process for deciding how it will deal with a request for a private plan change. It must decide what procedures it will put in place for making the decisions under section 25 of Schedule 1 RMA.

This preliminary step 3 of developing procedures may in theory be required to be funded from future private plan change applicants under the provisions of Section 36 (1) (ca) RMA, although the cost of developing administrative policy, even policy under the Resource Management Act, is usually carried internally within Environment Canterbury and funded via general rates.

There is a need for the Regional Council to specify in advance a council charging policy for the costs of processing the invited plan changes. In particular, it needs to specify what additional charges will be made in addition to the fixed charges it has already set, and when such additional charges will be levied. Such a policy would help reduce uncertainty and may, if it reduces costs, encourage applications that would not otherwise be put forward.

Policy development is a process normally funded by Council through general rates. No charging policy action is recommended. However, procedures need to be developed at an early stage to reduce uncertainty about costs and other matters. Specifically, decision criteria needs to be developed as to how the Council will deal with proposed private plan changes for aquaculture.

A possible approach that could lead to reduced costs is set out under the relevant steps below.

Step 4 Notifying the invitation for Expressions of Interest

The regional council (by public notice) invites persons qualifying under Step 2 (Expressions of Interest phase) to request a change to the regional coastal plan to establish an Aquaculture Management Area.

This step largely involves the preparation and publication of a public notice or advertisement. Whilst in theory the costs of this process could be recovered from private plan change applicants as “preliminary” costs under Section 36 (1) of the RMA, in practice this will be at a cost to Environment Canterbury. No Environment Canterbury charging policy action is recommended.

Step 5 Request for private plan change notified and applications received

Prospective aquaculture developers prepare and submit a proposed regional coastal plan change to establish an Aquaculture Management Area. This step is currently provided for by s. 165Z (1) RMA. An alternative approach is proposed by the Aquaculture Legislation Amendment Bill (No. 2) 2008 as follows: Once the Expressions of Interest stage has been concluded, it is proposed by section 61 of the Aquaculture Legislation Amendment Bill (No. 2) 2008 that “the regional council must notify a person whose Expression of Interest has been accepted, and of the last day on which that person may lodge a request to change the plan.” This request must be rejected if it does not meet certain criteria. A full discussion of this step is provided in section 3.2 of this report.

This step is a cost borne by the developer/applicant although some assistance via consultation may (and should) be provided by the regional council. Environment Canterbury has assisted this process by developing both a model plan change and an example Section 32 Report, the form and content of which it would most likely find acceptable (refer to Appendix 4).

Environment Canterbury notification and consultation costs, whilst in theory are recoverable, would normally be funded, along with other planning costs, from the general rate. No Environment Canterbury charging policy action is recommended.

Step 6 Information decision

The regional council must determine whether it has sufficient information about a request and may require more information or a report in accordance with Clause 23 of Part 2 of Schedule 1 of the RMA.

Guidance is given through this project for model plan changes (including draft provisions and associated notification and information requirements), that should assist in reducing these costs to a minimum.

Some analytical and processing costs for Environment Canterbury will still be involved. This would normally form part of the council expenditure charged to the person submitting the proposed regional coastal plan change to establish an Aquaculture Management Area under Section 36(1) (a) of the RMA. These charges are set out below under the heading “Current Funding Policy”. A fixed fee of \$1,125 is provided for, with the provision for additional charges, should this be insufficient. No Environment Canterbury charging policy action is recommended.

Step 7 Submitter supplies more information

The submitter of the privately initiated plan change proposed may or may not provide such information or agree to a report under Step 8 below. The costs of doing so would be a cost to the applicant without any regional council involvement.

Step 8 Commissioned reports

The regional council must decide whether or not to commission a report on the proposal or to decline the request on the basis of the submitter not providing sufficient information as requested. Commissioned reports may be required to be funded from private plan change applicants under Section 36(1) (a) of the RMA.

Minor costs only are incurred in making decisions. Any commissioned reports are directly chargeable to the applicant. No Environment Canterbury charging policy action is recommended.

Step 9 Request modification

The Regional Council modifies the request on the basis of the further information received, commissioned reports or other relevant matters, but only with the agreement of the submitter of the request. There should be little or no costs involved in undertaking these modifications. There will only be relatively minor costs chargeable to the applicant. No Environment Canterbury charging policy action is recommended.

Step 10 Decision to adopt, accept or reject

The Regional Council must decide, in accordance with its procedures established under Step 3 above:

- a) whether it will adopt all or a part of any request for a private plan change; or
- b) whether it will accept a request and notify it and process it under the procedures set out in Schedule 1 RMA; or
- c) whether it will reject a request on the grounds set out in clause 25 (4) of Schedule 1 RMA.

If under this Step 10 the regional council adopts the requested plan change as its own, the original submitter of the request steps aside from the further processing of the proposal. If this is done in combination with the adoption of a number of other proposals, the costs can be reduced by sharing the processing costs amongst the applicants (see the funding options discussed below, combining applications allows for a cost sharing formula to be applied).

Step 11(a) Adopt the proposed private plan change

Step 11(a) assumes that the regional council decides to adopt the proposed plan change rather than accept it.

Whilst the regional council will initially bear the costs of preparing the plan change under this option, there is still a provision in the RMA for a charge to recover all of the processing costs to be made to the original applicant or combined applicants for the plan change (RMA Section 165ZA(3)(b))¹⁷.

One significant difficulty at present with this option is the current Environment Canterbury charging policy set out in its Annual Plan. The current policy provides that, if a plan change is adopted, the costs from that point on will be met by Environment Canterbury. This is a disincentive for Environment Canterbury to achieve cost savings to the applicants by adopting and combining applications. The present policy states no further fixed or additional charges will be payable by the applicant. It is recommended that this policy be changed for adopted Invited Private Plan Changes for establishing new Aquaculture Management Areas. Section 165ZA

¹⁷ 165ZA (3)

If the regional council adopts a request and combines it with any other request or amends the request under subsection (2),—....

(b) the council may fix a charge under section 36(a) payable by each person who requested a change recognising the proportion of the available space to which the person's request relates.

of the RMA provides for charges to be fixed in proportion to the available space requested for proposals adopted and combined with others for processing.

A new policy should be adopted to recover actual and reasonable costs of the plan change process for applicants whose private plan change proposal for aquaculture are adopted, to be shared over all such applicants in proportion to the available space requested. Such funding arrangements would continue to be applied for steps 13 and 14.

Step 11(b) Accept the proposed private plan change

Step 11(b) assumes that the regional council decides to accept rather than adopt a request. Section 26 of Schedule 1 of the RMA provides that the regional council prepares the requested change in consultation with the person requesting it. As with Step 11(a), the regional council must specify in the plan change that authorisations for aquaculture are to be allocated to the person(s) making the original request as well as the allocation to the trustee.

The regional council will similarly initially incur the costs of preparing the plan change under this option, with the full council costs of preparing the plan change later chargeable to the individual applicant. The current policy provides for all costs to be met by the applicant. No Environment Canterbury charging policy action is recommended.

Step 12 Ministry of Fisheries aquaculture decision

The preparation process for both Steps 11(a) or 11(b) are subject to Schedule 1A of the RMA which involves the Ministry of Fisheries making an aquaculture decision. The Ministry's costs are met by the Crown, not the applicant.

Step 13 Pre-notification plan change

The regional council makes changes to the proposal as required by the Chief Executive of the Ministry of Fisheries. The regional council will initially incur the costs of altering the plan change with the costs later chargeable to the individual applicant for an accepted plan change (Step 10(b)). Relatively minor costs would be met by the applicant with an accepted plan change proposals.

An Environment Canterbury charging policy change is necessary for adopted plan change proposals (see Step 11(a) above).

Step 14 Notification, submission processing, hearing and decisions

The proposal proceeds from this point as for any other proposed regional coastal plan change with the exception of some minor additional notification and other rights for the person who makes the plan change request. Choices about who processes the proposal need to be made. Normally this is a regional council run process, but it could be contracted out.

If there are submitters and there has to be a hearing, there is the usual choice to be made about appointing a hearing panel of either Councillors or Commissioners or a combination. These choices could greatly influence the cost. Councillor's remuneration, other than their direct costs, is normally met from their normal allowances funded from general rates. Commissioner costs are over \$2,000 per day. Commissioners are needed in some cases where particular legal or technical

expertise is required or where the councillors have predetermined views. It is generally expected that Councillors will be involved in plan hearings where council policy is to be determined.

There are costs involved in notification of a plan change, summarising submissions and calling for further decisions, hearing submissions, deliberating on those submissions and issuing and notifying a decision. The full cost of this process will be required to be funded from accepted private plan change applicants under Section 36(1) (a) of the RMA. As discussed below, adoption and combining of a number of applications by the regional council is likely to greatly reduce the overall costs.

This is potentially the most costly part of the process other than the applicant's own preparation costs. The costs are met by applicants for accepted plan change proposals. An Environment Canterbury charging policy change is necessary for adopted plan change proposals (see Step 11(a) above).

Step 15 Environment Court appeal process

This may involve applicants in preparing their evidence at their own cost, but traditionally Environment Canterbury funds its own participation in defence of its decisions and recovers the cost from the general rate. An Environment Court Judge may award costs against one or more of the parties.

This step and associated costs may be largely eliminated for adopted plan changes with the passing of the Resource Management (Simplifying and Streamlining) Amendment Bill 2009 providing that such plan changes are not subject to references to the Environment Court other than on points of law.

Many appeals are settled by negotiating a consent order, with each party bearing its own costs of participating, including the regional council. However, the Environment Court may award costs. No Environment Canterbury charging policy action is recommended.

Step 16 Minister of Conservation approval and s. 165O RMA functions exercised

The Minister of Conservation must approve the plan change and may alter it. It is also noted that the notification requirements and the opportunity for the Minister of Conservation to set directions with respect to s. 165O RMA is most appropriately undertaken at this point.

The Minister and the Department of Conservation bear their own costs. If the Minister requires change to the plan these will normally be funded by the regional council as it represents an alteration of a council decision. No Environment Canterbury charging policy action is recommended.

Step 17 Notification of space to be allocated to the trustee and appeal provisions

Following the approval of the regional coastal plan by the Minister of Conservation, public notice must be issued regarding the allocation of space to the trustee (s. 9 (1) MCACSA). There is a 15 working day period in which appeals may be lodged on regional council decisions with respect to sections 9, 10, and 11 MCACSA.

Notification costs will be absorbed by councils and funded via general rates. Costs of any such appeals will be met by the appellant and the regional council.

Step 18 Plan Change becomes operative

The plan change is made operative by the regional council. There are costs involved in this process but such costs are usually absorbed by councils and funded via general rates. No Environment Canterbury charging policy action is recommended.

Step 19 Aquaculture agreement

Prior to obtaining resource consent, where a reservation related to commercial fishing exists, the holder of the authorisation for that space must secure an aquaculture agreement with affected fishers. The cost of obtaining these agreements are met entirely by the holder of those authorisations affected (i.e. the plan change applicant and Maori to whom the authorisations have been assigned).

Step 20 Resource consents

Resource Consents for the aquaculture venture in the Aquaculture Management Area are issued. This resource consent process is a cost to be fully borne by the consent applicant. The costs involved will be affected by the operative plan change which has occurred as a result of the request.

The plan change may well include provisions that reduce or eliminate the costs of associated resource consents by avoiding notification and by restricting the matters considered in deciding whether or not the consent should be allowed and the conditions imposed. No Environment Canterbury charging policy action is recommended.

3.4.3 Legislative provisions for charging or funding the Invited Private Plan Change process

Section 36(1) RMA provides for a local authority to set charges of the following kinds:

- a) charges payable by applicants for the preparation or change of a plan and, for the carrying out by the local authority of its function in relation to the application; and
- b) charges payable by persons seeking aquaculture authorisations (i.e. rights to apply for a coastal permit to occupy space in an Aquaculture Management Area) and the carrying out by the local authority of its functions in relation to the allocation of authorisations, including its functions preliminary to the allocation.

The charges referred to above must be set using the special consultative procedure under the Local Government Act 2002. The special consultative procedures involve public notice, hearing of submitters in public and public decision making. Section 36 (2) RMA requires this procedure to be followed¹⁸.

¹⁸ 36(2) Charges may be fixed under subsection (1) only—

- (a) in the manner set out in section 150 of the Local Government Act 2002; and
- (b) after using the special consultative procedure set out in section 83 of the Local Government Act 2002; and
- (c) in accordance with subsection (4).]

There is also provision for an additional charge to be made if the charge fixed by the process above is inadequate to recover actual and reasonable costs. An estimate of such additional costs must be given in advance of the process, if such an estimate is asked for (See section 36 (3) and (3A) RMA).

The fixing of charges must have regard to the following criteria:

- a) the sole purpose is to recover reasonable costs;
- b) the benefits of the local authority's actions are gained by the person charged as distinct from the community as a whole;
- c) the local authority actions are needed in response to the application;
- d) the nature or classification of the applicant; and
- e) any actions taken by the applicant to reduce the local authority costs (Section 36 (4) RMA).

There are objection rights in relation to additional charges, the local authority may remit or require all or part of the charges to be paid, and the charge may be required in advance (Section 36 (5), (6), (7) RMA).

3.4.4 Current funding policy

The Long Term Council Community Plan 2006-2016 contains the present policies for funding plan changes. It states that, in general, planning costs are to be funded from general rates. However, there are more specific provisions set out in the annual plan. These, including GST, are set out below:

Part D fixed charge

Processing Requests to Prepare or Change a Regional Plan

The following fixed charge is payable by the applicant and shall be due when the application is made. Should the request be adopted by Environment Canterbury, no further fixed or additional charges will be payable.

Preliminary fixed charge payable at the time of lodging a formal written request for the preparation or change of a regional policy statement or regional plan.	\$1,125
Further fixed charge should the request be accepted but not adopted.	\$3,375

In many instances, the total cost of processing applications will exceed the fixed charge. In these cases an additional charge will be made to reflect the actual and reasonable costs incurred, having regard to the provisions of Section 36 (3), (3A) and (4) of the RMA.

The charge will be determined by the following formula:

$$\text{Charge} = (\text{staff hours} \times \text{hourly charge rate}) + \text{disbursements} + \text{all actual and reasonable additional costs.}$$

Schedule 1 and 2 of the Annual Plan set out the charging rates in relation to hearings and processing

Schedule 1		Schedule 2	
Basis for calculating the increased fixed charge as set out in Part A. The increased fixed charge will be calculated using the following components, applying the relevant time periods or applicable units considered by Environment Canterbury to be needed to complete the application decision-making process.		Staff and consultant charge out rates	\$/hour GST inclusive
		Consents Administration Officer	\$56.25
		Advisory Officer	\$90.00
Preparation S42a report for hearing	Estimated staff hours X staff rate set out in Schedule 2	Compliance Monitoring Officer/Consents Investigating Officer/Consents Hearing Officer	\$101.25
Organise hearing	Estimated staff hours X staff rate set out in Schedule 2	Consents Senior Investigating Officer/Specialist Officer/Management Officer	\$112.50
Assembling papers for hearing committee / commissioner	Estimated staff hours X staff rate set out in Schedule 2	Where consultants / external contractors are used to assist the processing of consents, and their charge out rate exceeds \$100/hour, their actual charge out rates may apply.	
Distribution of Section 42A report(s)	Estimated staff hours X staff rate set out in Schedule 2		
Photocopying of hearing material	\$16.88/report		
Venue hire	\$281.25/day of hearing		
Equipment hire	\$112.50/day of hearing		
Hearing Committee	\$2025/day of hearing		
Commissioners	\$2025/commissioner/day of hearing		
Accommodation – hearing committee / commissioner	\$168.75/person/day		
Accommodation – staff	\$168.75/person/day		
Travel – hearing committee / commissioners	\$281.25/person		
Staff at hearing	Estimated staff hours X staff rate set out in Schedule 2		
Photocopying of decision	\$16.88/decision		
Prepare Notice of decision	Estimated staff hours X staff rate set out in Schedule 2		

3.4.5 Funding options

Accepting or adopting plan changes

A decision to adopt an invited proposal rather than accept it will make a difference to costs of the process.

If a proposal is simply adopted in isolation by the regional council, the regional council must pay all of the processing costs. However, if the proposal is combined with others, or altered to increase the space to better provide for the trustee allocation, then a charge may be fixed in proportion to the available space applying to the proposal (section 165ZA (3) RMA). The adoption of a proposed plan change for aquaculture presently results in a total and final charge to an applicant of \$1,125 (see above) which is a minimum fixed charge estimated on the basis of minor plan changes affecting rules applying to single properties. It greatly underestimates the likely cost for a private plan change for aquaculture ventures even if it is combined with other applications. One of the main reasons for adopting, rather than simply accepting, a proposal may be that, if the proposal is combined with others, there will be administrative and other savings associated with processing proposals together.

Proposed legislation before Parliament could have a significant impact on the costs associated with a decision to accept or adopt a private plan change. Under the provisions proposed in the Resource Management (Simplifying and Streamlining) Amendment Bill 2009, decisions on submissions on an adopted private plan change could only be appealed to the Environment Court on points of law, not on merit arguments. This could eliminate a potentially costly court process.

The present policy set out in the Long Term Council Community Plan 2006 - 2016 is that the council will incur the ongoing costs of any plan change that is adopted. An initial application fee is still required. If some form of cost sharing for applicants is to occur, a change to the funding policy of the Long Term Council Community Plan is required. Without such a change, there may be reluctance by Environment Canterbury to adopt any private plan changes, even if the adoption in combination with others would significantly reduce overall costs to applicants.

The criteria for deciding to adopt one or more proposed private plan change requests does not include a criteria for reducing overall costs, although it does include one of more effective planning for aquaculture activities. Effectiveness does not include efficiency, although the disincentive effect of the charging policy and keeping with an acceptance regime rather than an adoption regime may be an element in making the planning process less effective in establishing new aquaculture ventures.

The best way forward may be for Environment Canterbury to change its funding policy so that it accords with Section 165ZA (3) (b) RMA.

Funding criteria

Aside from the decision whether or not to adopt combined proposals, the funding options must meet the funding criteria set out in Section 36(4) RMA.

Firstly, the costs recoverable must be reasonable and directly attributable to the application. Secondly, the costs must relate to benefits gained by the applicant rather than the community as a whole and where the actions by the applicant have led to the costs being incurred. It would be difficult to argue that the process of establishing

an Aquaculture Management Area for the applicant benefits the community rather than the applicant.

Reasonableness

Reasonableness is a possible reason for funding the process from sources other than direct charges to the applicant.

In determining the reasonableness of charging for the proposals, consideration needs to be given to the treatment of other activities that occupy the coastal marine area as well as considering the burden on applicants arising from a hearing process for allocation of public space. Because there are presently no coastal occupation charges, there will likely be public opposition to the allocation of public space for private use. This may extend the hearing process and could also lead to appeals to the Environment Court.

This opposition could occur despite the fact that Excluded Areas have already been established and that other areas are deemed suitable for aquaculture provided of course that possible adverse effects on the environment are avoided, remedied or mitigated.

However, it should be borne in mind that the changes to the Regional Coastal Environment Plan will mean that the consent process should be made easier. This ease of processing consequential and subsequent resource consents would be further assisted by the categorisation of aspects of aquaculture ventures with the authorisation to occupy an Aquaculture Management Area as controlled or restricted discretionary activities. Applications for controlled or restricted discretionary activities usually do not require public notification and must be granted subject to conditions related to the matters over which control is exercised. This means that the costs of public notification and hearings of public submissions on the subsequent resource consents would not be needed.

Comparisons may be made with other activities occupying the coastal marine area and the reasonableness of expecting aquaculture ventures to pay for a process of setting aside areas.

For port companies, exclusive occupancy of port operational areas was achieved through deemed consents, provided for in the Resource Management Act and determined by ministerial decree. For network utilities, there are provisions in the Canterbury Regional Coastal Environment Plan that provide for occupancy as a permitted activity if the placement of the network utility structure involved was similarly authorised as a permitted activity. Recent changes to the Regional Coastal Environment Plan provide for all lawfully established structures to have exclusive occupancy of the coastal marine area, subject to conditions relating to maintaining public safety and any existing public access. Such structures include swing moorings, boat sheds, club houses, jetties and bridges. Parts of the coastal marine area are zoned by the Canterbury Regional Coastal Environment Plan for particular purposes including swing moorings, port operations, swimming with dolphins, swimming, sewage and other discharge, and defence.

Essentially the funding options for a private plan change are to either fully fund the estimated costs of the plan change process from the applicants, or to partly or fully fund it from general rates or another source of regional council revenue. Judgement of what is reasonable for the applicant to pay relates to the overall costs and benefits of establishing an aquaculture venture. Costs here include costs incurred by the

applicant independent of the planning process. If the process costs are too high, relative to the benefits, the venture will not proceed.

It may be that excessive costs are created by the regime and imposed on new aquaculture ventures. However, public funding can only be justified if the regime has been established for overall public rather than private benefit. If the benefits all accrue to the applicant, the solution to high costs is not to subsidise the process, but rather to attempt to reduce the costs of the process.

Community benefits

Community benefits are a possible reason for funding the process from sources other than direct charges to the applicant.

It could be argued that there are public or community benefits because the regime has been established to resolve conflicting or competitive demands for public space from both the public and the aquaculture industry. However, this will not be the case if the Excluded Area process is adopted and such public interests are resolved prior to the plan change process. It is difficult to establish a wider public benefit from the establishment of an aquaculture venue. Fishermen may use aquaculture structures to tie to, and may benefit from the additional fish life around a structure. The lighting of an aquaculture structure may also aid navigation in some aquaculture areas and in some weather conditions.

There are community benefits associated to the establishment of a new venture such as additional employment and expansion of the local economy. However, this does not justify the expenditure of rates because rate collection from local households and businesses can have balancing or worse adverse effects on the local economy.

Coastal occupation charges are a possible source of funding. However, they are not presently in place and the possibility of their imposition on aquaculture structures acts as a further financial impediment or disincentive to new ventures proceeding.

3.4.6 Policy and process decisions required of the Regional Council

Earlier in this report, it is established that the source of funding of the Invited Private Plan Change process will depend on the policies and procedures adopted by the regional council and any likely changes to existing policies. This section of the report identifies those recommended policy decisions.

Policy development is a process normally funded by council through general rates. No charging policy action is recommended. However, procedures need to be developed at an early stage to reduce uncertainty about costs and other matters. Specifically, decision criteria need to be developed early on as to how councils will deal with proposed private plan changes for aquaculture.

A policy is required for dealing with overlapping claims. Because of the uncertainty over costs for potential applicants throughout the private plan process, it is recommended that the additional cost and the required 50% payment to the Crown from a tender system is avoided if possible. A "fair and reasonable" process would need to be found in the case that a negotiated settlement cannot be reached amongst competing parties, if not, a tender system must be adopted. Such a procedure could, for example, be to accept a preferred Expression of Interest for an area of overlap on the basis of some assessment criteria and reject those that have a

less favourable assessment (see the section of this report on managing overlapping or conflicting Expressions of Interest).

There is a need for the Regional Council to specify in advance a council charging policy for the costs of processing the invited plan changes. In particular, it needs to specify what additional charges will be made in addition to the fixed charges it has already set, and when such additional charges will be levied. Such a policy would help reduce uncertainty and may, if it reduces costs, encourage applications that would not otherwise be put forward.

Procedures need to be developed at an early stage to reduce uncertainty about costs and other matters. Specifically, decision criteria need to be developed as to how the Council will deal with invited proposed private plan changes for aquaculture. In particular, policy and procedures have to be developed to make decisions to adopt, accept or reject a proposal. A possible set of policy and procedures is set out below:

- a) Apply the tests set out in Section 25(4) of Schedule 1 RMA. If it passes these tests, proceed to (b), otherwise reject the proposal.
- b) Check that the proposal conforms with the model plan change prepared for this purpose.
- c) Check that all the required information has been satisfactory provided in accordance with the information schedule.
- d) If 10.2 and 10.3 checks are both met, adopt the proposal.
- e) If either one of (b) and (c) checks are not met, accept the proposal rather than adopt it.

The present charging policy states that the applicant will pay no further fixed or additional charges for adopted private plan changes. It is recommended that this policy be changed for adopted Invited Private Plan Changes when it is for the purpose of establishing new Aquaculture Management Areas. Section 165ZA RMA provides for charges to be fixed in proportion to the available space requested for proposals adopted and combined with others for processing.

A new policy should be adopted to recover actual and reasonable costs of the plan change process for applicants whose Invited Private Plan Change proposals for aquaculture are adopted, with costs to be shared over all such applicants in proportion to the available space requested. Such funding would continue for steps involving the final pre-notification plan change and the notification, submission processing, hearing process and final decision phases.

3.4.7 Conclusions on funding

Costs should be reduced if Environment Canterbury documents its policy and procedures for dealing with private plan changes for aquaculture and its model plan changes and model evaluation reports are documented and used by applicants.

An Environment Canterbury decision to adopt and combine invited plan change proposals rather than simply accept them is likely to significantly reduce the overall costs of the process.

Environment Canterbury should consider changing its existing funding policy so that it can charge applicants the costs of the process even if Environment Canterbury does adopt and combine the invited plan change proposals.

Applicants, rather than the community as a whole, should bear the actual costs of processing plan changes from the point of adoption or acceptance. Community benefits cannot justify public funding of this process.

The aquaculture industry should consider ways of dealing with conflicting or overlapping Expressions of Interest to avoid having to follow a tender process that results in half of the tender proceeds being paid to the Crown.

3.4.8 Estimation of costs

The analysis above indicates where costs lie between Council, the applicant and the Crown for each of the steps involved in the developing an Aquaculture Management Area through the Invited Private Plan Change process, and obtaining a resource consent for activities to be undertaken in that space. In order to quantify an estimation of costs associated with this process, a simple scenario has been developed. It should be highlighted that the estimation of costs below, is that only, an estimation of the parameters within which costs may lie. The costs will vary depending on multitude of factors including:

- a) the number of applications lodged and any decision taken by council to combine applications;
- b) the sensitivity of the area in which aquaculture is proposed, and the amount and complexity of the research needed to support the application;
- c) the size and scale of the application, and the nature of the activities to be undertaken (fed versus non-fed species for example);
- d) the number and nature of any appeals or judicial reviews;
- e) whether there is a commercial fishing reservation imposed through the Ministry of Fisheries aquaculture decision on undue adverse effects, and the procedures and resources needed to subsequently secure an aquaculture agreement.

The estimation of costs is based on the following scenario:

- a) A single application is received to the Invited Private Plan Change process;
- b) The application is well presented by the applicant with full information including a section 32, assessment of environmental effects, plan change details and consultation with affect parties (including Maori) undertaken - (no further information requests needed);
- c) A hearing is held, with 2 – 3 Commissioners present, which runs for 7 days;
- d) No appeals¹⁹ or judicial reviews²⁰ are encountered in the process;
- e) The estimate does not include any costs that may arise as a result of the need to negotiate a aquaculture agreement (compensation or High Court costs), i.e. it is assumed that there is no commercial fishing reservation;
- f) The costs of processes administered by the Minister of Fisheries and Minister of Conservation are met by the Crown.

¹⁹ Appeals may be taken on: a council decision to reject the plan change request (Sch. 1 cl. 27 RMA); on decisions related to an aquaculture agreement (s. 186I FA); decisions related to the plan change itself (Sch. 1 cl. 14, 15 RMA), or on any decision of the regional council in relation to S. 9, 10, 11 MCACSA (s. 12 MCACSA).

²⁰ Judicial reviews to the High Court may be taken of the decisions related to Excluded Areas, or on an aquaculture decision (s. 186J FA).

- g) The process of obtaining a coastal permit once authorisations have been granted is assumed to be non-notified and straightforward on the basis that the major issues have been addressed at the plan change stage.

The estimation of costs is outlined in the table below based on the steps used to describe the process previously in this chapter. For an illustration of how the steps described previously in this chapter (Steps 1 – 20) relate to the diagrammatic illustration of the Invited Private Plan Change process used in Chapter 2, refer to Appendix 1.

Table 2: Estimation of Costs for the Invited Private Plan Change process.

Step	Description of Step	Cost (000)	Cost allocation
1	Excluded Areas Process	\$100 - 160	Council
2 - 4	Expressions of Interest and development of policy and procedures	\$10 - 20	Council
	Applicant submitting Expression of Interest	Variable ²¹	Applicant
5	Public notice inviting plan change requests	\$10	Council
	Applicant lodges application	\$50 - 300	Applicant
6 - 11	Plan change request considered by Council, accepted or adopted (or rejected)	\$15 - 25	Applicant Some costs are only recoverable from the applicant dependent on Council Funding Policy.
12	Ministry of Fisheries undue adverse effects test		Crown
13 - 14	Amendment to the plan to reflect undue adverse effects decision and then undertake Schedule 1 process to change the plan.	\$100 - 200	Applicant Some costs are only recoverable from the applicant dependent on Council Funding Policy.
15	Environment Court	Variable	Council. Applicants may contribute through preparation of evidence.
16	Minister of Conservation approves the Plan and s. 165O functions exercised		Crown
17	Notification of allocation of space to trustee Appeal opportunity (s. 12 MCACSA)	\$10 Variable	Council Council
18	Plan change made operative	Combined with notification of allocation of space ²²	Council
19	Aquaculture agreement secured Ministry of Fisheries registering of aquaculture agreement	Variable	Holder of authorisations Crown
20	Resource consent applied for and processed	\$1.5 - 2	Applicant

²¹ See explanation in the discussion of costs below.

²² See explanation in the discussion of costs below.

Discussion of costs

In summary, the total range of costs estimated for applicants under this scenario is \$166 500 - \$527 000. The total cost estimation for councils, including those costs associated with the identification of Excluded Areas is \$200 000. The Excluded Areas process will most likely not need to be repeated every time an invitation to lodge requests for a plan change to create Aquaculture Management Areas is undertaken. Therefore, the costs estimation for councils, excluding the Excluded Areas process, under this simple scenario is \$40 000.

It should be noted that the cost of the scenario that is estimated above is a very simple one, and a best case. Cost would be expected to increase significantly for both the council and the applicant where legal processes occur, such as when appeals or judicial reviews are lodged, or where an aquaculture agreement is required to be secured when a reservation relating to commercial fishing is imposed.

The costs of submitting an Expression of Interest have not been estimated. The Expressions of Interest step is a new concept to address management of overlapping applications and at this point is not yet law. It remains unclear how much an applicant will be prepared to invest at this early stage of the process. The amount invested is likely to represent a small proportion of the total costs of preparing an actual application (estimated between \$50 000 - \$300 000) and so has not been itemised separately. Unless there is extensive overlap with other applications, the investment/research prepared in the Expressions of Interest stage can be utilised during the application for an Invited Private Plan Change. It will be at the applicant's discretion as to how much they wish to invest in the Expression of Interest stage.

An estimated range of costs has been indicated for the steps 6 - 11 between \$15 000 - \$25 000. This is based on estimated council processing costs of \$5000 and an additional provision of \$10 000 - \$20 000 to evaluate the Assessment of Environmental Effects (AEE) which may need to be contracted out.

As indicated, the costs associated with the Ministry of Fisheries undertaking the undue adverse effects test, and the Minister of Conservation's consideration and approval of the plan, are met by the Crown. s. 186E (2) Fisheries Act 1996 notes that the Chief Executive may, in the context of making an aquaculture decision, *"request the regional council that requested the aquaculture decision and any fisher whose interests may be affected to provide him or her with further information about the effects that the Aquaculture Management Area would have on access to or displacement of fishing"*.

The costs of such information requests should not be significant because the regional council is not required to undertake specific studies to provide the information and may simply pass on information it already has.

The existing section 36 RMA provides for private plan change applicants for Aquaculture Management Areas to pay charges in relation to regional council functions preliminary to the allocation of authorisations. This could cover costs incurred by the regional council that are associated with requesting and providing information associated with the undue adverse effects assessment along with other regional council processing costs.

However, proposed legislation may amend this. The Aquaculture Legislation Amendment Bill (No. 2) 2008 provides for a prescribed fee to be paid to the Ministry of Fisheries by the regional council when it applies for an assessment, though this

fee is yet to be stipulated. This proposed legislation also amends the section 36 RMA charging provisions to provide for cost recovery from persons submitting an invited Expression of Interest in a new Aquaculture Management Area via the private plan change process, including the costs of the process of resolving overlapping claims. However, the proposed legislation also provides that any charges fixed under the provision are notified in advance in the public notice calling for Expression of Interest. Whether or not this has to specify exact amounts and/or hourly rates is not clear.

In the circumstances, it will not necessarily be possible to accurately predict the nature and costs of any information requests associated with the undue adverse effects assessment or the costs of a yet to be determined process of resolving overlapping claims. Any Ministry of Fisheries fee should however be included.

The costs of running the Schedule 1 process will vary considerably depending on the need for a hearing, the use of Commissioners, how long the hearing takes, and whether the costs of the hearing are shared by a number of combined applications or a single applicant (which is the case under this scenario).

There is a requirement to publicly notify both the allocation of 20% of space to the trustee prior to the plan change becoming operative (s.9 (1) MCACSA) and to publicly notify the date on which the plan change becomes operative (Schedule 1 cl. 20(2) RMA). Both these notifications could occur within the same public notice, provided that the operative date for the plan was notified as occurring on a date after the notification of allocation of space to the trustee (for example, the plan become operative after 15 working days once the s.12 MCACSA appeal period has passed). For this reason step 17 has not been separately estimated as it has been assumed that a combined public notice could be used to address both steps (17 and 18).

The costs of obtaining resource consent has been estimated to be comparatively small and assumes that the consent is non-notified, and is for activities of a nature and scale, and with effects, which are anticipated and provided for by the plan change. The proportion of costs that occur during the preparation and execution of the plan change, and the subsequent resource consent will likely vary. The scenario used above assumes that the process is 'front loaded', i.e. that the substantive issues are addressed at the plan change stage, making the obtaining of resource consent, for activities to be carried out in the Aquaculture Management Area, a more simple proposition.

3.5 Historical Issues

3.5.1 Introduction

The purpose of this section is to:

- a) outline the history associated with the development of issues in Canterbury;
- b) set out the issues that have emerged as a result of the history of development of aquaculture in the Canterbury region; and
- c) examine how the Invited Private Plan Change process may be able to assist in addressing these issues.

3.5.2 History of aquaculture in Canterbury

Prior to the aquaculture reforms, Environment Canterbury was seeking to address the need for allocation of space for aquaculture activities through the development of a Proposed Regional Coastal Water Space Allocation Plan. In preparation, Environment Canterbury undertook consultation with the community. A consultation document "Sharing our Sea – Management of Canterbury's Coastal Marine Area – setting aside areas for marine farms and charging for occupation of sea space, September 2002" was produced. The marine farmers consultative group that Environment Canterbury had set up in relation to the "Sharing Our Sea" process indicated that their requirements (at that time) would be met through some minor extensions to their existing mussel farms. The marine farmer's proposal also suggested where additional Aquaculture Management Areas may best be located around Banks Peninsula and offshore of Christchurch city.

The extension of boundaries to existing farms was envisaged to allow for small scale expansion of existing businesses, which would provide more scope for expansion of existing aquaculture activities, or to provide for the installation of new technology. The ability to alter boundaries of existing farms would also have facilitated the movement of the footprint of the marine farm in a direction of more productive water where this was in close proximity to the existing site. Using minor boundary adjustments, movement of the site could have been achieved without necessarily increasing the overall space allocated to the particular Aquaculture Management Area.

The 'Sharing our Seas' process was curtailed by the aquaculture reforms in 2005, and Environment Canterbury determined that the Invited Private Plan Change process was the preferred means of responding to the demand of additional Aquaculture Management Areas. This position was concluded at the Council meeting of 28 April 2005, after the consideration of 3 options to either:

- a) Allow all deemed Aquaculture Management Areas to proceed unfettered, consider use of the Excluded Area process and the Invited Private Plan Change process in the future;
- b) To accept only some of the deemed Aquaculture Management Areas (through a Council initiated plan change process);
- c) To designate new Aquaculture Management Areas through a Council initiated plan change and confirm some or all deemed Aquaculture Management Areas.

After an evaluation of the benefits and costs of each of the options, including social, environmental, economic, and cultural and governance considerations, the council concluded that it would not be proper to proceed with a coastal water space allocation plan change at that point, and would instead elect to work to identify Excluded Areas.

The rationale that supported the decision to not create new Aquaculture Management Areas included (at that time) the uncertainty of the viability of the Pegasus Bay project and ongoing unresolved Environment Court cases. The officer's report also noted that the Invited Private Plan Change process existed, and questioned why Council should commit ratepayer resources to creating new Aquaculture Management Areas if industry were not themselves prepared to meet these costs through the Invited Private Plan Change process.

Following on from this decision, Environment Canterbury publicly notified Excluded Areas where no private plan changes would be invited following a council decision in support of this initiative (13 September 2006). Typically, these Excluded Areas coincided with areas already controlled by rules in the Regional Coastal Environment Plan and largely covered the area surrounding existing marine farm locations in the Banks Peninsula area.

When seeking to implement the aquaculture reforms, and more specifically the Invited Private Plan Change process, it is important to be mindful of the history of aquaculture development in the region. The following is a summary of aquaculture issues that are currently present in the Canterbury region. These examples are most likely not unique to Canterbury. Use of the Invited Private Plan Change process to address these issues will be subsequently evaluated.

3.5.3 Minor extensions or boundary adjustment to existing marine farm boundaries

Under the Resource Management Act as amended by the aquaculture reforms, extensions to, or movement of existing marine farms (including small-scale extensions) require the creation of an Aquaculture Management Area²³. The aquaculture reforms provide for plan changes to be established through Council or privately initiated conventional plan changes, or through an Invited Private Plan Change process.

The Excluded Areas identified by Environment Canterbury largely surround existing marine farm sites in Banks Peninsula preventing the use of the Invited Private Plan Change process to establish Aquaculture Management Areas adjacent to existing sites. Applicants may choose to use a conventional plan change approach to establish new Aquaculture Management Areas in those areas identified as Excluded Areas (as this mechanism is only constraining on the Invited Private Plan Change process). However, when using a conventional plan change approach, the applicant, if successful, would not necessarily have first call on the area created²⁴. Environment Canterbury has already indicated a preference for the use of the Invited

²³ Re-siting of off-site farms is discussed at 3.5.6.

²⁴ King Salmon and Marlborough District Council are currently initiating stage 1 of a 3 stage process of plan changes to address this issue, by amending the plan to ensure that any space created through the conventional plan change approach is allocated to the plan change applicant.

Private Plan Change process and it is therefore very unlikely a council initiated plan change approach will be undertaken in the near future.

In summary, the Invited Private Plan Change will be unable to be used to seek extensions to existing marine farms where these farms are surrounded by Excluded Areas.

3.5.4 Non-commercial aquaculture - the provision of aquaculture for cultural purposes associated with Marae

There are situations where non-commercial aquaculture may be required, for instance to provide kai moana for cultural purposes. Customary aquaculture is generally understood to refer to catering for ancillary Marae activities in order to meet and satisfy expectations of *kawa* and *mana* of the Marae and its tangata whenua, and is of a non-commercial nature (Northland Regional Council Summary of Council decisions on the Aquaculture Planning documents April 2008). In terms of clarifying the “non-commercial nature” of customary aquaculture, the Fisheries Act 1996 provides guidance in sections 193 – 195. These sections stipulate that the taking of fish, aquatic life or seaweed is considered to be for commercial purposes if it is *in any premises owned or operated by any licensed fish receiver, or in any premises where food is sold, prepared for sale, stored, or processed (section 193) or is in, on, or transferred from any fish farm (section 194)*. Section 195²⁵ outlines the amount limits for fish, aquatic life and seaweed that may be held with “non-commercial intent” as that which does not exceed 3 times the amateur individual daily limit prescribed, unless the fish, aquatic life or seaweed was lawfully taken by a person in accordance with s. 186 commercial fishing regulations.

Non-commercial aquaculture has been indicated as a requirement where the original gathering areas for the Marae have been depleted, polluted, or smothered in sediment. Currently, aquaculture of this nature can only occur within an Aquaculture Management Area.

Similar restrictions would apply to the creation of Aquaculture Management Area for non-commercial aquaculture as for minor boundary change adjustments noted above. Development of new Aquaculture Management Areas for non-commercial aquaculture are unable to be undertaken in Excluded Areas when using the Invited Private Plan Change process though conventional plan change policies may be used to create Aquaculture Management Areas in these areas.

3.5.5 Experimental aquaculture

Prior to the Resource Management Act 1991, the Marine Farming Act 1971 provided for pilot commercial scheme leases to be issued *for the purposes of enabling the suitability of the area specified in the licence for farming on a commercial scale any specified species of fish or marine vegetation to be determined (s. 14B (1))*.

The Marine Farming Act 1971 provided for a pilot commercial scheme lease to be granted for a maximum non-renewal period of 5 years with the area limited to 2000

²⁵ *For the purpose of this Act, any person in possession of any fish, aquatic life, or seaweed of an amount or quantity exceeding 3 times the amateur individual daily limit (if any) prescribed in respect of that fish, aquatic life, or seaweed, shall, in the absence of proof to the contrary, be deemed to have acquired, or to possess, the fish, aquatic life, or seaweed for the purpose of sale unless the fish, aquatic life, or seaweed was lawfully taken by a person under regulations made under section 186 of this Act.*

square metres along with limitations on the structures that may be erected in the licence area.

Currently, the establishment of experimental aquaculture and limited commercial trials of new species are required to be located within Aquaculture Management Areas, either co-located within existing Aquaculture Management Areas (where existing Aquaculture Management Areas have the flexibility to allow trailing of new species) or in newly created Aquaculture Management Areas established for that purpose.

The current provisions of the Resource Management Act do not provide for the unique characteristics of experimental aquaculture such as the short term nature of scientific trials, the need to establish small-scale trials within a short time, and the uncertainty regarding the assessment of the environmental impacts of a proposal, which may itself be a factor of the experiment

The Aquaculture Legislation Amendment Bill (No. 2) 2008 proposes to amend the Resource Management Act to provide a process which will allow experimental aquaculture to take place outside of Aquaculture Management Areas in operative regional coastal plans. There is also an amendment to the Fisheries Act 1996 to enable the Ministry of Fisheries to consider whether the experimental aquaculture activity will have undue adverse effects on fishing. Coastal permits for experimental aquaculture activities are proposed to be issued for a maximum of 5 years with no right of renewal.

At this stage the Bill has been introduced and is being considered by a select committee.

3.5.6 Off-site marine farms

The issue of marine farms not being correctly located in Aquaculture Management Areas is a problem for a number of Regional Councils. The most common problem has arisen when the coordinates for the marine farms were mapped in relation to a coast line reference point based on cadastral data. Frequently the cadastral data did not represent the physical coastline. Where the cadastral data has been relied on, marine farms have been unintentionally located in a space that is not aligned with the formally approved coordinates specified in the consent e.g. some marine farms are located much closer to the coastline than the coordinates originally indicated.

The off-site farm issue was anticipated during the aquaculture law reform process and provision was made for this to be resolved by coastal permit holders and/or regional councils (s. 53 and 54 of the Aquaculture Reform Act 2004 respectively). These sections of legalisation provide for a review to enable coastal permit holders or councils to legitimise existing offsite farms rather than incur the costs and possible environmental effects of shifting the farms to the permitted locations. A requirement of the legislation for the offsite farm review was that they had to be initiated within a two year window after the commencement of the Act, i.e. ending 1 January 2007.

A number of regional councils and coastal permit holders (including those in Canterbury) missed the two year window ending 1 January 2007 to resolve the off-site issue for established farms. The Aquaculture Legislation Amendment Bill (No. 2) 2008 contains a package of technical amendments to aquaculture legislation including provisions to address the off-site farm issue through providing a 12 month

extension to the timeframe for action. This Bill is currently being considered by select committee.

Environment Canterbury's position prior to the outcome of the pending Aquaculture Legislation Amendment Bill (No.2) 2008 is:

1. Where a farm is intentionally off-site and it can be moved with minimal environmental impact to the Aquaculture Management Area, it should be moved.
2. Where the actual space occupied by a developed (existing) marine farm is not the authorised space (i.e. the structures in the water are not in the approved Aquaculture Management Area), Environment Canterbury has adopted a non-enforcement stance in the interim provided that the consent holder undertakes to:
 - a) Ensure the actual farm area is no greater than the approved Aquaculture Management Area size
 - b) Actively apply for a review of the marine farm licence, should the Aquaculture Legislation Amendment Bill No. 2 be passed.
 - c) Comply with all other conditions of the consent including all navigation safety requirements.
 - d) The effects of the non compliance continue to be less than minor.
3. With respect to an undeveloped farm, in the event that an error in surveying has occurred and the intended site for occupation is different to the approved Aquaculture Management Area, the marine farm is only able to be installed in the area provided for in the approved Aquaculture Management Area. Structures are not to be placed in the area outside the approved Aquaculture Management Area (including within the intended area for occupation) thereby claiming that area. Pragmatically, in this situation, it is recommended that only the area that is common to both the approved AMA and the intended site be occupied until a review of the marine farm licence is able to be undertaken allowing legitimate expansion into the balance of the intended site of occupation.

It is anticipated that when the technical amendments are passed, the marine farms will have one year from the date of the amendment to 're-site' marine farms (on paper). This review can either be undertaken by the coastal permit holder under section 53 or by Environment Canterbury under section 54.

Related to the off-site farm matter, is the matter of interpretation of use of space beyond the boundaries of the Aquaculture Management Area for warps, lines and anchors associated with the marine farm. Environment Canterbury is of the view that all activities associated with aquaculture, i.e. including warps, lines and anchors, should be undertaken within the boundaries of the Aquaculture Management Area. This is consistent with s. 12A (1) (a), which maintains that:

- (1) *No person may occupy a coastal marine area for the purpose of an aquaculture activity—*
 - (a) *except in an Aquaculture Management Area in a regional coastal plan;*

As marine farm warps, lines and anchors are for the purpose of the aquaculture activity, they must be contained within the boundaries of the Aquaculture Management Area.

Conclusions

Where aspirations for experimental or non-commercial aquaculture or minor boundary adjustments relate to areas where Excluded Areas have been identified, an Invited Private Plan Change process cannot be used to resolve those issues. Aquaculture Management Areas cannot be created in areas identified as Excluded Areas using the Invited Private Plan Change approach. In addition, the Invited Private Plan Change process cannot, of itself, seek the removal of the Excluded Areas, since these are not part of the Regional Coastal Environment Plan.

Excluded Areas may be modified by public notice issued by the Council to remove some or all aspects of the areas previously identified as Excluded Areas following a consultation process similar to that used to establish those areas initially. If Excluded Areas were to be removed by public notice, the Regional Coastal Environment Plan provisions that may have been used to establish the boundaries for Excluded Areas (e.g. areas of significant natural value) would still apply for any Invited Private Plan Change process initiated. However, if Excluded Areas were to be removed, the Invited Private Plan Change process may be used to establish minor boundary extensions or to provide for Maori customary or experimental aquaculture around Banks Peninsula.

4.0 Conclusion

Summary of the report

Section 2 of this report provides the background and legal context to the management of aquaculture in New Zealand in which the enactment of reforms establishing the Invited Private Plan Change process occurred on 1 January 2005. Recent case-law, amendments and the Aquaculture Legislation Amendment Bill (No. 2) 2008 currently under consideration were outlined. A description and analysis of the Invited Private Plan Change process was then provided. A more detailed evaluation of the overlapping plan change requests (under both current and proposed provisions) was then undertaken in the section 3.2.

Regional councils have been given new additional responsibilities during the Invited Private Plan Change process – to identify (and defend appeals against) 20% of space for allocation of authorisation to the trustee. Section 3.3 contains the analysis undertaken on the criteria and processes council must adhere to when identifying this space. A recommended interpretation of some statutory provisions is also provided.

The cost implications of engaging in the Invited Private Plan Change process for regional councils, applicants and the Crown were then investigated (refer to section 3.4). While the Resource Management Act 1991 stipulates how costs should fall in many situations, the importance of councils establishing clear funding policy was highlighted.

An evaluation was then undertaken on the extent to which the Invited Private Plan Change process assists in addressing issues such as minor extensions or boundary adjustments to existing farms, provisions for non-commercial aquaculture (such as for cultural purposes for marae), experimental aquaculture, or re-siting of off-site farms.

The analysis and conclusions drawn for each of these topics has been presented in each of the respective chapters above. A summary of key findings of the report will be reflected below. An evaluation of the implications of the findings in this report for potential aquaculture reform will be drawn.

Changing context

At the time of the commissioning of this report, the government was committed to encouraging and supporting implementation of the established (current) regime. The purpose of this report was to assist councils in interpretation of statutory provisions and subsequent implementation of the Invited Private Plan Change process. During the process of writing this report, a change of government occurred, bringing a new mandate for aquaculture reform. While the government have stated clearly intent to “overhaul” the provisions as they relate to aquaculture, it is not yet clear what those reforms may entail. Some of the proposals contained in the Resource Management (Simplifying and Streamlining) Amendment Bill 2009 will have implications for aquaculture. However, a more comprehensive reform for aquaculture provisions has been indicated for phase 2 of amendments to the Resource Management Act.

The LECG Report “Review of Regulatory Regime for Aquaculture” to the Aquaculture Forum of Chief Executives²⁶ has been developed though it would be speculative to postulate the extent to which this report may form the basis for government policy for aquaculture reform, though clearly it is an important and timely report. This report will therefore not comment directly on the recommendations of the LECG report itself, but will rather draw conclusions from the analysis above that may inform aquaculture reform, whatever form it may take.

It is proposed that the two key aspects to be considered when establishing, implementing or reforming provisions for the management of aquaculture may be broadly defined as:

- (a) The sustainable management of aquaculture (including the management of effects);
- (b) The allocation, protection, creation or erosion of “property rights” as they relate to the notions of public space, the fisheries regime, Treaty of Waitangi requirements and the desire to create and utilise new aquaculture space.

Regional councils have developed experience and expertise in sustainable management of natural and physical resources since the inception of the Resource Management Act 1991 (and prior to this under previous regimes) though cumulative effects present particular problems. Allocation of space is a concept more recently encountered, and the responsibility to identify 20% of space for allocation of authorisation to the trustee has not yet been exercised.

4.1 Conclusions of the report

The following is the summary of the conclusions reached at each of the sections of this report. For further discussion, the references to relevant sections will be provided.

The Invited Private Plan Change process provides any person with the opportunity to request a plan change to create an Aquaculture Management Area, except in Excluded Areas, once an invitation has been issued by the council. Distinct from a conventional plan change, this process ensures that 80% of the space created is allocated to the plan change proponent with the balance (20%) of authorisations being allocated to the Trustee.

The steps undertaken during an Invited Private Plan Change are fully described in Section 3.1 and include:

- Identification of Excluded Areas;
- Calling for Expression of Interest or requests for a Invited Private Plan Change;
- Decisions by council to accept, adopt or reject the plan change;
- Aquaculture decision by the Ministry of Fisheries;
- First Schedule RMA plan change process;

²⁶ The Aquaculture Chief Executives Forum comprises of the Chief Executives (or their delegates) of the Ministry of Fisheries, Ministry for the Environment, Department of Conservation, Northland Regional Council, Environment Bay of Plenty, Marlborough District Council and Te Ohu Kaimoana, as well as the Chief Executive and Chair of Aquaculture New Zealand, and representatives of the Salmon and Oyster Farming Sectors.

- Approval of the plan change request by the Minister of Conservation;
- Allocation of authorisation to the trustee and the plan change applicant;
- Obtaining an aquaculture agreement where necessary;
- Obtaining of coastal permits for aquaculture activities in the Aquaculture Management Area.

There are five opportunities for the courts to become involved in the process including: an appeal on the council's decision to reject a plan change request; the aquaculture decision by the Chief Executive of the Ministry of Fisheries may be appealed or judicially reviewed; appeals may be lodged on decision taken on the plan change itself; the Regional Council's decision on matters related to identification of space for the trustee (20%); and the High Court may become involved in an aquaculture agreement where 90% or more, but less than 100%, of consent related to the reservation has been obtained by the applicant.

There are no specific provisions in the current regime to say how overlapping requests for Invited Private Plan Changes are to be reconciled. The Aquaculture Legislation Amendment Bill (No. 2) 2008 proposes a solution by establishing the Expressions of Interest phase (refer to section 3.2 of this report). This enables the resolution of any overlaps by negotiation, tender or some other method, prior to a plan change being formally received. The Bill is currently at select committee.

The Excluded Areas process provides a useful tool for regional councils when initiating an Invited Private Plan Change process. However, the policy intent of the tool seems unclear, as the provisions do not apply to conventional plan change processes. The "protection" of Excluded Areas from aquaculture proposals may be circumvented by a conventional plan change request.

The Minister of Conservation's s.1650 RMA function may be undertaken during the Invited Private Plan Changes process. There is however some ambiguity with the drafting of this function, which may possibly need to be addressed by amendment. Regional councils should discuss this provision with central government before undertaking the Invited Private Plan Change process.

The Chief Executive of the Ministry of Fisheries' s.165G RMA functions are considered not to apply to the Invited Private Plan Change process. Exactly what was envisaged by this step remains unclear.

Regional councils have been assigned responsibility to identify 20% of new space for allocation of authorisations to the trustee. Space must be identified in a manner that is representative and ensures the space is of economic size. It is considered that the criteria for representativeness may be given effect to by councils without undue difficulty. The requirement to ensure that 20% of space for Maori is of an economic size is highly problematic. For a fuller discussion of how this may be achieved see, Section 3.3.

With respect to funding the process, costs met by applicants includes those associated with: lodging an Expression of Interest and/or plan change request; costs associated with the provision of further, additional information and the commissioning of reports; undertaking First Schedule RMA processes for plan changes (notification, submissions, hearings); and the securing of any aquaculture agreement and subsequent resource consent.

Councils meet the cost of any remaining stages in the process and also for the costs of any appeals or judicial reviews related to council decisions (identification of Excluded Areas, decision on plan change, and identification of 20% of space for allocation of authorisations to the trustee).

It was concluded that the Invited Private Plan Change process is unable to be used to resolve 'small scale' issues such as minor extensions or boundary adjustments to existing marine farms, provisions for non-commercial or experimental aquaculture, or re-siting of off-site farms.

4.2 Conclusions: implications for reform

Three areas are highlighted below, which this report has concluded, are a priority consideration in the event that any reform of aquaculture legislation is undertaken:

- (a) allocation of property rights;
- (b) the relationship of the Crown and regional councils in addressing Treaty responsibilities with respect to aquaculture; and
- (c) the challenge of attempting to allocate aquaculture space in the absence of a planning framework.

Allocation of property rights

An analysis of the Invited Private Plan Change process indicates that it is the issue of management of 'property rights' which is most problematic. Layers of decisions include: management of overlapping applications through the proposed Expressions of Interest step; aquaculture decisions taken by the Chief Executive of the Ministry of Fisheries; identification of 20% of space by regional councils for allocation to the trustee; and finally the need to obtain an aquaculture agreement where a reservation for commercial fishing has been imposed. It is no coincidence that appeals to the Environment Court or the High Court are provided for at each of these decision points, such is the importance of the decisions taken. The issue of management of 'property rights' and the allocation of those rights will therefore lie at the heart of any reforms. It could be argued that the reform is not about aquaculture *per se*, but rather the allocation of notional 'property rights' in the public space.

The challenge is the allocation of space in the context of existing allocated 'rights' (fisheries), and a commitment to honouring Treaty obligations, all in the absence of nationally directed strategic planning regime for the coastal marine area, or an oceans policy.

Policy 16 of the proposed New Zealand Coastal Policy Statement 2008 (NZCPS) is one attempt to address this matter.

Policy 16 Use and development of the coastal marine area

Policy statements and regional coastal plans shall identify where, in the coastal marine area, specified forms of use or development will and will not be appropriate. In identifying these areas, while giving effect to this policy statement as a whole, local authorities shall:

- (a) *recognise the public utility of the coastal marine area as public open space and protect the cultural and amenity values of the coastal marine area as open space;*

- (b) *recognise and make appropriate provision for activities important to the social, economic, and cultural wellbeing of people and communities that can, by nature, only be located in the coastal marine area;*
- (c) *recognise that activities that do not, by nature, require location in the coastal marine area, generally should not be located there;*
- (d) *avoid sprawling development, by encouraging efficient use of occupied space and discouraging the agglomeration of separate occupied areas; and*
- (e) *buffer or otherwise protect sites of significant indigenous biological diversity value.*

The proposed NZCPS is currently being considered by the Board of Inquiry and recommendations are not yet available.

This poses the question, has the current regime failed? Many have concluded 'yes', on the basis that no new aquaculture areas have been created since its inception. This report draws out many of the challenges that the current regime presents. However, the current regime does attempt to address the 'management of effects' and 'property rights' issues in a sequential way. Based on the evidence of an absence of creation of new aquaculture space, the current approach seems inefficient, overly complex and provides no incentive for applicants or regional councils to engage. Reforms will therefore need to address both these issues, perhaps finding novel means to resolve them.

Addressing Treaty responsibilities

A significant policy decision has been made when drafting the current provisions, to devolve Crown responsibilities with respect to the Treaty of Waitangi and aquaculture areas to regional councils. Councils are responsible for identifying 20% of space for allocation of authorisations to the trustee for new aquaculture areas. The Crown has retained responsibility to address 'pre-commencement space' issues. The Crown has still retained the ability to intervene in the Invited Private Plan Change process through directions given by the Governor General by an order in Council on the recommendation of the Minister of Conservation (s.1650 RMA). Intervention may occur for the following purposes:

- (a) *to give effect to Government policy in the coastal marine area;*
- (b) *to preserve the ability of the Crown to give effect to any of its obligations under any agreement in principle or deed of settlement between the Crown and any group of Maori claimants or representative of any group of Maori claimants in relation to a claim arising from, or relating to, any act or omission by or on behalf of the Crown or by or under any enactment before 21 September 1992 (s.1650 (2) RMA)).*

The current regime clearly outlines which regional councils have primary responsibility for identifying space where allocation or authorisations can occur, the Crown retains the ability to intervene where necessary. This is in recognition that *"the full legal and beneficial ownership of the public foreshore and seabed is created in the Crown, so that the public foreshore and seabed is held by the Crown as absolute property"* s.13 (1) Foreshore and Seabed Act 2004.

While the statutory provisions are clear as to where responsibilities lie, this resolution raises a number of questions that should be considered by the reform:

- Should Crown responsibilities with respect to the Treaty and aquaculture continue to be devolved to regional councils?
- What responsibilities does the Crown have to regional councils to assist in the exercise of this function? E.g. assist in development of criteria for evaluation of economic size.
- Is it appropriate for regional councils to meet the costs when creating new space to meet s.9 (1) MCACSA obligations?
- Could this devolution of function result in unintended consequences or perverse incentives, e.g. regional differences in approaches to identification of space (20%) resulting inconsistencies, or councils “over allocating” when creating new space (a comparatively free good) in an attempt to reduce the risk of appeal.

This is an area that clearly illustrates the interdependence between central and local government when seeking to resolve complex resource management issues. There appears to be an increased appetite in the new government for development of guidance to local government through national policy statement and standards. Clearly articulated policy guidance on aquaculture issues may assist in implementation of statutory provisions.

Spatial allocation in the absence of a framework

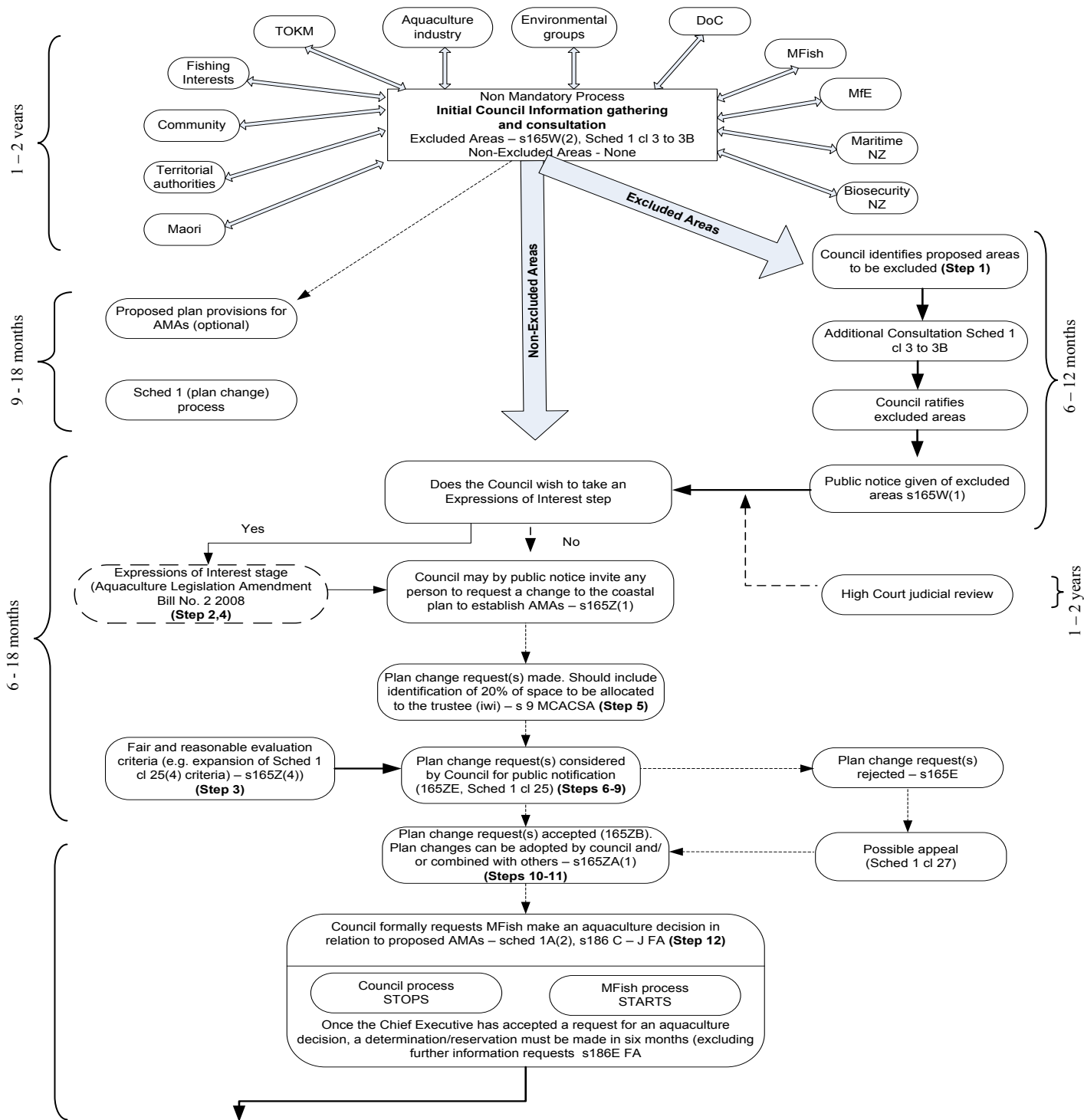
It is considered that one of the key challenges that remains unresolved by the current regime is the absence of a framework in which decisions on allocation are made.

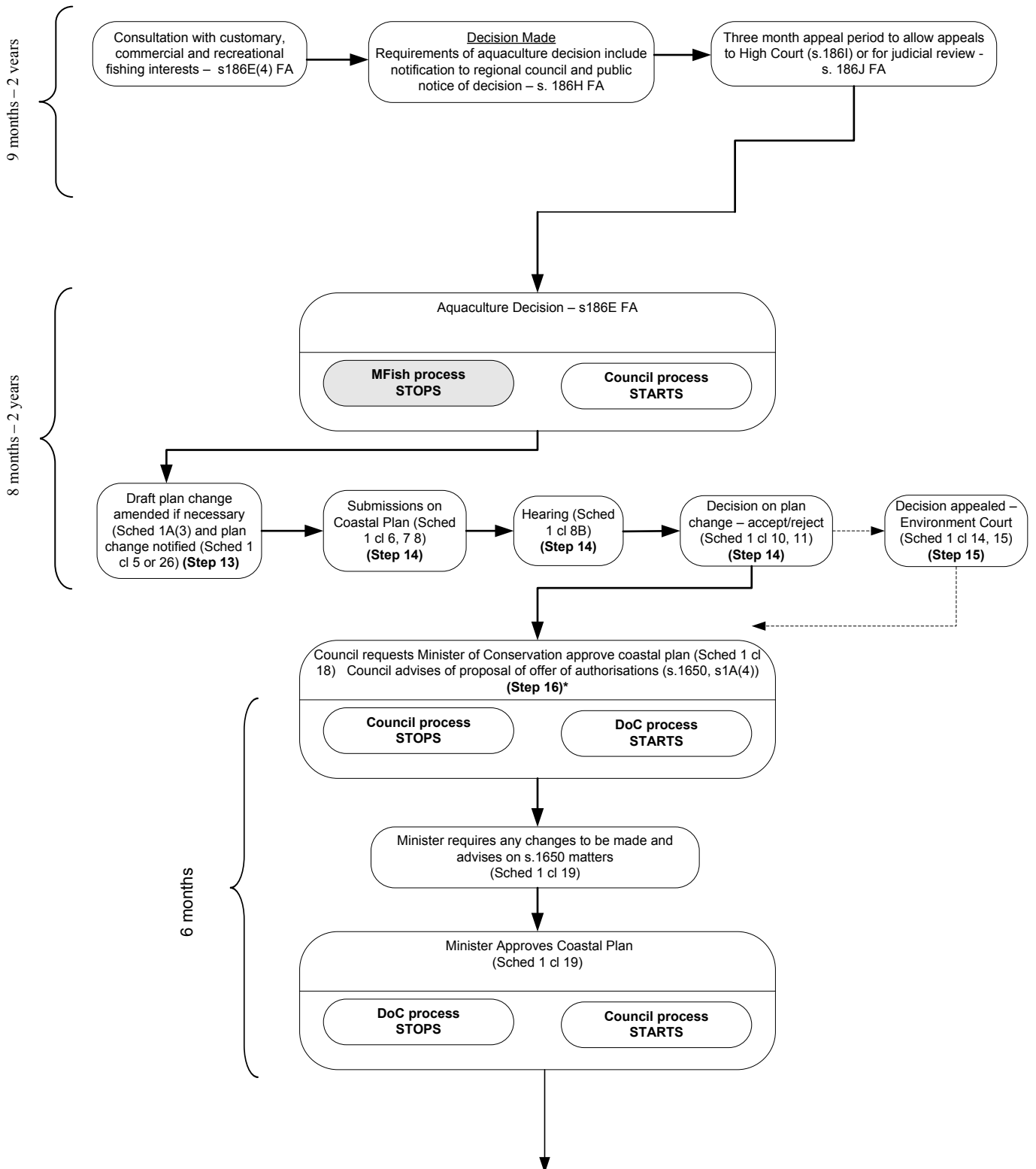
The Excluded Areas process only provides limitations for where aquaculture cannot be established. Requests for plan changes to create Aquaculture Management Areas may be lodged for any areas that the invitation relates to outside the Excluded Areas. Excluded Area provisions do not, in any way, guide or control how Aquaculture Management Areas may be established in “non-excluded spaces”, with respect to location or intensity of use. Unless a conventional plan change by the council is undertaken, no practical mechanisms for determining where aquaculture should occur, or the intensity or nature of this activity are established.

Under an Invited Private Plan Change process, councils react to proposals made by applicants, which are generally lodged through a proposed Expressions of Interest step in the absence or knowledge of other applicants’ intentions. Given the importance of the decisions taken in relation to allocation of space, it is considered that a planning framework would be desirable. This is not provided by the current statutory provisions and could be something considered by any future reforms.

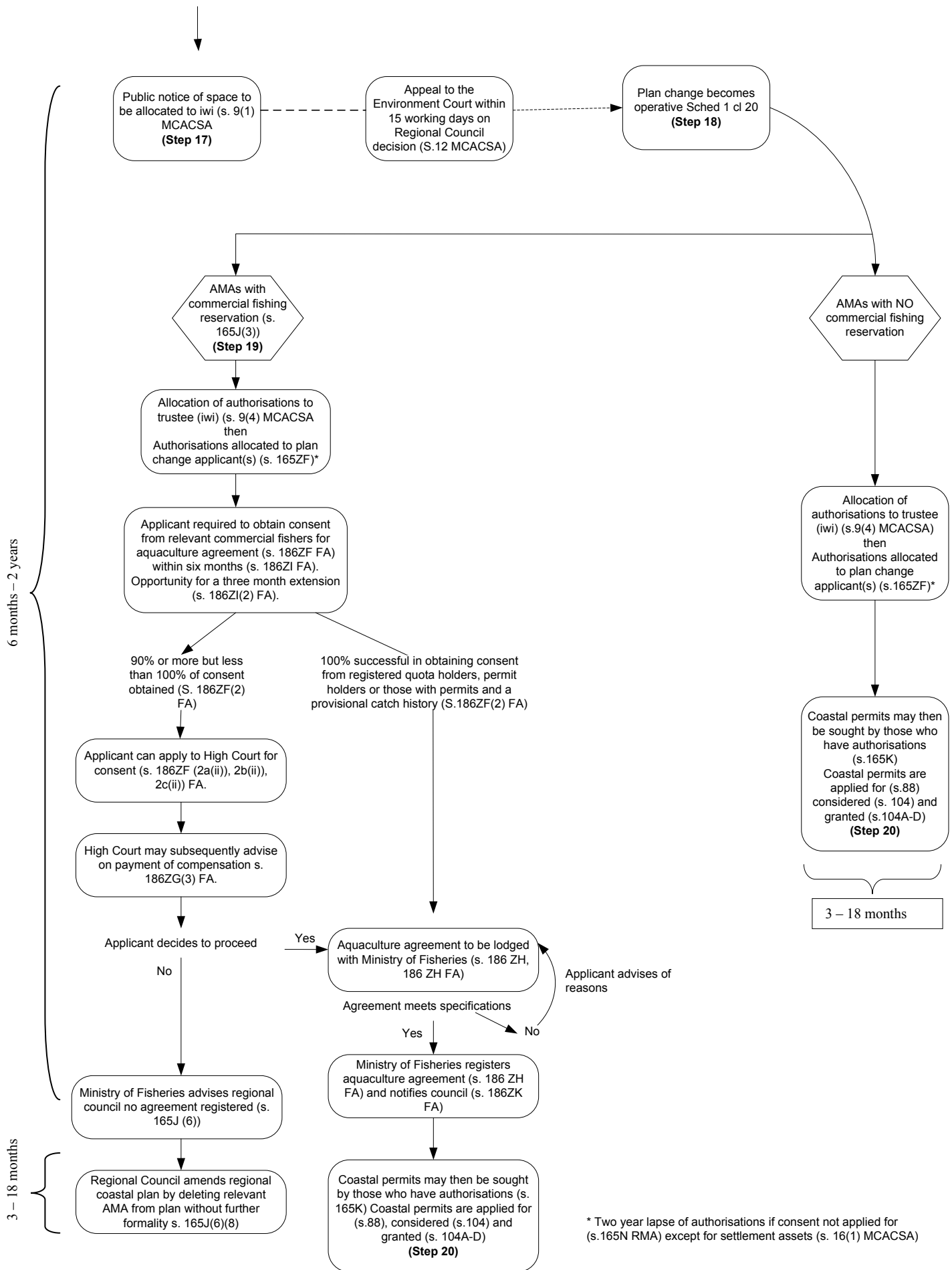
5.0 APPENDICIES

APPENDIX 1: Invited Private Plan Change Process





* See report for full discussion on section 1650 RMA



APPENDIX 2: Assessing Productive Capacity for Different Groups of Aquaculture Organisms

The groups are:

- Seaweeds
- Sponges
- Filter feeding bivalves – mussels, oysters
- Fin fish
- Other invertebrates – paua, kina, sea-cucumbers, rock lobster

In this evaluation the ecological factors that can be measured, and hence, used to assess productive capacity of space, in order to assist in the identification of space for allocation to the trustee that is representative. The other factors that can influence productivity, but are not easily measurable or predictable, are described at the end of this section of the report.

Seaweeds

Seaweeds are plants, and hence require light and nutrients for plant production.

The productive capacity of water space used for seaweed culture will be dependent on:

- light penetration and light intensity
- concentration of dissolved inorganic nitrogen and dissolved reactive phosphorus
- hydrodynamics
- salinity
- wave exposure

This is not a rank order list. However, both light penetration and light intensity and the concentration of dissolved inorganic nitrogen and dissolved reactive phosphorus in the water column are considered of equal and primary importance for seaweed productivity.

Light penetration and intensity

The depth of light penetration into the water column is a function of water clarity. The clearer the water, the deeper the light penetration and hence the deeper the seaweed can grow. The clearer the water, the higher the intensity of light reaching the seaweed at a given depth.

Water clarity is affected by the number of organic and inorganic particles within the water column. When white light hits the particles it is fragmented into wavelengths, reflected and hence scattered and some light energy is absorbed by the particles. Water clarity and hence depth of light penetration and light intensity decreases as the concentration of organic and inorganic particles in the water column increases. In particular, it is the concentration of inorganic land derived sediment particles, from general land run-off and freshwater flows to the sea, that has a significant influence on water clarity. The greater the distance from land or a river mouth, the less land derived sediment particles in the water and the clearer the water. The influence of land derived sediment particles on water clarity can often be distinguished by 'the blue line' as seen from an elevated point on shore.

Measure

Water clarity, using a sechhi disc, at numerous sites over time within the area of interest. Turbidity and total suspended solids (TSS) concentrations in water samples

collected from numerous sites and depths over time within the area of interest. Turbidity is a measure of the light scattering properties of the water while TSS provides a measure of the number of particles in the water. The number of inorganic suspended solids can be determined by calculation after measuring the volatile (organic) suspended solids concentration in combination with TSS concentration. Distances from land and rivers can be measured using a GIS computer programme.

Dissolved inorganic nutrient concentrations

In the marine environment, dissolved inorganic nitrogen (DIN) is considered the critical limiting nutrient for plant growth. Although high DIN concentrations can lead to excessive plant growth, the relative availability of dissolved inorganic nitrogen and dissolved reactive phosphorus, i.e. the N:P ratio is also important. Sources of both dissolved inorganic nitrogen and dissolved reactive phosphorus include the freshwater flowing into the sea from rivers, streams, creeks, etc., land run-off, sewage outfalls and oceanic upwelling. That is, nutrient concentrations will be influenced by the proximity of the aquaculture area to nutrient sources.

Measure

The concentrations of DIN and DRP in water samples collected from numerous sites and depths over time within the area of interest. Distances from land and rivers can be measured using a GIS computer programme.

Hydrodynamics

The flow of sea water through a seaweed aquaculture area brings with it 'new water' with its dissolved nutrients. As water passes through the area, some proportion of the nutrient load will be depleted by the seaweed.

The concentration of nutrients within the incoming water will be dependent on where the water has been before it reaches the aquaculture area. For example, has the water passed through an adjacent seaweed aquaculture area before reaching the specified area? The speed of the water as it flows through the aquaculture area determines the quantity of nutrients available to the plants. Stratification of the water column is also important, as it influences the vertical availability of nutrients. For example, thermal stratification in summer limits mixing through the water column, such that surface waters become nutrient depleted while the bottom waters are comparatively nutrient rich. With the breakdown of the temperature layers (thermocline) in autumn, the bottom water become mixed through the water column with a resultant supply of nutrients to surface waters.

Measure

Current speeds and current directions over time in the area of interest. Assessment of the vertical structure of the water column over time in the area of interest.

Salinity

Sea water has a salinity of 34-35 parts per thousand. However, salinity is reduced by freshwater flows into the sea. A reduction in salinity can have a significant impact on the functioning of plants that require a salinity of 34-35 parts per thousand. That is, the proximity of the site to freshwater inputs could have an influence on seaweed productivity. The salinity requirement will be species specific, for example: *Gracilaria* species can tolerate widely varying salinities, *Undaria pinnatifida* can tolerate a reduced salinity, while *Pterocladia* species are found on the open coast, which suggests they need the 'normal' salinity of sea water (Jefferies, 2003).

Measure

Salinity at numerous sites and depths over time within the area of interest.
Distances from rivers can be measured using a GIS computer programme.

Wave exposure

This is a measure of how 'rough' the sea is at a site. For example, sites within an embayment or harbour are less exposed than those off headlands. Plants subjected to large and/or frequent waves could suffer physical damage. This will reduce productivity. The wave exposure requirement will be species specific, for example the fast growing seaweed *Macrocystis pyrifera* does not naturally occur in very exposed open coast areas, while the kelp *Durvillea antarctica* thrives in such areas.

Measure

Wave conditions over time in the area of interest.

Sponges

Sponges are:

- suspension feeding animals that feed on the bacteria, detritus and plankton in the water.
- sessile and need a surface to attach to. The growth form of sponges varies immensely, from thin encrusting to massive hemispherical forms, from branching and tree-like forms, to plate or vase shapes, to spherical-, barrel- or volcano-shaped forms.

The productive capacity of water space used for sponge culture will be dependent on:

- site location
- water depth
- concentration of food particles
- hydrodynamics
- suspended sediment and sedimentation
- salinity

This is not a rank order list.

Site location

Each species of sponge has specific environmental requirements. Kelly *et al* (2004) reported that growth rates and the overall health of the sponge they were attempting to culture was better where the sponges occurred naturally.

Water depth

There are many different constructs for the aquaculture of sponges. Examples include hanging ropes and hanging 'lanterns' consisting of multiple horizontal plastic trays, held together by ropes and covered in mesh. The deeper the water, the longer the structures can be and hence the more sponge that can be cultured per unit area.

Concentration of food particles

As suspension feeders, sponges need water that contains food particles. The types and concentration of food particles required will be species specific. Data on the types and concentrations of food required to ensure sponge growth were not found. However, it is assumed that sponges with a good food supply will grow faster than those with a poor food supply.

Measure

The types and concentrations of food particles in water samples collected from numerous sites and depths over time within the area of interest.

Hydrodynamics

A sponge aquaculture area requires a flow of water through it. This flow of sea water through the area brings with it 'new water' containing the bacteria, detritus and plankton food particles. As water passes through the area some proportion of the bacteria, detritus and plankton will be depleted by the sponge individuals.

The concentration of bacteria, detritus and plankton within the incoming water will be dependent on where the water has been before it reaches the aquaculture area. For example, has the water passed through an adjacent sponge or bivalve aquaculture area before reaching the specified area? The speed of the water as it flows through the aquaculture area determines the quantity of food available to the sponges.

Measure

Current speeds and current directions over time in the area of interest.

Suspended sediment and sedimentation

Suspended inorganic sediment particles can clog the sponge feeding structure, which affects food intake and hence animal growth. The suspended sediment particles can also settle onto the sponge to cover them with a layer of sediment. Kelly *et al* (2004) reported that individuals of the sponge they were attempting to culture, once covered in silt, experienced poor to negative growth and rarely recovered. They found the ideal for the culture of their sponge to be oceanic water with a low sediment load. Thus sponge productivity can be influenced by the concentration of inorganic suspended sediment particles in the water, which in combination with hydrodynamics, then determines the settlement of particles to the seabed. Thus sponges in an aquaculture area beyond the influence of sediment run-off from land will be more productive than those in an area within the influence of sediment run-off.

Measure

Total suspended solids (TSS) concentrations in water samples collected from numerous sites and depths over time within the area of interest. The number of inorganic suspended solids can be determined by calculation after measuring the volatile (organic) suspended solids concentration in combination with TSS concentration. Sedimentation can be measured by the placement of sediment traps for a given period of time in the area of interest. Distances from land and rivers can be measured using a GIS computer programme.

Salinity

Sea water has a salinity of 34-35 parts per thousand. However, salinity is reduced by freshwater flows into the sea. A reduction in salinity can cause a reduction in the sponge volume (used as a measure of growth) as a result of compression of the normally inflated aquiferous system of the sponge (Reiswig 1973, cited in Kelly *et al.*, 2004). Such compression is usually temporary but can last for weeks depending on environmental conditions. That is, the proximity of the site to freshwater inputs could have an influence on sponge growth.

Measure

Salinity at numerous sites and depths over time within the area of interest. Distances from rivers can be measured using a GIS computer programme.

Filter feeding bivalves

The filter feeding bivalves that are currently cultured in New Zealand are mussels and rock oysters. These animals filter particles out the water as it flows across their gills. Mussels are typically cultured on continuous looped longline ropes, which are suspended from surface or subsurface rope backbones to which large floats are attached. Oysters are typically cultured on wooden racks positioned in intertidal areas. However, the shortage of suitable intertidal sites available for oyster farming has stimulated interest in subtidal culture on suspended longlines. High growth rates can be achieved by subtidal culture but fouling of the oyster shells by mudworms is a major problem (Handley and Jeffs, 2002).

The productive capacity of water space used for the culture of filter feeding bivalves will be dependent on:

- water depth
- plankton concentrations
- hydrodynamics
- suspended sediment

These criteria are in rank order of importance for the productive capacity of water space for the subtidal culture of filter feeding bivalves. Note, water column plankton concentrations and hydrodynamics go hand in hand and are of equal importance for subtidal and intertidal cultured bivalves.

Water depth

For longline subtidal culture, the deeper the water the longer the line that can be used, and hence, the more individuals that can be cultured per unit area.

Plankton concentrations

Mussels

Present evidence indicates that phytoplankton is the major food source for mussels. Any other planktonic matter that is consumed is by-catch. High concentrations of phytoplankton are generally associated with good mussel growth and research at several locations over many years provides the following generalisations of likely mussel growth (Stenton-Dozey *et al.*, 2006):

1. Less than 0.5 µg/l Chl-*a*: Very poor conditions leading to loss of flesh through starvation; a relatively infrequent occurrence.
2. 0.5 to 1 µg/l Chl-*a*: Growth is slow and generally in poor-moderate condition.
3. 1-1.5 µg/l Chl-*a*: Moderate growing conditions. Quite common range; typical annual chlorophyll averages in Pelorus Sound are 1.0-1.5 µg l⁻¹.
4. 1.5-2.5 µg/l Chl-*a*: Good growing conditions, but may also lead to spawning. This range is generally necessary for conditioning mussels. Represents typical bloom conditions that are relatively common in spring and autumn.
5. > 2.5 µg/l Chl-*a*: Very good growing conditions. Usually result from a reasonable period of suitable environmental conditions with relatively high nutrient (nitrogen) concentrations in summer or stable water column in winter.

Oysters

Oysters also feed on the phytoplankton (Hay and Linsday, 2004). It is assumed that good oyster growth occurs when there are high concentrations of phytoplankton. There are no data on oyster growth and specific phytoplankton concentrations.

Measure

Chlorophyll-a concentration (a measure of phytoplankton concentration) in water samples collected from numerous sites and depths over time within the area of interest.

Hydrodynamics

A bivalve aquaculture area requires a flow of water through it. This flow of water brings with it 'new water' containing the planktonic food particles. As water passes through the area, some proportion of the plankton will be depleted by the cultured individuals.

The concentration of plankton within the incoming water will be dependent on where the water has been before it reaches the aquaculture area. For example, has the water passed through an adjacent sponge or bivalve aquaculture area before reaching the specified area? The speed of the water as it flows through the aquaculture area determines the quantity of food available to the cultured individuals. Given that a certain stocking-density of bivalves filters material from the water at a constant rate, the actual water flux through the farm (estimated using local water velocity) controls the level of food delivery and filtration (Stenton-Dozey *et al.*, 2006). That is, the faster the flow, the more food 'delivered' to an individual per unit time. The speed of water flow also influences the dispersal of faeces, pseudofaeces and shell matter. This matter sinks to the bottom, either directly beneath the farm where water flows are weak, or further afield wherever there is sufficient flow to disperse the material. Good water flows through an intertidal oyster farm help reduce the build-up of sediment directly beneath the rack structures.

Measure

Current speeds and current directions over time in the area of interest.

Suspended sediment

Filter feeders take in all the available particles in the water. In mussels, the food particles are digested while the indigestible particles are bound in mucus and ejected from the gills as pseudofaeces. In oysters, all the particles are ingested with the waste and indigestible particles passed as faeces. The more indigestible particles to be either bound in mucus or ingested, the more energy used by the animal during the feeding process and the less energy for maintaining weight, growth and reproduction (Hancock and Hewitt, 2004). That is, the concentration of inorganic suspended sediment particles affects the productivity of these filter feeding bivalves. In any given aquaculture area, the animals will typically be exposed to comparable concentrations of inorganic suspended sediment particles. However, during rainfall, land run-off and high freshwater flows can result in a concentration gradient of inorganic suspended sediment particles across an aquaculture area. Hence, the distance from land or a river mouth needs to be considered.

Measure

Total suspended solids (TSS) concentrations in water samples collected from numerous sites and depths over time within the area of interest. The number of inorganic suspended solids can be determined by calculation after measuring the volatile (organic) suspended solids concentration in combination with TSS

concentration. Distances from land and rivers can be measured using a GIS computer programme.

Finfish

At present, salmon are an important aquaculture species in the Canterbury region. In the future, other species may be cultured with research underway in New Zealand on the potential and requirements for the culture of other finfish species.

Salmon are grown in large floating sea cages moored to the sea floor. Each cage contains several thousand salmon, which are grown from smolt to a weight of around 3.5 to 4 kg. The cultured salmon are fed a formulated diet, i.e. they do not obtain their food from the natural environment.

The productive capacity of water space used for the culture of finfish will be dependent on:

- water depth
- water clarity
- wave exposure
- hydrodynamics
- salinity

This is not a rank order list. However, water depth is of primary importance for the productive capacity of finfish culture in a given water space.

Water depth

The deeper the water, the deeper the sea cage that can be used, and hence, the more fish that can be cultured per unit area.

Water clarity

Salmon use sight to locate their food, thus feeding efficiency is affected by water clarity. The more efficient the feeding, the faster the growth of the fish.

Water clarity is affected by the number of organic and inorganic particles within the water column. In particular it is the concentration of inorganic land derived sediment particles, from general land run-off and freshwater flows to the sea that has a significant influence on water clarity. The greater the distance from land or a river mouth the less land derived sediment particles in the water and the clearer the water.

Measure

Water clarity, using a sechhi disc, at numerous sites over time within the area of interest. Total suspended solids (TSS) concentrations in water samples collected from numerous sites and depths over time within the area of interest. The number of inorganic suspended solids can be determined by calculation after measuring the volatile (organic) suspended solids concentration in combination with TSS concentration. Distances from land and rivers can be measured using a GIS computer programme.

Wave exposure

This is a measure of how 'rough' the sea is at a site. For example, sites within an embayment or harbour are less exposed than those off headlands. Fish confined to a sea cage and subjected to large and/or frequent waves could suffer physical damage. Frequent and/or high waves could alter the level of activity of the fish. The more active the fish, the more food used for energy production and the less used for fish tissue production.

Measure

Wave conditions over time in the area of interest.

Hydrodynamics

Sea-based grow-out salmon farms tend to be placed in areas that are 'flushed' by currents. Water flowing through the farm helps keep the cages clean and continually changes the water the salmon are living in. This maintains the rearing environment for salmon and minimises the effects of salmon waste and uneaten food on the fish and the environment.

Measure

Current speeds and current directions over time in the area of interest.

Salinity

Sea water has a salinity of 34-35 parts per thousand. However, salinity is reduced by freshwater flows into the sea. The salinity tolerance range of sea caged salmon is not known. The salinity requirement will be species specific.

Measure

Salinity at numerous sites and depths over time within the area of interest.
Distances from rivers can be measured using a GIS programme.

Other invertebrates – paua, kina, sea-cucumbers, rock lobster

Currently there is very limited marine based aquaculture for some invertebrate species. Paua, kina, sea-cucumber and rock lobster have been included in this report acknowledging that there may be potential for further diversification of the industry in the future. These four species are currently managed under the Quota Management System by the ministry of Fisheries. Any potential further expansion of the aquaculture industry into these species must be consistent with the existing regime.

The productivity requirement differs between these species as their food and habitat requirements differ.

Paua live in the shallow subtidal, where they cling to rocks and graze on the fine algae that grow on the surface of rocks. The water depth they occupy is limited by food availability. Kina live in the rocky subtidal zone. They are omnivorous and feed upon whatever they come across, particularly drift and intact large brown algae (Jeffs, 2003). The sea cucumber that has the potential for cultivation is *Stichopus mollis*. This animal lives on the seabed where it consumes sediment, removes the digestible particles and passes the sediment out as a trail behind the animal. Rock lobsters inhabit the small caves/deep crevices of rocky subtidal reefs. They typically feed on molluscs and other crustaceans.

Paua, kina and rock lobster culture require artificial structures on which the animals can live. For paua, barrel culture has been used with the barrels suspended in the water column. Cultured paua, kina and rock lobster are fed a formulated diet, i.e. they do not obtain their food from the natural environment. Sea cucumber culture is being investigated as an adjunct to other types of aquaculture, with the sea cucumbers on the seabed making use of the nutrients and other waste from the animals above.

The productive capacity of water space used for the culture of other invertebrates will be dependent on:

- water depth

- hydrodynamics
- salinity
- sedimentation

This is not a rank order list. However, water depth is of primary importance for the productive capacity of the subtidal cultivation of paua, kina and rock lobster in a given water space.

Water depth

The deeper the water, the deeper the culture structure that can be used, and hence, the more paua or kina or rock lobster that can be cultured per unit area. Water depth is not a factor in sea cucumber productivity.

Hydrodynamics

Water flowing through the aquaculture area for paua, kina and lobster will help keep the growing structures clean and continually changes the water the animals are living in. This maintains the rearing environment and minimises the effects of animal waste and uneaten food on the cultured species and the environment. Flowing water is not likely a factor in sea cucumber productivity.

Measure

Current speeds and current directions over time in the area of interest.

Salinity

Sea water has a salinity of 34-35 parts per thousand. However, salinity is reduced by freshwater flows into the sea. It is speculated that these species have a small salinity tolerance range. That is, reduced salinities will likely alter the feeding rate and affect species physiology thereby influencing productivity.

Measure

Salinity at numerous sites and depths over time within the area of interest. Distances from rivers can be measured using a GIS programme.

Sedimentation

Sedimentation, i.e. deposition of land derived sediment to the seabed is a function of distance from land or a sediment source such as a river. The greater the distance from the sediment source, the less land derived sediment particles in the water and the less sedimentation. The amount of sediment settling to the seabed and the persistence of the settled sediment will be influenced by the hydrodynamics of the area.

Sedimentation on and in artificial growing structures (paua, kina and rock lobster) will cover the food. This will influence feeding efficiency and hence growth of the animals. Sedimentation will bring with it nutrients and food for sea cucumbers so continuous small volume inputs may enhance growth. However, catastrophic sedimentation as a result of severe rainfall events could smother individuals. Such events would also have a significant impact on the survival, and hence productivity, of paua and kina and possibly rock lobsters.

Measure

Total suspended solids (TSS) concentrations in water samples collected from numerous sites and depths over time within the area of interest. The number of inorganic suspended solids can be determined by calculation after measuring the volatile (organic) suspended solids concentration in combination with TSS

concentration. Sedimentation can be measured by the placement of sediment traps for a given period of time in the area of interest. Distances from land and rivers can be measured using a GIS computer programme.

Other influences on productivity

The cultured organism in the natural food chain

All of the cultured organisms listed above are potentially a food source for other organisms. Herbivorous gastropods and fish graze on seaweed. Nudibranchs, starfish and fish graze on sponges. Carnivorous molluscs, starfish, crabs and fish such as leatherjackets prey on mussels. Carnivorous molluscs, starfish, crabs and flatworms prey on oysters. Large predatory fish and seals prey on finfish. Fish such as snapper prey on kina, octopus prey on crayfish and starfish prey on paua. That is, the productivity of cultured organisms is influenced by the presence and abundance of grazers or predators. While grazers and predators occur naturally in the environment adjacent to an aquaculture area, the establishment of a dense culture of a food source attracts grazers or predators and can result in an abundance of them in the culture area. The measurement of the natural abundance of grazers and predators in the vicinity of the aquaculture area is unlikely to provide an indication of the influence of grazers or predators on the productive capacity of an area.

Parasites and shell boring worms

Finfish are prone to external parasites such as sea lice when in a dense culture. These parasites do affect fish health and reduce the productivity of an individual.

Boring worms infest oyster and mussel shells with at least 14 worm species identified (Read, 2001). The thicker oyster shells are more prone to these worms than mussel shells. The worms that infest oyster shells cause blisters in the shell that fill up with sediment, hence the term mudworms. The oyster uses up energy to lay down shell material over the blister and fill in depressions around the blister (Handley and Jeffs, 2002). This reduces the productivity of an individual.

Phytoplankton blooms

Phytoplankton abundance and persistence is influenced by light, dissolved nutrient concentrations, the N:P ratio, water temperature, the availability of other chemicals such as silica and iron, weather and sea conditions. When conditions are right, a phytoplankton bloom can occur, but because a range of factors are required for a bloom, a bloom in any one area cannot be predicted. However, blooms tend to occur more in enclosed coastal areas, e.g. Akaroa Harbour, than in open coastal areas. Phytoplankton blooms typically result in discolouration of the water and can persist for a period of time depending on weather and sea conditions. Some phytoplankton species that bloom are toxic species.

A phytoplankton bloom has the potential to clog the gills of a fish. This can result in fish death. A bloom can also reduce dissolved oxygen concentrations in the water. This can reduce the production efficiency of the fish, and if oxygen concentrations become too low, fish will die.

Toxic phytoplankton blooms can result in the accumulation of toxins in bivalve flesh which can affect the health of consumers. However, some phytoplankton blooms have the potential to impact on the health of the bivalve and hence productivity. The occurrence of such bivalve health influencing blooms in New Zealand is infrequent (Hay and Lindsay, 2004). Some toxic phytoplankton blooms have the potential to kill fish, e.g. the *Karenia brevisulcata* bloom in Wellington Harbour in 1998 that resulted in high mortalities of fish (Kröger *et al.*, 2006).

APPENDIX 3: Example Plan Change

Introductory Note

This appendix is intended to represent specimen chapter dealing with Aquaculture Management Areas to be inserted through the Invited Private Plan Change into the Regional Coastal Environment Plan for the Canterbury Region.

Chapter 8A: Aquaculture Management Areas and Occupation by Aquaculture Activities in the Coastal Marine

8A.1 Introduction

This part of Chapter 8 deals with the issues arising from the creation and development of Aquaculture Management Areas within the coastal marine area of the Canterbury Region. It should be read in conjunction with the other Chapters of the Regional Coastal Environment Plan.

Activities controlled by the Act

Section 12A states that:

“No person may occupy a coastal marine area for the purpose of an aquaculture activity –

(a) except in an aquaculture management area in a regional coastal plan...”

Section 165C; “Provisions about aquaculture management areas”, states that:

(1) A regional coastal plan or proposed regional coastal plan—

- (a) may provide for 1 or more aquaculture management areas in a coastal marine area; and*
- (b) may provide for 1 or more aquaculture management areas in a coastal marine area for the express purpose of providing for the allocation of space to the trustee under section 9 of the Maori Commercial Aquaculture Claims Settlement Act 2004.*

Subpart 2 – “Privately initiated plan changes” states in 165:

“A regional council may, by public notice, invite any person to request a change to a regional coastal plan to establish an aquaculture management area.”

8A.2 Issue Resolution

Issue

The need to allow for some development of the Coastal Marine Area through the establishment of Aquaculture Management Areas while protecting; ecosystems, flora and fauna, water quality, natural character, public use values and Tangata Whenua values.

Objective 8A.1

(1) To enable people to establish Aquaculture Management Areas in order to carry out aquaculture activities in Coastal Marine Area while avoiding, remedying or mitigating the adverse effects of that use on the environment, including:

- (a) conflicts between this use and people’s well-being, health and safety; and**
- (b) on natural character, and other (natural, ecological, amenity, Tangata Whenua, historic and cultural) values of the coastal environment.**

Principal Reason

To maintain a coastal environment that is available for all forms of use that do not reduce environmental quality or compromise Tangata Whenua values, and to reduce the adverse effects of activities on the coastal environment.

Policy 8A.1

To enable the development and use of specific areas of the Coastal Marine Area as Aquaculture Management Areas for the purposes of marine farming and aquaculture activities.

Explanation

The Resource Management Act 1991 restricts Aquaculture Management Areas in the Coastal Marine Area to those areas created as a result of a Council initiated Plan Change, an Invited Private Plan Change or a request for a Plan Change.

Principal Reason

To enable use of the Coastal Marine Area for marine farming activities that require a location in the Coastal Marine Area, and would otherwise not be able to proceed, provided other than minor adverse environmental effects are avoided, remedied or mitigated.

Methods

The Method used or to be used by Environment Canterbury is:

- Regional rules.

Policy 8A.2

That an Aquaculture Management Area/s be located in the Coastal Marine Area as shown on Map X in Map Volume Y and by the accompanying co-ordinates.

Explanation

This meets the purpose of Policy 8A.1 by creating an Aquaculture Management Area in which aquaculture activities can take place.

Principal Reason

To enable use of the Coastal Marine Area for marine farming activities that require a location within an Aquaculture Management Area, and would otherwise not be able to proceed, provided other than minor adverse environmental effects are avoided.

Methods

The Method used or to be used by Environment Canterbury is:

- Regional rules.

Policy 8A.3

That in the designated Aquaculture Management Area, the following activities will take place:

- i) **The occupation of water space for *mussel farming* (example only – activity or activities to be stipulated by the Plan Change proponent);**
- ii) **The erection, reconstruction, placement, alteration, extension, removal or demolition of any structure or part of any structure that is fixed in, on, under or over any of the foreshore or seabed for the purposes of the aquaculture activity specified in clause i); and**

- iii) **the deposition of substances in, on or under the foreshore or seabed for the purpose of the aquaculture activity specified in clause i) above; and**
- iv) **the destruction, damage or disturbance of the foreshore or seabed for the purpose of the aquaculture activity specified in clause i) above.**
- v) **the discharge of contaminants or water into water for the purpose of the aquaculture activity specified in clause i) above.**

Explanation

To provide a clear indication of the intended use to which the Aquaculture Management Area is to be put.

Principal Reason

The public should be aware of the likely effects of the intended activity on the natural environment and on access to and along the Coastal Marine Area at the time the Aquaculture Management Area is formed.

Methods

The Method used or to be used by Environment Canterbury is:

- Regional rules.

Policy 8A. 4

That in the designated Aquaculture Management Area, the following Discretionary Activity and Non-Complying Activity Rules shall not apply to the activities specified in Policy 8A.3;

Discretionary Rules 7.2, Rule 8.3, Rule 8.8, Rule 8.13, Rule 8.24; and Non-Complying Rules 7.5, 8.5, 8.10, 8.15

Explanation

Aquaculture Management Areas are created by Changes to the Regional Coastal Environment Plan and consideration of location and broad effects form part of that Plan Change. The effects of the aquaculture activity that establishes by consent within the Aquaculture Management Area can then be considered within that area. Any other activity requiring occupation of the Aquaculture Management Area will need to be compatible with the aquaculture activity.

Principal Reason

The principal effects on the Coastal Marine Area should be discussed and resolved at the time the Aquaculture Management Area is established under Policy 8A.3 above. The application of the Rules referred to in Policy 8A.4 can then be considered as Controlled Activities under Policy 8A.5 below

Policy 8A.5

That in the Aquaculture Management Area, activities falling within the definition of aquaculture activities in the Resource Management Act (Part 1) and activities associated with the principal activity shall be deemed to be Controlled Activities.

Explanation

The effects of the aquaculture activity that establishes by consent within the Aquaculture Management Area can be considered as controlled activities within that area. Any other activity requiring occupation of the Aquaculture Management Area will need to be compatible with the aquaculture activity.

Principal Reason

To enable use of the Coastal Marine Area for marine farming activities that require a location within an Aquaculture Management Area, provided that any adverse environmental effects are no more than minor and are contained within the consented area, and that any other uses do not impinge on the principal purpose for which the Aquaculture Management Area was formed.

Policy 8A.6

In accordance with Section 165C of the Resource Management Act, authorisations are to be allocated to the trustee in compliance with Section 9 of the Maori Commercial Claims Settlement Act 2004.

Explanation

20% of any Aquaculture Management Area must be allocated to the trustee to accord with the Act.

Principal Reason

Central government wishes to address Treaty claims by providing opportunities for iwi to engage in aquaculture.

Methods

The Method used or to be used by Environment Canterbury is:
Regional rules.

Rule 8A.1

The following activities undertaken in the Aquaculture Management Area designated in Policy 8A.2 are Controlled Activities:

- i) The occupation of water space for XXX. (example only – activity or activities to be stipulated by the Plan Change proponent.);**
- ii) The erection, reconstruction, placement, alteration, extension, removal or demolition of any structure or part of any structure that is fixed in, on, under or over any of the foreshore or seabed for the purpose of the aquaculture activity specified in clause i) above.**
- iii) the deposition of substances in, on or under the foreshore or seabed for the purpose of the aquaculture activity specified in clause i) above.**
- iv) the destruction, damage or disturbance of the foreshore or seabed for the purpose of the aquaculture activity specified in clause i) above.**
- v) the discharge of contaminants or water into water for the purpose of the aquaculture activity specified in clause i) above.**

Control is reserved under this rule to the following matters for which conditions may be imposed:

- i) the effects on the water column**

- ii) maintenance of public access
- iii) hydrodynamic effects
- iv) effects on benthic communities and habitat in that location
- v) staging and timing of development
- vi) navigation and safety
- vii) methods for the repair or removal of abandoned or derelict equipment or structures

Application for resource consent for the controlled activities in this rule may be decided without public notification or service on persons who may be adversely affected.

Principal Reason

Aquaculture Management Areas are established through the Plan with the purpose of accommodating aquaculture activities. These activities should be able to be assessed within limited parameters in such areas once the Aquaculture Management Area has been confirmed.

Rule 8A.2

The following activities undertaken in the Aquaculture Management Area designated in Policy 8A.2 are Discretionary Activities:

- i) The occupation of water space for any other aquaculture activity not included in Rule 8A.1;
- ii) The erection, reconstruction, placement, alteration, extension, removal or demolition of any structure or part of any structure that is fixed in, on, under or over any of the foreshore or seabed for the purposes of the aquaculture activity specified in clause i) above; and
- iii) the deposition of substances in, on or under the foreshore or seabed for the purpose of the aquaculture activity specified in clause i) above; and
- iv) the destruction, damage or disturbance of the foreshore or seabed for the purpose of the aquaculture activity specified in clause i) above.
- v) the discharge of contaminants or water into water for the purpose of the aquaculture activity specified in clause i) above.

Discretion is reserved under this rule to the following matters for which conditions may be imposed:

- i) the effects on the water column
- ii) maintenance of public access

- iii) **hydrodynamic effects**
- iv) **effects on benthic communities and habitat in that location**
- v) **staging and timing of development**
- vi) **navigation and safety**
- vii) **methods for the repair or removal of abandoned or derelict equipment or structures**

Application for resource consent for the discretionary activities in this rule may be decided without public notification or service on persons who may be adversely affected.

Principal Reason

This rule provides that a plan change to alter the activities occurring within a particular aquaculture management area is not required. Alteration of activities can be considered as a discretionary activity.

APPENDIX 4: Guide to Preparing a Consideration of Alternatives, Benefits and Costs to Comply with Section 32 of the Resource Management Act.

This report is required to be made available at the same time as the Plan Change

Introduction

The Resource Management Act requires, under Section 32, an evaluation of alternatives, benefits and costs of proposed plans, including plan changes that are requested by individuals. This guide sets out briefly what the main components of what is called a “Section 32 analysis” should be. In addition, it contains advice on how to respond to the information requirements of each part of the Section 32.

Section 32: Consideration of alternatives, benefits and costs

The most relevant part of the section 32 requirements are as follows:

An evaluation must examine—

- (a) the extent to which each objective is the most appropriate way to achieve the purpose of this Act; and*
- (b) whether, having regard to their efficiency and effectiveness, the policies, rules, or other methods are the most appropriate for achieving the objectives.*

General Advice

If you, as an applicant for a Private Plan Change, are using the specimen chapter that has already been prepared, then your “Section 32” report should relate to the Objective and Policies of that chapter.

Because the creation of an Aquaculture Management Area is the only way that marine farming operations can be established in the Coastal Marine Area, any consideration of alternatives, benefits and costs is very limited.

Essentially:

- There are no alternatives; and
- The benefits are broader than the specific site; and
- The “costs” relate to both the environmental costs and benefits and the social and economic costs and benefits.

Specific Advice

The following template has been prepared as a broad guide to organising the contents of the Section 32 report.

TEMPLATE: SECTION 32 ANALYSIS

This section provides a stand-alone Section 32 analysis of the Issue which drives the objectives, policies and methods examined to address the issue.

Issue - To provide a Plan Change to create one or more Aquaculture Management Areas in the Coastal marine Area of the Canterbury Region.

Explanation

In the Resource Management Act, aquaculture activities are prohibited except within Aquaculture Management Areas. New Aquaculture Management Areas must be established through a Plan Change to the Regional Coastal Environment Plan

1. Issue

Issue

The need to allow for some development of the Coastal Marine Area through the establishment of Aquaculture Management Areas while protecting; ecosystems, flora and fauna, water quality, natural character, public use values and Tangata Whenua values.

Quoted from the draft Chapter 8A

2. Relevant Documents

1. Title of paper 1, date, etc
2. Title of paper 2, date, etc
3. See Appendix X at the end of this section for a list of underlying technical and other documents

3. Is the Management Objective(s) necessary?

Objective 8A.1

(1) To enable people to establish Aquaculture Management Areas in order to carry out aquaculture activities in Coastal Marine Area while avoiding, remedying or mitigating the adverse effects of that use on the environment, including:

(a) conflicts between this use and people's well-being, health and safety; and

(b) on natural character, and other (natural, ecological, amenity, Tangata Whenua, historic and cultural) values of the coastal environment.

Quoted from the draft Chapter 8A

Analysis:

Is the objective(s) necessary to achieve the purpose of the RMA?

Is the related issue a resource management (RM) issue? Y/N	If a RM issue should it be addressed in the Plan? Y/N	Does the objective directly relate to the issue and address a significant aspect of the issue? Y/N	Are there new initiatives resulting from this objective? Y/N

If 'No' to any of the above questions then the objective is unnecessary and is to be rejected.

Recommendation: accept Objective 8A.1

4. Policies and Methods

Provide background information to the policy options, if this helps to scene set the policy options. If policy options relate to a specified question then state the question first and then present the range of policy options.

List and clarify the policy options as follows:

Policy 8A.1

To enable the development and use of specific areas of the Coastal Marine Area as Aquaculture Management Areas for the purposes of marine farming and aquaculture activities.

Are there any policy options? Discuss.

Policy 8A.2

That an Aquaculture Management Area/s be located in the Coastal Marine Area as shown on Map X in Map Volume Y and by the accompanying co-ordinates.

Are there any policy options? Discuss.

Policy 8A.3

That in the designated Aquaculture Management Area, the following activities will take place:

- vi) **The occupation of water space for *mussel farming* (example only – activity or activities to be stipulated by the Plan Change proponent);**
- vii) **The erection, reconstruction, placement, alteration, extension, removal or demolition of any structure or part of any structure that is fixed in, on, under or over any of the foreshore or seabed for the purposes of the aquaculture activity specified in clause i); and**
- viii) **the deposition of substances in, on or under the foreshore or seabed for the purpose of the aquaculture activity specified in clause i) above; and**

- ix) the destruction, damage or disturbance of the foreshore or seabed for the purpose of the aquaculture activity specified in clause i) above.
- x) the discharge of contaminants or water into water for the purpose of the aquaculture activity specified in clause i) above.

Are there any policy options? Discuss.

Policy 8A. 4

That in the designated Aquaculture Management Area, the following Discretionary Activity and Non-Complying Activity Rules shall not apply to the activities specified in Policy 8A.3;

Discretionary Rules 7.2, Rule 8.3, Rule 8.8, Rule 8.13, Rule 8.24; and Non-Complying Rules 7.5, 8.5, 8.10, 8.15

Are there any policy options? Discuss.

Policy 8A.5

That in the Aquaculture Management Area, activities falling within the definition of aquaculture activities in the Resource Management Act (Part 1) and activities associated with the principal activity shall be deemed to be Controlled Activities.

Are there any policy options? Discuss.

Policy 8A.6

In accordance with Section 165C of the Resource Management Act authorisations are to be allocated to the trustee in compliance with Section 9 of the Maori Commercial Claims Settlement Act 2004.

Are there any policy options? Discuss.

Analysis: Is each policy necessary to help achieve the associated objective? Is it more effective than any other policy option?

Policy No'	Necessity Y/N	In consideration of the costs and benefits associated with principal methods to implement the policy, is the policy more efficient than the alternatives?	
		Y/N with reasons	Decision Reject /Accept
1		➤	
2		➤	
<i>Etc</i>		➤	

Recommendation: accept policies ...

Methods to implement Policies ...

Method 1 Regional Rules

Assessment of the costs and benefits for each method.

Stage 3: Environmental cost benefit testing of methods accepted from Stages 1 and 2

Method	Environmental benefits(ENB)	Environmental costs (ENC)	Do the ENB outweigh ENC? Y/N
	➤	➤	
	➤	➤	
	➤	➤	

Method are accepted because the environmental benefits exceed the environmental costs.

Stage 4: Social and economic cost benefit testing of methods accepted from Stage 3

Method	Social & Economic benefits(SEB)	Social & Economic costs (SEC)	Do the SEB outweigh SEC? Y/N
	➤	➤	
	➤	➤	
	➤	➤	
	➤	➤	

Method is accepted because the social and economic benefits exceed the social and economic costs.

Appendix X: Underlying Technical & Other Documents

Includes documents referred to in issues and options documents, policy briefing papers and subsequent studies, etc., directly relevant to this issue.

Title of each document including author/ source, date and publication number/reference

APPENDIX 5: Example Information Requirements for Private Plan Change Requests to Establish an Aquaculture Management Area (AMA) Provided by Northland Regional Council

All Private Plan Change Requests must contain the information specified in 27.6.1. Private Plan Change applicants may also choose to provide full details of the proposed aquaculture activities to be carried out within the proposed AMA (as specified in 27.6.2), at the same time as the plan change request is submitted. Where this detailed information has been subject to assessment and consideration within the publicly notified plan change process and no changes are proposed at the coastal permit stage, the consent authority may consider the coastal permit application on a non-notified basis.

<p>27.6.1 Base Information Requirements for Private Plan Change Requests to Establish an AMA <i>Without limiting the requirements of the First Schedule to the RMA, the information supplied with a request for a private plan change must include:</i></p>	<p>27.6.2 Additional Information Requirements for Private Plan Change Requests in order to meet Rule 31.5.2(c) <i>Where the applicant is intending to apply for a coastal permit for future aquaculture activities under Rule 31.5.2(c)²⁷, the following additional information must be supplied within the private plan change request:</i></p>
<p>(a) Plans showing the size and location of the proposed AMA, and details of boundary point co-ordinates, to be supplied in Geodetic Datum 2000, New Zealand Transverse Mercator Projection.</p>	<p>(a) Plans showing the location of the proposed boundary points of all aquaculture activities within the proposed AMA, including co-ordinates, to be supplied in Geodetic Datum 2000, New Zealand Transverse Mercator Projection.</p>
<p>(b) A description of the coastal environment in which the application is located, including:</p> <ul style="list-style-type: none"> i) The location of the site in respect of natural and other features of the coastal environment; ii) The landscape context and surroundings, including any significant or 	

²⁷ Rule 31.5.2(c) – The **establishment of aquaculture activities**, where the activity (including the proposed species, structures and methodology for the proposed aquaculture activities) are considered by the consent authority to be **explicitly provided for within the AMA concerned**.

27.6.1 Base Information Requirements for Private Plan Change Requests to Establish an AMA	27.6.2 Additional Information Requirements for Private Plan Change Requests in order to meet Rule 31.5.2(c)
<p>outstanding landscapes or natural features, and natural character;</p> <ul style="list-style-type: none"> iii) Hydrodynamic conditions including water depth, current velocities, wind, wave and tide conditions; iv) Water column conditions including temperature, salinity, water quality, inputs from rivers and discharges to land, nutrient replenishment; v) The benthic habitat (including substrate characteristics) and epifaunal and infaunal communities within the application area, including any species of particular ecological value or vulnerable species; vi) Other uses of the coastal marine area, including major navigational routes and safe anchorages, any recreational and commercial uses (including fisheries and any existing aquaculture activities), values and utilities. vii) Any cultural or historic heritage values, including traditional or customary fishing values. 	
<p>(c) The species that are proposed to be predominantly farmed in the AMA and the proposed methods of farming;</p>	<p>(b) Details of species that will be farmed in the AMA and methods of farming, including;</p> <ul style="list-style-type: none"> (i) Species to be farmed, stocking density and stock source; (ii) Details and layout of all proposed structures and equipment, navigation markers (surface and subsurface), and details of any proposed lighting and anchoring requirements; (iii) A description and plans showing any staging of the development; (iv) Details of any disturbance of the foreshore and seabed, and deposition or discharge in the coastal marine area (including feed) required to undertake the aquaculture activity;

27.6.1 Base Information Requirements for Private Plan Change Requests to Establish an AMA	27.6.2 Additional Information Requirements for Private Plan Change Requests in order to meet Rule 31.5.2(c)
	<ul style="list-style-type: none"> (v) A maintenance plan for all structures, including navigational lighting and associated equipment. (vi) Details of any monitoring to be undertaken; (vii) Details of any use of technology or management practices (including adaptive management), to avoid, remedy or mitigate any actual or potential adverse effects.
<p>(d) Identification of a potential “representative aquaculture space” within the proposed AMA which would be apportioned to iwi (20% of the new space). This should be undertaken in consultation with local Iwi and Te Ohu Kai Moana Trust</p>	
<p>(e) Details of consultation undertaken with iwi, relevant local authorities and government agencies, the community, or other parties, including information that has been supplied and any responses to any issues raised by consulted parties.</p>	
<p>(f) A description of the likely adverse effects of the proposed Aquaculture Management Area, and associated aquaculture activities, including:</p> <ul style="list-style-type: none"> (i) The potential for cumulative adverse effects from multiple AMAs; (ii) Effects on water quality, including nutrient enrichment, and the effects of any discharges to the coastal marine area; (iii) Sustainability of the proposed farm and effects on existing farms; (iv) Changes to habitats within and inshore of the application area; (v) Effects on epifaunal and infaunal species and communities; (vi) Effects on other fauna, including birds and marine mammals; (vii) Visual amenity and landscape effects; (viii) Effects on natural character; 	<p>(c) A comprehensive Assessment of Effects on the Environment of the proposed activity, meeting the requirements of Schedule 4 to the Resource Management Act 1991.</p>

27.6.1 Base Information Requirements for Private Plan Change Requests to Establish an AMA	27.6.2 Additional Information Requirements for Private Plan Change Requests in order to meet Rule 31.5.2(c)
<ul style="list-style-type: none"> (ix) Effects on other amenity values, including noise effects; (x) Effects on other uses of the coastal marine area including navigational safety and anchorage, public access to and along the coast, recreational and commercial uses and utilities; (xi) Effects on cultural values. (xii) Effects on historic heritage sites, including waahi tapu and other sites of significance to Maori; 	
<ul style="list-style-type: none"> (g) A description of the potential benefits of the proposed AMA and associated aquaculture activities, including: <ul style="list-style-type: none"> (i) Economic benefits to the national economy and the Northland region and its communities; (ii) Environmental, social and cultural benefits to the Northland region and its communities; (iii) Tangata whenua involvement in aquaculture; (iv) The range of parties involved in aquaculture in Northland. 	<ul style="list-style-type: none"> (d) A comprehensive Assessment of Effects on the Environment of the proposed activity, meeting the requirements of Schedule 4 to the Resource Management Act 1991.
<ul style="list-style-type: none"> (h) Infrastructure requirements to support the proposed aquaculture development, including: <ul style="list-style-type: none"> (i) Any existing or proposed land based facilities; (ii) The identification of existing wharves, jetties and boat ramps, and the number of vessels and peak vessel movements that are likely to require the use of these facilities. 	

27.7 Information Requirements for Coastal Permit Applications to Undertake Aquaculture Activities within an AMA

27.7.1 Information Requirements for all Coastal Permit applications

Without limiting the requirements of Schedule 4 to the RMA, an application for a coastal permit to undertake aquaculture activities within an AMA must include the following information. Where this information has already been provided as part of the Plan Change application (Section 27.6), a copy must be provided within the coastal permit application.

- (a) A description of the proposed activity, including plans showing the location of the proposed boundary points of all aquaculture activities within the AMA, including co-ordinates, to be supplied in Geodetic Datum 2000, New Zealand Transverse Mercator Projection.
- (b) A description of the coastal environment in which the application is located, including:
 - (i) The location of the site in respect of natural and other features of the coastal environment;
 - (ii) The landscape context and surroundings, including any significant or outstanding landscapes or natural features and natural character;
 - (iii) Hydrodynamic conditions including water depth, current velocities, wind, wave and tide conditions;
 - (iv) Water column conditions including temperature, salinity, water quality, inputs from rivers and discharges to land, nutrient replenishment;
 - (v) The benthic habitat (including substrate characteristics) and epifaunal and infaunal communities within the application area, including any species of particular ecological value or vulnerable species;
 - (vi) Other uses of the coastal marine area, including major navigational routes and safe anchorages, any recreational and commercial uses (including fisheries), values and utilities;
 - (vii) Any cultural or historic heritage values, including traditional or customary fishing values.
- (c) Details of species that will be farmed in the AMA and methods of farming, including;
 - (i) Details and layout of all proposed structures and equipment, navigation markers (surface and subsurface), and details of any proposed lighting and anchoring requirements;
 - (ii) A description and plans showing any staging of the development;
 - (iii) Details of any disturbance of the foreshore and seabed, and deposition or discharge in the coastal marine area (including feed) required to undertake the aquaculture activity;

27.7.1 Information Requirements for all Coastal Permit applications

Without limiting the requirements of Schedule 4 to the RMA, an application for a coastal permit to undertake aquaculture activities within an AMA must include the following information. Where this information has already been provided as part of the Plan Change application (Section 27.6), a copy must be provided within the coastal permit application.

- (iv) A maintenance plan for all structures, including navigational lighting and associated equipment;
- (v) Details of any monitoring to be undertaken;
- (vi) Details of any use of technology or management practices to avoid, remedy or mitigate any actual or potential adverse effects.
- (vii) A 'clean-up plan' in the event that the farm is required to be removed – including, but not limited to, details on how the farm will be removed and the site cleaned up, how and where removed material will be disposed, together with details showing how the clean-up plan is to be financially and logistically achieved.

- (d) A comprehensive Assessment of Effects on the Environment of the proposed aquaculture activities, meeting the requirements of Schedule 4 to the Resource Management Act 1991, including:
 - (i) Effects on water quality, including nutrient enrichment, and the effects of any discharges to the coastal marine area;
 - (ii) Sustainability of the proposed farm and effects on existing farms;
 - (iii) Changes to habitats within and around the application area;
 - (iv) Effects on epifaunal and infaunal species and communities;
 - (v) Effects on other fauna, including birds and marine mammals;
 - (vi) Visual amenity and landscape effects;
 - (vii) Effects on natural character;
 - (viii) Effects on other amenity values, including noise effects;
 - (ix) Effects on other uses and values of the coastal marine area including navigational safety and anchorage, public access to and along the coast, recreational and commercial uses and utilities;
 - (x) Effects on historic heritage sites, including waahi tapu and other sites of significance to Maori;
 - (xi) Economic benefits to the national economy and the Northland region and its communities;
 - (xii) Environmental, social and cultural benefits to the Northland region and its communities;
 - (xiii) Tangata whenua involvement in aquaculture;

27.7.1 Information Requirements for all Coastal Permit applications

Without limiting the requirements of Schedule 4 to the RMA, an application for a coastal permit to undertake aquaculture activities within an AMA must include the following information. Where this information has already been provided as part of the Plan Change application (Section 27.6), a copy must be provided within the coastal permit application.

(xiv) The range of parties involved in aquaculture in Northland.

(e) Infrastructure requirements to support the proposed aquaculture development, including:

(i) Any existing or proposed land based facilities;

(iii) The identification of existing wharves, jetties and boat ramps, and the number of vessels (including peak vessel movements) that are likely to require the use of these facilities.

27.7.2 Additional Information Requirements for a new Coastal Permit application to undertake the same aquaculture activity that has been previously consented for

Where an existing coastal permit to undertake aquaculture activities has expired, or is due to expire, and a new coastal permit is required, the applicant will be required to demonstrate:

(a) Compliance with resource consent conditions for current or previous aquaculture activities undertaken by the applicant; and

(b) The use of current industry good practice for any current aquaculture activities, including compliance with relevant Codes of Practice; and

(c) Any change in site characteristics or adverse environmental effects which may have resulted from the existing or previous activities.

6.0 Glossary of Terms and Acronyms

FA	Fisheries Act 1996
NTCSA	Ngai Tahu Claims Settlement Act 1998
MCACSA	Maori Commercial Aquaculture Claims Settlement Act 2004
RMA	Resource Management Act 1991

7.0 References

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