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MEMORANDUM

To:	Bal Matheson KC, Chair of the Hananui Aquaculture Project Expert Panel
From:	Matt Allan / Lisa Wansbrough
Client/Matter:	Environmental Protection Authority / 712674 – Hananui Aquaculture Project
Subject:	Panel questions concerning 'material conditions' and commencement
Date:	4 August 2026

A. INTRODUCTION

1. We have been asked to advise on two questions arising from the Environmental Protection Authority's email dated 29 July 2026:

   (a) **Question 1** – What case law or guidance exists on what constitutes a material condition for the purposes of the aquaculture decision, the Panel's initial view being that the area of farming, and possibly the total number of pens or farms, would be material to a determination that there was no effect on commercial, recreational or customary fishing.

   (b) **Question 2** – Whether the Panel can define the commencement of the consent as the issue of a notice by the applicant, subject to a long-stop date at which the consent must commence - for example, that the consent will commence by 1 August 2029 unless the approval holder gives notice to Environment Southland that it wishes the consent to commence earlier.

B. QUESTION 1 – MATERIAL CONDITIONS

What caselaw or guidance is there on what is a material condition for the aquaculture decision?

2. We have searched for case law on clause 20(5) of Schedule 5 to the Fast-track Approvals Act 2024 (**FTAA**), which uses materially identical language to s 186H(3) of the Fisheries Act 1996. We have not located any case considering what makes a condition material for the purposes of an aquaculture decision. Section 186H(3) permits the chief executive, when making a determination under the Fisheries Act, to specify a condition that is "material to the decision" and relates to the "character, intensity, or scale" of the aquaculture activities. Clause 20(5) applies the same test to a determination made by the Panel.

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3. Decisions such as *Marlborough Aquaculture Ltd v Chief Executive of the Ministry of Fisheries* (HC Wellington CIV-2009-485-500, 13 June 2011), and on appeal in *SMW Consortium (Golden Bay) Ltd v Chief Executive of the Ministry of Fisheries* [2013] NZCA 95, together with *Challenger Scallop Enhancement Company Ltd v Director-General of the Ministry of Primary Industries* [2016] NZHC 3201, concern the interpretation and application of the undue adverse effects regime, rather than the identification of conditions that are material to an aquaculture decision, and we do not take them further here.

4. MPI's *Guidance Note 1: Aquaculture Planning and Consenting* (**attached**), issued in October 2012 following the 2011 aquaculture reforms, addresses the tagging mechanism but does not define materiality. It explains that the:

> … purpose of tagging the conditions is to ensure that the activity cannot be altered in a way that may change the impact on fishing without undergoing a further UAE [i.e. undue adverse effects] test.

5. The Guidance Note has no statutory force (and such guidance is usually given little weight by the courts), but it is useful contemporaneous administrative guidance on the purpose of s 186H(3). In our view, the quoted passage is consistent with the text of the provision: the mechanism protects the assumptions or limits concerning the character, intensity or scale of the aquaculture activity on which the fishing effects assessment was made, so that they cannot later be altered in a way that may change the impact on fishing without a further aquaculture decision.

6. In the absence of authority, we have identified a number of potential considerations below to assist the Panel in its decision-making under clause 20(5):

   (a) First, clause 20(5)(a) obviously contains two requirements, both of which must be met. The condition must:

      i. be material to the aquaculture decision; and

      ii. relate to the character, intensity or scale of the aquaculture activities.

   (b) Those are separate requirements. A condition may be important to the aquaculture decision because, for example, it controls where the activity occurs, but it can only be specified under clause 20(5)(a) if it also relates to the character, intensity or scale of the aquaculture activities. Conversely, a condition may clearly control the scale of the activity but still not be material to the particular aquaculture decision. Even where both requirements are met, clause 20(5) is permissive ("may"), so the Panel retains a discretion – which must of course be exercised in a principled way – whether to specify the condition and whether to state under clause 20(5)(b) that it may not be changed or cancelled without a further aquaculture decision.

   (c) The ordinary meaning of "material" is "important, essential, relevant": *New Zealand Oxford Dictionary* (OUP, 2005). In our view, a condition is material to the aquaculture decision where it is sufficiently significant to the Panel's conclusion that the aquaculture activities will not have an undue adverse effect on fishing that changing or cancelling the condition could alter the basis for that conclusion or require the fishing effects assessment to be revisited.

(d) A practical way of applying that test is to identify the assumptions or limits concerning the proposed activity on which the Panel's assessment of fishing effects rests, and then identify which consent conditions hold those assumptions or limits in place. If, for example, the Panel assesses exclusion or displacement on the basis that no more than a particular area can be exclusively occupied, a condition that fixes that maximum area is an obvious candidate for specification. By contrast, a condition does not become material merely because it is important to the resource consent generally.

(e) Another useful ‘cross-check’ is to ask: if this condition were materially relaxed or removed, would the Panel be content for the existing aquaculture determination to continue to apply without reconsidering effects on fishing? If a fresh fisheries assessment would be required, that is a strong indication that the condition is material. This is not intended as a strict “but for” test; it reflects the purpose identified in MPI's Guidance Note of preventing changes that may alter the impact on fishing without a further UAE assessment.

(f) Materiality must be considered in the context of the statutory aquaculture decision. Clause 20(3) requires the Panel to take into account, with greatest weight given to the first matter, the purpose of the FTAA and ss 8 to 10 and s 186GB(1) and (2) of the Fisheries Act, and to have regard to MPI's recommendation. Section 186GB(1) identifies the six matters relevant to the assessment of effects on fishing:

i. the location of the area the coastal permit relates to in relation to areas in which fishing is carried out;

ii. the likely effect of the aquaculture activities on fishing of any fishery, including the proportion of any fishery likely to become affected;

iii. the degree to which the activities will lead to the exclusion of fishing;

iv. the extent to which fishing for a species can be carried out in other areas;

v. the extent to which the occupation authorised by the permit will increase the cost of fishing; and

vi. the cumulative effect on fishing of authorised aquaculture activities.

(g) We have not identified any caselaw construing the expression “character, intensity, or scale” in this context. Some assistance may be obtained, by analogy only, from the Environment Court’s decision in *Lendich Construction Ltd v Waitakere City Council*.[1] That case concerned existing use rights and therefore arose in a materially different statutory context. The Court nevertheless considered the same three concepts together. It treated “character” as referring to the distinguishing features of a use, while “intensity” and “scale” concerned the degree or size of its effects and the size and magnitude of the effects generated by the use.[2] Earlier authority discussed by the Environment Court described “intensity” as the degree or amount of a quality or

[1] *Lendich Construction Ltd v Waitakere City Council*, Decision A77/99.
[2] *Lendich*, at [31].

condition and "scale" as relating, in context, to the size of the use and magnitude of its generated effects.[3]

(h) Applied (cautiously) to clause 20(5), we consider:

i. "character" is capable of referring to the nature or distinguishing features of the aquaculture activity (e.g. the type or configuration of marine farming activity authorised);

ii. "intensity" is capable of referring to the amount or degree at which the activity may be undertaken (potentially including matters such as the number or density of structures or the level of production); and

iii. "scale" is capable of referring to the physical or spatial magnitude of the activity (most obviously the area occupied or from which fishing may be excluded, and potentially the number and physical dimensions of the farm structures).

There may necessarily be some overlap between those concepts.

(i) Conditions dealing with matters such as monitoring and reporting are concerned with how the activity is supervised, and are likely to fall outside clause 20(5), however important they are to the administration of the consent as a whole. The position may be different where an adaptive management, staging or certification condition itself constrains substantive parameters of the activity (for example, the permitted footprint, number or configuration of structures, production intensity, or maximum scale).

7. You have not sought a review of the draft conditions, and in the time available we have undertaken only a cursory 'scan' of the draft conditions. Broadly speaking, we agree with the Panel's initial view (reflected in question 1) that the area capable of being occupied or excluded from fishing is the clearest potential "material" control. There is, however, an important distinction between the entire 1,285 ha consented site and the area from which other users may actually be excluded.

8. Draft condition 7 limits exclusive occupation to the marine farm structures, mooring lines and anchors, together with an area not exceeding 200m around the structures and not extending beyond Plan A. Draft condition 8 then imposes an overall maximum of 460 ha of exclusive occupation across all marine farms authorised by the consent. Draft condition 9 provides for preferential rather than exclusive occupation of the balance of the consented area. Those proposed controls bear directly on the extent to which fishing can be excluded or displaced, and conditions 7 and 8 in particular relate to the physical scale of the activity. If the Panel's determination rests on the proposition that exclusion will be confined to that footprint, we consider those conditions are ***potential*** candidates for specification under clause 20(5). Whether that is the case is of course a matter for the Panel.

9. The number of farms or pens requires a slightly more discriminating approach. Draft condition 19 permits a maximum of four marine farms, eight blocks of sea pens and 80 sea pens in total. MPI's assessment likewise describes the proposed activity as comprising four separate farms, each consisting of two blocks of ten pens. Those numerical limits plainly relate to the

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3 *Lendich*, at [27].

intensity and/or scale of the aquaculture activity. The separate question – again, one for the Panel – is whether they are material to the Panel's aquaculture decision.

10. If the Panel's assessment of fishing effects relies materially on that number or configuration of structures, independently of the 460 ha cap on exclusive occupation, the relevant numerical limits in condition 19 ***may*** properly be specified. If the fishing effects conclusion would be unchanged provided the overall exclusion footprint remains capped at 460 ha, regardless of the number of pens within that footprint, the case for treating the number of pens as independently material is weaker. The Panel should therefore identify what aspect of the number or configuration affects the s 186GB assessment before tagging it.

11. We would also distinguish between the particular components of draft condition 19. The rows limiting the number of farms, blocks and pens potentially bear on character, intensity and scale. Other parts of that condition (e.g. requirements concerning colours, net mesh and lighting) serve different environmental or operational purposes and do not appear, without more, to be material to the fishing determination. That illustrates why it may be preferable to specify a particular subclause or discrete numerical limit rather than an entire composite condition.

12. MPI's recommendation is relevant but is not determinative. MPI expressly considered the Panel's draft conditions and concluded both that they did not affect its assessment under ss 8 to 10 or s 186GB and that "no conditions of the coastal permit are material to the recommended determination".[4] That conclusion was repeated in relation to recreational/customary fishing and commercial fishing.

13. We would not discount MPI's conclusion on the basis that MPI was applying a materially different material-condition test. Clause 15(5) applies essentially the same "material" and "character, intensity, or scale" language to MPI's recommendation as clause 20(5) applies to the Panel's determination. The Panel must have regard to MPI's recommendation but may reach a different aquaculture decision under cl 20(4). If it does reach a different conclusion as to material conditions, it would in our view be appropriate for the Panel's reasons to identify the particular factual assumption or limit that the Panel regards as material to its own fishing effects assessment and explain why the relevant condition secures that assumption or limit.

14. If the Panel decides to specify a material condition, we suggest it address clause 20(5)(a) and (b) expressly: identify the condition (or discrete part of it) that is material to the determination and, if the Panel considers it appropriate, state that it may not be changed or cancelled until the relevant chief executive makes a further aquaculture decision under the Fisheries Act in relation to the affected area. Clause 22(1) then requires the decision document to note any condition of the coastal permit that may not be changed or cancelled until that further aquaculture decision is made.

15. Where only part of a composite condition is material, it would be preferable either to identify that subclause or requirement precisely, or to separate it into a discrete condition.

[4] See e.g. paragraphs 59 and 60 of the Recommendation on an aquaculture decision for Fast-track Approvals Act 2024 application FTAA-2511-1138 dated 15 July 2026.

C. QUESTION 2 – COMMENCEMENT

Can commencement be defined as the issue of a notice by the applicant, subject to a long-stop date?

16. There is, in our view, an arguable basis for the notice and long-stop mechanism proposed by the applicant. [5] The decision of the Board of Inquiry into the *Watercare Waikato River Water Take Proposal* (discussed below) provides a measure of practical comfort for an approach under which commencement is linked to future events and the giving of notice. However, the point is untested under s 97(1)(b) of the FTAA, and the position is not free from doubt. There are authorities, including *Northland Regional Council v Rogan* cited by the applicant, that support a cautious interpretation of a statutory requirement to specify a "date".

17. In our opinion, a fixed commencement date specified by the Panel is the legally safest course. If the Panel wishes to preserve flexibility, we consider that a mechanism under which an objective event, such as service of an irrevocable notice, triggers a commencement date according to a formula fixed by the Panel is more defensible than allowing the consent holder itself to nominate the date on which the consent takes legal effect.

18. Section 97(1) provides that, subject to subsection (2), an approval commences:

> (a) on the date on which the panel's decision document for the approval is issued under section 88; or
> (b) on any later date specified by the panel in the decision document.

19. The first point is therefore clear: any later commencement mechanism must be specified by the Panel in the decision document itself. It should not be left solely to a condition of consent, although we agree with counsel for the applicant[6] that it is sensible for the consent document to reproduce the mechanism so that its commencement and expiry provisions can be understood without reference to another document.

20. The interpretive question is what is required for a later date to be "specified by the panel". On a narrow reading, s 97(1)(b) contemplates a date that is fixed and ascertainable when the decision document is issued, most obviously a calendar date. On a broader reading, the Panel may specify a future date by reference to an objectively ascertainable event or formula, even though the resulting calendar date is not known when the decision is issued.

21. There is no authority directly construing s 97(1)(b). Case law on the similar provision in s 116 of the RMA (which likewise enables a later date to be specified) generally focuses on ***earlier*** commencement dates[7] (e.g. pending determination of an appeal).[8]

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[5] Submissions of counsel for the applicant, 28 July 2026, at [20]-[21].
[6] Submissions of counsel for the applicant, 28 July 2026, at [10].
[7] See e.g. *Summerset Villages (Waikanae) Ltd v Greater Wellington Regional Council* [2022] NZEnvC 243.
[8] It is noted that section 116A RMA relating to commencement of coastal permits for aquaculture activities also allows for permits to specify a "later commencement date". (We note in passing that s 116A RMA does not apply in respect of the commencement of coastal permits for aquaculture activities granted under the FTAA: see clause 31(4) of Schedule 5).

22. Counsel for the applicant refers to *Northland Regional Council v Rogan*.[9] That case arose under different legislation. The Court of Appeal considered a provision requiring a rates resolution to state the date or dates on which rates were payable, and held that a resolution which instead adopted dates to be set subsequently by other councils did not provide the required specificity and certainty at the time the resolution was made. The case therefore lends some support to the narrower reading of s 97(1)(b), although the statutory context and consequences were materially different.

23. We also note the Court of Appeal's finding in an earlier case, *Sharp v Amen*, concerning the Property Law Act 1952, which used the phrase "specify a date", and whether that required an actual calendar date.[10] The Court held that it did:[11]

> … the provisions of s. 92 require an actual date to be specified, and that it is not sufficient to include a formula whereby the mortgagor may work out for himself the date after which the power of sale may be exercised without further notice. We can see no escape from the conclusion that a notice specifying the date on which a power becomes exercisable requires the statement of a specific date, that is a statement of the day and month, and that it is not sufficient that it is identifiable by the mortgagor. …
>
> … counsel's argument ignores the further requirement that there should be a date specified, and the meaning of the word "date" is "the precise time at which anything takes place or is to "take place": see Shorter Oxford English Dictionary. …

24. *Sharp* also arose in a materially different statutory context. However, it demonstrates that courts may distinguish between specifying a date and specifying a means by which a date can later be calculated. It accordingly reinforces the interpretive risk associated with a formula-based commencement provision.

25. As against those authorities, we note that the Report and Decision of the Board of Inquiry into the *Watercare Waikato River Water Take Proposal* (***Watercare***), provides some support for the practical acceptability of a notice-based approach to commencement. The Board, chaired by Judge Kirkpatrick, considered the commencement of consents under s 116 RMA and stated:[12]

> We are aware that the limited duration of consents can effectively be further reduced by the time needed to construct necessary works and otherwise get ready to implement the operation. That is likely to be the case here. We are aware that there may be a delay between construction and initiating the water take. We have considered whether it would be appropriate to stipulate under section 116 of the RMA that the duration of the water take and associated operational consents not commence until the construction works to implement the water take are in place and the construction consents have been given effect. We do not consider it would be appropriate to ignore that. For that reason, we consider that the operational consents (to take water, to occupy and disturb the bed of the river and to discharge process, treated and backwash water) should not commence under section 116 of the RMA until the construction

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[9] *Northland Regional Council v Rogan* [2018] NZCA 63.
[10] *Sharp v Amen* [1965] NZLR 760.
[11] Ibid, at 766.
[12] Report and Decision dated January 2022, at [315]. The Report and Decision can be viewed here: https://www.epa.govt.nz/assets/FileAPI/proposal/NSP000046/Boards-decision/Watercare_Decision-updated_17_June_2022-v2.pdf.

consents have been given effect, the construction works have been completed and notice to that effect has been given to the WRC.

26. The *Watercare* decision is relevant because the Board appears to have accepted that commencement could be deferred until future objectively ascertainable events had occurred and notice had been given to the consent authority. It therefore provides a measure of comfort for the proposition that a later commencement date need not invariably be expressed as a calendar date known when the decision is issued.

27. That comfort should not, however, be overstated. The Board does not appear to have been required to decide, as a contested question of statutory interpretation, whether the words "later date specified" in s 116 permitted an event / notice-based formula. *Watercare* is therefore best treated as practical support for the broader interpretation, rather than as resolving the legal issue.

28. There is an important distinction between leaving the commencement date to be determined by another person and the Panel itself specifying a fixed commencement date, subject only to a prescribed mechanism by which the consent holder may bring that date forward. Under the proposed formulation, the Panel specifies (for example) 1 August 2029 as the default and latest commencement date, and also fixes the event capable of bringing commencement forward, the legal consequence of that event, and the period within which it must occur. The consent holder does not itself nominate the legal commencement date; it decides only whether and when to take the factual step that brings forward commencement in accordance with the mechanism prescribed by the Panel.

29. In our view, that distinction strengthens the basis for the proposed mechanism. Unlike the position in *Rogan*, the Panel's decision would specify an actual calendar date on which the consent will commence and prescribe the circumstances in which commencement may be brought forward. It also provides a stronger basis for distinguishing *Sharp*, because the decision document does not merely provide a formula from which the only commencement date must later be calculated; it specifies a fixed commencement date, subject to a confined mechanism for earlier commencement.

30. The revised formulation does not completely eliminate the interpretive risk. The earlier commencement date would still not be known when the decision document is issued and would arise by applying the period prescribed by the Panel to the date on which the notice is served. A court adopting the reasoning in *Sharp* strictly could therefore conclude that, in relation to the brought forward commencement date, the Panel had specified a means of calculating the date rather than the date itself. The risk is, however, narrower than under a mechanism that does not specify any calendar date.

31. We therefore prefer a formulation under which the Panel first specifies a fixed commencement date and then provides a confined mechanism by which commencement may be brought forward. The notice should not itself specify or nominate the commencement date. Rather, service of the notice should cause the consent to commence automatically after the period fixed by the Panel. For example:

> Pursuant to section 97(1)(b) of the Fast-track Approvals Act 2024, the resource consent commences on 1 August 2029, provided that the consent may commence on an earlier date, if the Consent Holder serves an irrevocable written Commencement Date Notice on the

> Consent Authority. If such notice is served, the consent will commence on the date that is 20 working days after the notice is served.
>
> Advice Note: This condition does not permit a later commencement date than 1 August 2029. This means that if a commencement date notice is served within 20 working days of 1 August 2029, the notice will not have effect and the consent will commence on 1 August 2029.

32. The qualification that the resulting date must be earlier than 1 August 2029 avoids any suggestion that a notice served shortly before or after that date could postpone commencement. The 20 working day period is not essential to the legal mechanism. Its purpose would be to provide administrative notice and to ensure that the earlier commencement date follows automatically from a fixed period prescribed by the Panel. The Panel could instead make commencement occur on the date of service itself. The material features are that the decision document specifies a fixed commencement date, the notice can only bring that date forward, and the consent holder does not itself nominate the date on which the consent commences.

33. If that approach is adopted, the present definition of "Commencement Date Notice" should also be amended. Rather than defining it as a notice "specifying the date on which this resource consent is to commence", it could provide:

> **Commencement Date Notice** means an irrevocable notice in writing given by the Consent Holder to the Consent Authority for the purpose of bringing forward the commencement of this resource consent in accordance with the commencement provision specified by the Panel in its decision document under s 97(1)(b) of the Fast-track Approvals Act 2024.

34. The present draft condition 6 also requires amendment for a separate reason. It refers to commencement "in accordance with sections 116 and 116A, RMA". That is not the appropriate statutory formulation for this FTAA approval. Section 97 is the commencement provision applying to approvals granted under the FTAA and, more specifically, clause 31(4) of Schedule 5 expressly provides that s 116A RMA does not apply to the commencement of coastal permits for aquaculture activities granted under the FTAA. Condition 6 should therefore record the commencement mechanism fixed under s 97 of the FTAA rather than refer to ss 116 and 116A of the RMA.

35. Condition 2(e) should be reviewed for the same reason. It presently allows certification before the Commencement Date Notice where the consent "would otherwise have commenced in accordance with sections 116 and 116A".

36. As noted, we have not reviewed the draft consent conditions in any detail. It may be worth reviewing the conditions to ensure they are consistent with whatever commencement mechanism the Panel adopts.

37. The lapse provision should obviously likewise be dealt with expressly in the decision document.

38. The decision as to fixing any appropriate later date for commencement, and subsequent lapse period, are ultimately matters for the Panel. In addition to the reasons advanced by counsel for the applicant at paragraphs 17 to 19 of the applicant's submission, which reflect some of

the same considerations identified in *Watercare*, the Panel may wish to consider the following oft-cited passage from the decision in *Katz v Auckland City Council*: [13]

> There are compelling reasons of policy why a planning consent should not subsist for a lengthy period of time without being put into effect. Both physical and social environments change. Knowledge progresses. District schemes are changed, reviewed and varied. People come and go. Planning consents are granted in the light of present and foreseeable circumstances as at a particular time. Once granted a consent represents an opportunity of which advantage may be taken. When a consent is put into effect it becomes a physical reality as well as a legal right. But if a consent is not put into effect within a reasonable time it cannot properly remain a fixed opportunity in an ever-changing scene. …

39. Our overall view is therefore as follows:

(a) A single fixed calendar commencement date, without provision for earlier commencement, is the legally safest option and avoids the potential interpretive issue under s 97(1)(b) discussed above.

(b) *Watercare* provides a measure of practical comfort for a notice-based approach, particularly where the commencement of operational activities depends on antecedent implementation steps.

(c) That decision does not resolve the meaning of "any later date specified by the panel", and *Rogan* and *Sharp* support caution about treating a formula as equivalent to the specification of a date.

(d) If the Panel considers that flexibility is justified, the more defensible mechanism is for the decision document to specify a fixed calendar commencement date, while permitting that date to be brought forward by service of an irrevocable notice, with the resulting earlier date determined automatically by a period fixed by the Panel. The notice should not itself nominate the commencement date.

(e) That formulation is stronger than one under which no calendar date is specified, but it reduces rather than removes the legal risk.

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[13] *Katz v Auckland City Council* (1987) 12 NZTPA 211 at p 213, followed e.g. in *Turner v Barrett* [2021] NZEnvC 43, at [41.

BROOKFIELDS LAWYERS

ATTACHMENT

Aquaculture Legislative Reforms 2011 Guidance Note 1 - Aquaculture Planning and Consenting

Ministry for Primary Industries
Manatū Ahu Matua

AQUACULTURE LEGISLATIVE REFORMS 2011
GUIDANCE NOTE 1

AQUACULTURE PLANNING AND CONSENTING

This guidance note is one in a series explaining changes to the way marine-based aquaculture is managed as a result of the aquaculture legislative reforms that made changes to the Aquaculture Reform (Repeals and Transitional Provisions) Act 2004, the Fisheries Act 1996 (Fisheries Act), the Maori Commercial Aquaculture Claims Settlement Act 2004 (Settlement Act), and the Resource Management Act 1991 (RMA). The changes came into effect on 1 October 2011.

This guidance note provides a detailed overview of the changes to aquaculture planning and consenting under the RMA, including integrating the undue adverse effects (UAE) on fishing test with the resource consent process.

In this guidance note, the term 'regional council' includes both regional councils and unitary authorities.

Other guidance notes that describe different parts of the legislative reforms in more detail include:

» **GUIDANCE NOTE 2:** Managing demand in the coastal marine area
» **GUIDANCE NOTE 3:** Aquaculture regulation-making power
» **GUIDANCE NOTE 4:** Re-consenting aquaculture
» **GUIDANCE NOTE 5:** Mechanisms for managing allocation of coastal space (jointly produced by MPI and DOC)
» **GUIDANCE NOTE 6:** Delivering on the Māori Commercial Aquaculture Settlement

SUMMARY OF CHANGES

The changes to the aquaculture planning and consenting processes introduced by the legislative reforms aim to reduce regulatory costs, delays and uncertainty; encourage investment in aquaculture; and integrate decision-making.

A key change is the removal of the requirement for aquaculture management areas (AMAs), meaning that applications for new marine farms can now be made, subject to the provisions of the relevant regional coastal plan.

Other changes to the way aquaculture consenting is handled include:

» the specification of a minimum 20-year consent duration for most aquaculture consents;
» a three-year default lapse period for all aquaculture consents; and
» removal of the ability to classify aquaculture activities in the coastal marine area as permitted activities in regional coastal plans.

In addition, the removal of AMAs means that a UAE test is now undertaken for most coastal permit applications for aquaculture activities. The legislative reforms better integrate the consent process and UAE test to ensure that regional councils and the Ministry for Primary Industries work together to reduce regulatory costs and delays.

WHY CHANGES WERE MADE

Aquaculture planning and consenting processes are generally managed by regional councils under the RMA. The 2004 aquaculture regulatory regime was intended to help councils manage the increasing demand for space for aquaculture while still enabling the industry to develop. It introduced a requirement that aquaculture could only take place within AMAs, and that these had to be identified in regional coastal plans after consultation with the public and marine farming industry.

Creating AMAs was a complex, lengthy and expensive process. The result was that, under the 2004 regulatory regime, very little additional water space was made available for aquaculture.

This section outlines how the legislative reforms change the way consents for aquaculture activities are managed.

REMOVAL OF AMAS

A key component of the legislative reforms is the removal of AMAs. The reforms repeal section 12A of the RMA and makes consequential amendments throughout the RMA to remove references to AMAs. This means that, in all regions, applications for new aquaculture activities can now be made, subject to the provisions of the relevant regional coastal plan.

Councils can still identify areas where aquaculture activities cannot occur, and include provisions in their regional coastal plans to manage aquaculture.

October 2012

Further planning work may be required in some regions to identify suitable areas for aquaculture and enable resource consent applications to be made in areas not previously allowed. This includes reviewing and updating regional coastal plans to ensure consistency with the new legislation.

The New Zealand Coastal Policy Statement 2010 promotes better spatial planning and zoning for coastal activities, including aquaculture. It also encourages regional councils to recognise the significant existing and potential contribution of aquaculture to the social, economic and cultural wellbeing of people and communities.

Amendments to Part 7A of the RMA provide new tools for managing demand in the coastal marine area, including situations of high and competing demand. These tools are discussed in detail in *Guidance note 2: Managing demand in the coastal marine area*.

DURATION OF CONSENTS FOR AQUACULTURE ACTIVITIES

The legislative reforms insert section 123A into the RMA, which provides for consent terms for coastal permits for aquaculture activities to be a minimum of 20 years. The purpose of this is to provide more incentive for marine farmers to invest in applying for consents. It also recognises the significant initial investment in infrastructure that is often needed and the length of time to see returns for some species.

Section 123A(2) allows for the term of a coastal permit to be less than 20 years if the applicant requests a shorter period, or if a shorter period is required to ensure that adverse effects on the environment are adequately managed.

CONSENT LAPSE PERIOD

Section 125 of the RMA has been amended to provide for a shorter default lapse period if coastal permits for aquaculture activities are not 'given effect to'. The shorter period of three years (compared with five years for non-aquaculture consents) is to ensure that consented aquaculture space is used in a timely manner. This is expected to reduce the incentive for people to speculate, which can put pressure on coastal space and councils' ability to manage demand effectively.

Whether a coastal permit has been given effect to can only be determined on a case-by-case basis.

Applicants will still be able to apply to the regional council to extend the lapse period under section 125(1A)(b).

REMOVAL OF PERMITTED ACTIVITY STATUS FOR AQUACULTURE ACTIVITIES

The legislative reforms remove the ability for regional coastal plans to authorise aquaculture activities in the coastal marine area as permitted activities. The new RMA section 68A ensures that a resource consent application is always made before new aquaculture activities are established, as this triggers the UAE test. This is discussed further below.

Section 68A(2) provides for transitional provisions to apply to rules in regional coastal plans that currently authorise any aquaculture activity as a permitted activity. These transitional provisions allow a person to rely on the existing rule while it continues to have legal effect, but require regional councils to review and alter existing rules as soon as reasonably practicable to ensure regional coastal plans do not authorise any aquaculture activity as a permitted activity.

The definition of 'aquaculture activities' in section 2 of the RMA has been amended to clarify that it applies to any activity described in section 12 of the RMA done for the purpose of 'farming' – that is breeding, hatching, cultivating, rearing or ongrowing of fish, aquatic life or seaweed for harvest.

PROCESSING AND HEARING APPLICATIONS TO OCCUPY COASTAL SPACE AT THE SAME TIME

The legislative reforms insert sections 165ZFB to 165ZFH which allows for processing and hearing applications to occupy coastal space together – along with any associated consent applications. The intention is for applications to be processed and heard together where this enables better assessment and management of cumulative effects and/or more efficient processing.

Further information on how these changes will work in practice is contained in *Guidance note 2: Managing demand in the coastal marine area*.

INTEGRATING THE UAE TEST WITH THE CONSENT PROCESS

PURPOSE OF THE UAE TEST

The Fisheries Act requires an 'aquaculture decision' on whether a proposed aquaculture activity will have an undue adverse effect on recreational, customary or commercial fishing because it restricts access to or displaces fishing. The process for assessing those effects is known as the 'UAE test'. The UAE test is done by an official in the Ministry for Primary Industries under delegated authority from the Director-General.[1]

If the test finds that there would be an undue adverse effect on recreational or customary fishing, or commercial fishing for species that are not part of the quota management system (QMS), the proposed aquaculture activity cannot go ahead.

If the test finds that there would be an undue adverse effect on commercial fishing for QMS species, the aquaculture activity can proceed if the person proposing the activity is able to enter into an aquaculture agreement with affected quota owners or refers the matter to an independent arbitrator to determine the level of compensation to quota owners.

1Note that the merger of the Ministry of Agriculture and Forestry with the Ministry of Fisheries occurred on 1 July 2011. The Government publicly announced the renaming of the Ministry of Agriculture and Forestry to the Ministry for Primary Industries on 6 March 2012. For practical purposes we have replaced Ministry of Fisheries with Ministry for Primary Industries in this document although in the aquaculture legislative reforms the Ministry of Fisheries is still referred to.

Under the previous regulatory regime (2004), aquaculture could only take place within AMAs identified in regional coastal plans, and the UAE test was intended to be undertaken for an entire AMA as part of the planning process.

Because AMAs are no longer required, the legislative reforms have amended the Fisheries Act to require the UAE test to be undertaken when individual coastal permits are issued under the RMA. This means that the consent application process for aquaculture activities and the UAE test now follow a more integrated process.

A coastal permit for an aquaculture activity cannot commence under the RMA until the outcome of the aquaculture decision is known and any amendments to the coastal permit are made (new section 116A of the RMA).

WHEN A UAE TEST IS NOT REQUIRED

Section 186GA of the Fisheries Act sets out when the Director-General must not make an aquaculture decision. A request for an aquaculture decision is not required for applications in the following areas:

» The area is, or was, subject to a lease, licence, marine farming permit or spat catching permit that was deemed under section 10, 20 or 21 of the Aquaculture Reform (Repeals and Transitional Provisions) Act 2004 (the Transitional Act) to be a coastal permit under the RMA, and the coastal permit has been continuously authorised by that permit or another permit granted under the RMA.
» An area is in a gazetted aquaculture area where an aquaculture decision was made under section 35 of the Transitional Act (individual consents within an interim AMA).
» An area is subject to an existing coastal permit unless the existing coastal permit has conditions 'tagged' in accordance with section 186H(3) of the Fisheries Act that are not being carried forward unchanged into the new coastal permit (tagged conditions are discussed later in this guidance note).

All other applications must be forwarded to the Ministry for Primary Industries under section 114(4) of the RMA.

STEP-BY-STEP GUIDANCE ON THE INTEGRATION OF UAE TEST WITH THE CONSENT APPLICATION PROCESS

The following sections provide detailed guidance on how the UAE test integrates within the consent application process. The relevant stages of the consent application process are discussed, along with detail of how the UAE process will operate and feed into the final coastal permit.

The organisation responsible for each stage is identified in brackets.

This section should be read in conjunction with figure 1 at the end of this guidance note, which provides an overview of the new process. Each step is numbered to simplify cross-referencing with figure 1.

Steps 1 to 6 describe the resource consent application process, while steps 7 to 10 describe the UAE test process.

STEP 1: RESOURCE CONSENT APPLICATION IS LODGED (REGIONAL COUNCIL)

When a 'complete' application for a coastal permit for an aquaculture activity is received (that is, it is not returned under section 88(3) of the RMA), the regional council must forward a copy as soon as is reasonably practicable to the Director-General of the Ministry for Primary Industries (new section 107F(3)(a) of the RMA).

The application should be forwarded electronically to **uae@mpi.govt.nz**. If an electronic copy is unavailable, the regional council should notify the Ministry for Primary Industries of the application by email and forward the hard copy to:

Ministry for Primary Industries
Private Bag 14
Port Nelson 7042

To aid this initial step, applicants are required under new section 88(2A) of the RMA to provide an additional copy of the application to the council. Councils will need to ensure that application forms for coastal permits for aquaculture activities are updated to reflect this requirement.

STEP 2: FURTHER INFORMATION SOUGHT FOR AQUACULTURE DECISION (MINISTRY FOR PRIMARY INDUSTRIES)

The need for an aquaculture decision is triggered once a council grants an application for a coastal permit, including the completion of any appeals. The Ministry for Primary Industries may gather information while the coastal permit application is being processed, to ensure that it can make an informed and timely aquaculture decision when requested. To assist with this, new section 107F of the RMA requires that the regional council provides the Director-General of the Ministry for Primary Industries with certain information during the consent process.

The Director-General of the Ministry for Primary Industries may also choose to consult with the applicant, any fisher whose interests may be affected, or any people or organisations that represent affected customary, commercial or recreational fishing interests. The Ministry for Primary Industries may set a date by when this consultation must be finished, and may also choose to extend the consultation period if required. This consultation period is likely to occur following the request for an aquaculture decision.

STEP 3: APPLICANT REQUEST TO DEFER PROCESSING OF APPLICATION WHILE PRE-REQUEST AQUACULTURE AGREEMENT IS SOUGHT (REGIONAL COUNCIL)

New section 88F allows the applicant to request that the regional council defers processing the application while trying to obtain a 'pre-request aquaculture agreement' (under section 186ZM of the Fisheries Act). A pre-request aquaculture agreement is an agreement the applicant makes with registered quota owners of affected QMS stocks before a UAE test is undertaken.

The agreement must be with registered quota owners for the stock, holding not less than 75% of the quota shares for that stock. Further detail on pre-request (and standard) aquaculture agreements can be found later in this guidance note.

The applicant can make the request at any time after their coastal permit application for an aquaculture activity is successfully lodged; however the request may only be made once. The regional council must grant the request.

The consent processing 'clock' is stopped once the request to defer the processing of the application is granted.

The applicant has 80 working days from the date the request is made. The regional council must continue to process the application at the end of this period or earlier, if the applicant notifies it to continue. The regional council cannot waive or extend this time period (section 37(1A) of the RMA).

STEP 4: FURTHER INFORMATION OR REPORTS OBTAINED (REGIONAL COUNCIL)

The regional council must, under s107F(3)(b) of the RMA, forward to the Director-General of the Ministry for Primary Industries any information or report obtained under the following procedures:

- a report commissioned by the regional council under section 42A of the RMA;
- a further information request under section 92 of the RMA; and
- a further information request or a report commissioned by the Environmental Protection Authority (EPA) under section 149 of the RMA.

This information must be forwarded to the Director-General of the Ministry for Primary Industries as soon as is reasonably practicable.

STEP 5: NOTIFICATION OF APPLICATION (REGIONAL COUNCIL)

If an application is notified under section 95 of the RMA, the regional council must, as soon as is reasonably practicable after the closing date for submissions, forward a copy of any submissions received to the Director-General of the Ministry for Primary Industries (new section 107F(3)(c) of the RMA).

STEP 6: DECISION MADE TO GRANT APPLICATION (REGIONAL COUNCIL)

If the regional council decides to grant an application for a coastal permit for an aquaculture activity, it must send a copy of the decision (and the notice of decision) to the Director-General of the Ministry for Primary Industries (section 114(4) of the RMA).

The council must also advise the applicant that the decision is still subject to an aquaculture decision, and that the consent may only commence in accordance with section 116A of the RMA.

Following the completion of any appeal related to the application (if there is one), the regional council must send a copy of the final decision to the Director-General of the Ministry for Primary Industries and request that an aquaculture decision be made (section 114(4)(c)(ii) RMA).

STEP 7: DIRECTOR-GENERAL MUST MAKE AQUACULTURE DECISION (MINISTRY FOR PRIMARY INDUSTRIES)

The Director-General of the Ministry for Primary Industries has 20 working days to make an aquaculture decision following a request from a regional council. Time spent during any consultation undertaken under section 186D(3) of the Fisheries Act is not included in this 20 working day limit.

The Ministry for Primary Industries will process requests as received and will have 20 working days to make a decision. If more than one request is sent by a regional council at the same time, the council must specify the order in which the applications were received. Requests for aquaculture decisions that are within the same fishing area or may impact on the same fish stocks will also be processed in the order they are received. Because the UAE test is a cumulative test, this means that some UAE decisions can only be made once decisions relating to the same fishing area or fish stocks have been made and concluded. In this case, the 20 working day period will begin only once a final decision is made on the previous request (section 114(5) of RMA).

As an exception to the above, under section 186F(5) of the Fisheries Act, the Director-General of the Ministry for Primary Industries may make aquaculture decisions in a different order than the requests were received in, if making such a decision would not have an adverse effect on any other aquaculture decision that the Ministry has been requested to make.

The matters which the Director-General of the Ministry for Primary Industries must consider are outlined in section 186GB of the Fisheries Act. QMS stocks that have been subject to a prerequest aquaculture decision cannot be considered by the Director-General of the Ministry for Primary Industries for an aquaculture decision over the same area.

The Director-General of the Ministry for Primary Industries must notify both the regional council and the holder of the coastal permit of the decision (section 186H(1)(d) Fisheries Act).

The aquaculture decision may be made up of:

- a 'determination', where the Ministry for Primary Industries is satisfied that there are no undue adverse effects – this amounts to a green light for the activity, which can then proceed; or a 'reservation', where the Ministry for Primary Industries is not satisfied that there are no undue adverse effects on either customary, recreational or non-QMS commercial fishing – this amounts to a red light and the application will not proceed; or
- a 'reservation', where the Ministry for Primary Industries is not satisfied that there are no undue adverse effects on commercial fishing in relation to stocks that are subject to the QMS – this amounts to an orange light, as there is an opportunity to negotiate an aquaculture agreement with affected quota holders or refer the matter to an independent arbitrator to determine compensation to allow aquaculture to proceed; or

» a combination of reservation for some part(s) of the area, and a determination for the rest.

The process followed for each of these scenarios is detailed in steps 8 to 10.

Following notification of the aquaculture decision, there is a 30 working day period within which anyone can seek a judicial review of the decision. This time period does not suspend the regional council's obligations under section 116A of the RMA, which are outlined in the following sections.

The Ministry for Primary Industries will inform the regional council of any proceedings brought to seek judicial review and the outcome of those proceedings, including appeals.

STEP 8: DETERMINATION (MINISTRY FOR PRIMARY INDUSTRIES/REGIONAL COUNCIL)

If the Director-General of the Ministry for Primary Industries is satisfied that the aquaculture activities authorised by the coastal permit will not have an undue adverse effect on fishing, a determination is made over all or part of the area the permit covers (under section 186E(1)(a) and (c) of the Fisheries Act).

In making a determination, the Ministry for Primary Industries may 'tag' any conditions in the coastal permit which are material to the aquaculture decision and relate to the character, intensity or scale of the aquaculture activity (section 186H(3) Fisheries Act). The purpose of tagging the conditions is to ensure that the activity cannot be altered in a way that may change the impact on fishing without undergoing a further UAE test. It is recommended that the tag takes the form of an advice note on the coastal permit, using the following wording:

"Prior to the change or cancellation of the following conditions, a further aquaculture decision in relation to the area affected by the change or cancellation will be required to be made by the Director-General of the Ministry for Primary Industries: [insert tagged conditions]."

When the regional council is notified of the determination by the Ministry for Primary Industries, it must complete the following steps as soon as is reasonably practicable:

1. Amend the coastal permit to include an advice note which identifies any conditions which have been tagged under section 186H(3) of the Fisheries Act (section 116A(2)(a) RMA).
2. Notify the applicant that the permit may commence, unless the permit states a later date (section 116A(2)(b) RMA).

STEP 9: RESERVATION (IN WHOLE OR PART) IN RELATION TO RECREATIONAL, CUSTOMARY OR NON-QMS COMMERCIAL FISHING (MINISTRY FOR PRIMARY INDUSTRIES/REGIONAL COUNCIL)

If the Director-General of the Ministry for Primary Industries is not satisfied that the aquaculture activities authorised by the coastal permit will not have an undue adverse effect on fishing, a reservation is made over all or part of the area covered by the coastal permit (section 186E(1)(b) and (c) of the Fisheries Act).

If a reservation is made in relation to recreational, customary, or non-QMS commercial fishing and the regional council is notified of that decision by the Ministry for Primary Industries, it must complete the following steps as soon as is reasonably practicable.

If the reservation is over the entire area:

1. Cancel the coastal permit by way of written notice served on the applicant (section 116A(8) RMA).

If the reservation is over part (or parts) of the area:

1. Amend the coastal permit to remove the area(s) affected by the reservation (section 116A(3)(a) RMA).
2. Perform the steps outlined in determination (Step 8) and/or reservation in relation to QMS commercial fishing stocks (Step 10), for the rest of the area covered by the coastal permit.
3. Notify the consent holder of the changes and provide a copy of the amended coastal permit (section 116A(3)(b) and (c) RMA).
4. Notify the consent holder that the amended permit may commence immediately, unless the permit states a later date.

STEP 10: RESERVATION (IN WHOLE OR PART) IN RELATION TO QMS COMMERCIAL FISHING STOCKS (MINISTRY FOR PRIMARY INDUSTRIES/REGIONAL COUNCIL)

If a reservation is made in relation to QMS commercial fishing stocks, the Ministry for Primary Industries will notify the consent holder and the regional council when the aquaculture decision is made.

When the regional council is initially notified of the aquaculture decision by the Ministry for Primary Industries, it must complete the following steps as soon as is reasonably practicable:

1. Amend the coastal permit to show the area(s) affected by the reservation (section 116A(4)(a) RMA).
2. Perform the steps outlined in determination (Step 8) and/or reservation in relation to recreational, customary or non-QMS commercial fishing (Step 9) for the rest of the area covered by the coastal permit.
3. Provide the consent holder with a copy of the amended coastal permit and inform him or her that the permit will not commence in the area affected by the reservation unless an aquaculture agreement is registered (section 116A(4)(b) and (c) RMA).

Once notified of the decision, the consent holder has the opportunity to seek an aquaculture agreement by obtaining the consent of registered quota owners for the stock(s) specified in the reservation. As an alternative, the consent holder can refer the matter to an independent arbitrator to determine the level of compensation to quota owners, resulting in a compensation declaration.

The consent holder has six months (plus an additional three months if an extension is granted by the Ministry for Primary Industries) to either obtain an agreement with registered quota owners holding at least 75% of the quota shares or lodge a compensation declaration resulting from the decision of an independent arbitrator. Note: The time period for lodging an aquaculture agreement or compensation declaration does not include the time taken by any judicial review of the aquaculture decision (section 186ZI Fisheries Act).

The Ministry for Primary Industries will notify the regional council if an aquaculture agreement or compensation declaration has been registered, if an extension has been granted, if an application has been made to the High Court for its consent to the lodging of an agreement, or if an aquaculture agreement or compensation declaration has not been reached at the end of this period.

If an aquaculture agreement or compensation declaration is reached, the regional council (once it has been notified by the Ministry for Primary Industries), must complete the following steps as soon as is reasonably practicable:

1. Amend the coastal permit to remove the area(s) shown as affected by the reservation (section 116A(5)(a) RMA).
2. Provide the applicant with a copy of the amended permit and inform him or her that the permit can immediately commence in the area(s) previously affected by the reservation, unless the permit states a later date (section 116A(5)(b) and (c) RMA).

Note: Following this process, the entire coastal permit is to be treated as having commenced on the date stipulated in point (2) above (section 116A(6) RMA).

If an aquaculture agreement or compensation declaration is not reached, then once notified by the Ministry for Primary Industries, the regional council must complete the following steps:

If the reservation is over the entire area:

1. Cancel the coastal permit by way of written notice served on the applicant (section 116A(7)(c) RMA).

If the reservation is over part (or parts) of the area:

1. Amend the coastal permit to remove the area(s) affected by the reservation (section 116A(7)(a) RMA).
2. Notify the consent holder of the changes and provide a copy of the amended coastal permit (section 116A(7)(b) RMA).
3. Notify the consent holder that the amended permit may commence immediately, unless the permit states a later date.

REVIEWING, CHANGING OR CANCELLING CONSENT CONDITIONS

As discussed earlier, in making a determination, the Ministry for Primary Industries may tag any of a coastal permit's consent conditions to ensure the activity cannot be altered in a way that changes the adverse effect on fishing without undergoing a further UAE test.

If a consent holder applies to change or cancel a consent condition (or conditions) (under section 127 of the RMA), the regional council may process it without requiring an aquaculture decision as long as it does not include a change or cancellation of a tagged condition. Should the application include a tagged condition, the regional council must make a request to the Director-General of the Ministry for Primary Industries for an aquaculture decision as if the application was for a new coastal permit.

Similarly, if a regional council wishes to review a tagged consent condition under section 128 of the RMA, it must make a request to the Director-General of the Ministry for Primary Industries for an aquaculture decision as if the review was an application for a new coastal permit.

WHERE TO FIND OUT MORE

Information on the aquaculture reforms is available on the Ministry for Primary Industries website.

This document is intended to give general technical guidance on aspects of marine-based aquaculture under the 2011 aquaculture legislative reforms.

It is not legal advice. For legal advice on any aspect of the legislation you should consult your lawyer.

The general disclaimer on the Ministry for Primary Industries website also applies to this document and should be read in conjunction with it.

Figure 1. UAE Aligned Processes