

Te Ohu Kai Moana Trustee Ltd

Briefing to iwi on:

Re-Starting Aquaculture
Report of the Aquaculture Technical Advisory Group



November 2009

Background

Recognising that a regulatory mess had stifled aquaculture development following the lifting of the moratorium against aquaculture in 2004, earlier this year the Government formed an Aquaculture Technical Advisory Group (ATAG) to provide it with recommendations “to enable the development of sustainable aquaculture in New Zealand.” ATAG was chaired by the Hon Sir Douglas Kidd (a former Minister of the Crown and Minister of Fisheries) and included Mike Burrell (CEO Aquaculture NZ), Dennis Bush-King (Manager Environment & Planning Department, Tasman District Council), Mark Farnsworth (Chairperson, Northland Regional Council), Nici Gibbs (Policy Manager, SeaFIC), Keir Volkering (Iwi Consultant) and Kirsty Woods (Manager Fisheries Leadership Team, Te Ohu Kai Moana Trustee Limited).

ATAG released its report entitled “Re-starting Aquaculture” (the Report) on 5 November 2009. This Briefing Paper to iwi provides an outline of the Report and includes Te Ohu Kai Moana Trustee Limited’s (Te Ohu’s) initial responses to it. This Briefing Paper was developed with a view to providing an update to iwi as well as assisting those iwi who may wish to make submissions on the Report by the closing date of **16 December 2009**. For further information on making a submission, see ‘Where to from here?’ below.

The Report

The Report contains a number of useful recommendations for the Government to consider as they seek in seeking to provide a more suitable environment for development of the aquaculture industry in New Zealand. It follows a significant amount of work progressed by Aquaculture New Zealand and other interested parties (including Te Ohu and iwi) over the last several years. For those with existing and potential aquaculture interests in the coastal marine area, it is essential reading. This briefing paper provides an overview of the Report chapter by chapter.

Chapter 1 – Active role for government

A key thread running through the Report is that the current system provides few incentives for any participant and that this, along with no clear voice in Government as well the lack of coordination between central and local government, has created a complex regulatory environment which has stifled innovation and growth in the aquaculture sector. Direct evidence of this is, in part, is the lack of aquaculture space created since the 2004 reforms, along with every agency stating that it has done its job. Changing incentives and clarifying responsibilities between the various players was seen as leading to a more coherent and less risky regulatory environment. ATAG is of the view that a greater level of input from central government is required to achieve this end. Specific recommendations include:

- appointing a Minister responsible for Aquaculture as soon as possible

- establishing an Aquaculture Agency (AQA) within the Ministry of Fisheries as soon as possible
- strengthening the government's ability to stimulate development through providing the Minister with powers to insert provisions into regional coastal plans, initiate private plan changes, make consent applications and to call in plan changes and consent applications
- establishing and administering an Aquaculture Fund to be funded through an Aquaculture Levy
- having the Aquaculture Agency develop an Aquaculture Development Strategy to set out the Government's policy for aquaculture development
- providing national consistency through National Environmental Standards for aquaculture developed by the Aquaculture Agency and Ministry for the Environment
- developing a specific policy on aquaculture within the New Zealand Coastal Policy Statement to better provide for aquaculture development.

Te Ohu's response:

Te Ohu supports the recommendations in this part of the Report, in particular the various recommendations that will allow central government to coordinate the development of aquaculture policy. On balance Te Ohu also supports the Aquaculture Fund and associated Levy, although we note that this levy should only be imposed on aquaculture farms which are under production and not on space allocated and transferred to iwi under the Maori Commercial Aquaculture Claims Settlement Act until such farms are producing commercially.

Chapter 2 – Re-setting aquaculture planning

Treating aquaculture as fundamentally different from other activities which are assessed on the usual effects-based tests of the Resource Management Act has been wholly inappropriate. The Report agrees and makes a number of specific recommendations which include:

- removing the prohibition on aquaculture outside AMAs and removing associated provisions including AMAs, Excluded Areas and Invited Private Plan Changes
- providing for Aquaculture Zones as an optional planning tool with UAE test and settlement obligations to be applied at the planning stage, but with tendering as the default allocation mechanism for space in the Zone and deeming current AMAs as Aquaculture Zones
- enhancing council decision-making on plans through having accredited Councillors and Commissioners under section 39A of the Resource Management Act and requiring at least one accredited independent Commissioner to sit on any such matter
- enabling any private plan change applicants to be certain (in regions where pre-commencement obligations to iwi have been settled) that they will receive 80% of the space
- enabling parallel processing of private plan changes and resource consents

- reviewing section 144 of the Resource Management Act to ensure aquaculture matters can also be called in by Ministers
- that Stage 2 of the wider review of the RMA include re-examining the role of the Minister of Conservation in the coastal marine area

Te Ohu's response:

Te Ohu has for some time advocated the 'normalisation' of aquaculture within the planning regime and therefore applauds ATAG's recommendation in this respect. The removal of the prohibition on aquaculture outside AMAs is a positive step which will allow future aquaculture to be developed through a range of faster mechanisms. It incentivises rather than restricts applicants while still allowing Councils and applicants to use the optional tool of Aquaculture Zones where it is expected aquaculture will be intensive and there will be strong competition for space.

While Te Ohu accepts that applicants for private plan changes ought to get access to all of the non-settlement obligation space resulting from an application, for those regions where pre-commencement space obligations is owing, Te Ohu does not support the amount available for transfer to the trustee being 20% rather than 40% as the Report suggests.

The parallel processing of plan changes and resource consents is a progressive move and is supported by Te Ohu, as is the proposal to re-examine the role of the Minister of Conservation's role in the coastal marine area.

Chapter 3 - Enhancing consents for aquaculture

Along with 'normalising' aquaculture within the planning regime, the Report makes a number of specific further recommendations which it believes will enhance resource consents for aquaculture, including:

- establishing an aquaculture consent register under the Fisheries Act
- allowing a resource consent holder to on-lease a resource consent
- enabling consents to be caveated so they cannot be sold without lender approval with a link to the Personal Properties Security Register
- providing a separate consent category for experimental aquaculture
- ensuring that the approval for occupation is explicit within the coastal permit
- providing a default minimum term of 20 years
- simplifying the renewal process and any new consents for an existing aquaculture activity be as a default, 'controlled' or 'discretionary' activities
- using regulations to ensure that all regional coastal plans are flexible enough to enable self-fed and supplementary-fed aquaculture
- specifying the information required for aquaculture consent applications (including UAE assessments)

Te Ohu's response:

Centralising a resource consent register and cross-linking it with the Personal Properties Security Register is one way in which the primary aquaculture asset (space) can be seen as a far safer security for lenders. This is particularly important for iwi organisations, who because of the sometimes complex nature of their own legal structures, often struggle to gain access to development capital. The proposal's aim is to create a stronger property right that is tradable and therefore of value as security.

As research is fundamental to the future development of the industry, the creation of experimental aquaculture categories of consent is useful. It is not clear from the report that experimental aquaculture is able to be undertaken inside Aquaculture Zones.

Additional measures to enhance consent rights are approved of by Te Ohu.

Further, the recommendation to ensure flexibility within coastal plans as to the types of aquaculture activities which may be undertaken is a positive step, reducing costs for councils and applicants alike as it will negate the need for significant future changes to plans. As research develops, the industry is more likely to be able to move to higher value species without the need to constantly have planning regimes updated.

Chapter 4 – Allocating space for aquaculture

A positive effect of 'normalising' aquaculture is that approvals can happen faster and at a lot lower cost. The default is then having space allocated on a 'first come, first served' basis. However this has the potential to create a 'gold rush' of applications for space by parties who have no intention of developing the coastal marine area for aquaculture themselves but are rather interested in making a capital gain. This was a key concern that led to the earlier moratorium. The main recommendations of this part of the Report:

- provide Councils with the ability to manage demand by using allocation methods other than 'first in, first served', including the inclusion of a statutory test to allow Council's to override that part of the Resource Management Act that currently requires Council to accept and process well prepared applications
- ensure all coastal plans are able to include (through deeming) a number of tools including tendering, preferential allocation, balloting, combining of applications to be heard together and rules to change activity status once particular thresholds have been reached.

Tendering of authorisations (the ability to apply for a resource consent over a given area) will both assist councils to recover some costs of the planning process as well as providing a measure for the value of the Maori Commercial Aquaculture space.

Te Ohu's response:

Te Ohu supports these recommendations, particularly the assurance for successful tenderers that they will in fact receive an exclusive right to apply for a resource consent in the area to which an authorisation applies.

Chapter 5 – Cost recovery and charges

One of the more significant barriers to investment and innovation in the aquaculture sector, particularly in the post-moratorium period, has been the significant costs to all participants and the time taken to gain approval for aquaculture space. Developing the appropriate regional regulatory regime has been a costly process. This led Councils to favour using Invited Private Plan Changes but there were missing elements to allow this. The ATAG's proposed change regime will mean that Councils must directly face some costs. Recognising this ATAG proposes:

- the current cost recovery regime for consents processing and monitoring continue
- assistance to Regional Councils for coastal planning for aquaculture be funded through the Aquaculture Fund
- that this fund be supported through an Aquaculture Levy set at a reasonable level of \$100-\$200 per hectare per annum, with an appropriate charging regime to be adopted for offshore farms, and such levy to be reviewed 5-yearly by the Minister
- The Aquaculture Levy would replace coastal occupation charges, requiring an amendment to section 64 of the Resource Management Act exempting marine farmers

Te Ohu's response:

The ATAG's proposals if wholly implemented will be a significant step change. To ensure this can be achieved we recognise there is a need for a funding regime particularly in the transition. While Te Ohu supports the cost recovery regime for consents processing and monitoring, we are wholly opposed to any coastal occupation charges being implemented. We therefore endorse the Report's approach to have the Aquaculture Levy replacing any such charges. The imposition of coastal occupation charges would, in Te Ohu's view, further exacerbate the loss felt by iwi through the Crown's assumption of title to the foreshore and seabed. Also, while on balance Te Ohu supports the Aquaculture Levy, such levy must only be charged on space which is under commercial production and not immediately once space becomes available. As a new charge, care will be needed in designing it, implementing it along with how the fund will be used. A number of questions will need to be worked through including whether it should be uniform i.e. the same for all species – mussels, oysters and salmon – or reflect the expected differences in 'profitability'? Also if differences are recognised then should there also be regional charges reflecting different productivity?

Chapter 6 – Streamlining interface between aquaculture and fishing

A key issue in supporting the development of the aquaculture industry will be the development of processes to balance effectively the rights of existing users with aquaculture farmers wishing to utilise the coastal marine area. This is a particularly delicate issue in respect of commercial fishing, with iwi having significant commercial fishing interests derived in part from the Maori Fisheries Settlement. Iwi are in the unique position of wanting to see both settlements maintained simultaneously with neither at the expense of the other. The Report focused on ways in which the RMA and fishing regulatory regimes could be streamlined and coordinated, so that the significant time and expense currently involved could be lessened and earlier

indications given on the likely success of any proposal (so that significant expense does not occur where plainly there is strong opposition from either environmental or fisheries perspectives). The report proposes:

- ensuring information held by MFish on fishing and fisheries resources is made available to regional councils during the preparation of a coastal plan change
- aligning (during preparation of a plan change) the undue adverse effects (UAE) assessment and RMA processes with respect to timeframes for notification, submissions, hearings and announcements of decisions
- repealing the High Court merit appeal on UAE decisions and replace with appeal provisions that match the equivalent RMA appeals (with provision for combined hearings)
- the UAE test not being required for a consent application within an Aquaculture Zone (as it will already have dealt with earlier in the process) providing that any limits set by the plan are not breached
- Provide a framework for negotiations between affected commercial fishers and aquaculture consent applicants, with the UAE test (in respect of commercial fishing) only required where agreement cannot be reached (or an applicant elects to go directly to the UAE test)
- That following a finding of the UAE in respect of commercial fishing, a three month window is open for the parties to negotiate an agreement, with a further one month extension available if demonstrable progress is being made.

Te Ohu's response:

Te Ohu supports the streamlining and combination (where appropriate) of the RMA and fishing application processes. Te Ohu believes the early provision of information by MFish to the parties involved is a key element in having these recommendations work successfully. The UAE test must be preserved, given its ability to protect the integrity of the Maori Fisheries Settlement, but Te Ohu supports the combination of the RMA/UAE tests should the matters progress to an appeal. Further, Te Ohu supports the view expressed by ATAG that any applications for space outside aquaculture zones should allow the parties (commercial fishers and applicants) to negotiate prior to any UAE test being required, rather than how the system presently operates, with such negotiation commonly only occurring following the UAE test. Te Ohu feels however, that while ATAG provides some good options, that there may need to be further incentives developed, or greater assistance provided, to ensure that agreements between commercial fishers and applicants become a reality rather than a mere theoretical possibility. Further options might include Crown-sponsored mediation, for example.

Chapter 7 – Maori Commercial Aquaculture Settlement

The Report clearly envisages that any amendments to the aquaculture regulatory regime must enhance rather than diminish the Maori Commercial Aquaculture Settlement. ATAG did not comment on the Crown's pre-commencement obligations to iwi, which is understandable given the relatively modest obligations remaining to be fulfilled following settlement of the South Island and Hauraki pre-commencement space entitlements. ATAG focused on delivering more options

for the provision of the settlement, and consequential changes required in light of its other recommendations in the Report. Their specific recommendations include:

- providing for 20% of representative space available for aquaculture in Aquaculture Zones to be transferred immediately to the trustee for allocation to iwi
- developing, with the trustee and iwi, options for providing 20% of space outside Aquaculture Zones
- consulting with iwi and the trustee on a revised aquaculture regime before finalizing policy for legislative drafting.

Te Ohu's response:

Te Ohu supports the immediate transfer of settlement space within Aquaculture Zones to the trustee on behalf of iwi though we note that this means, as per the current regime, that iwi will need to meet the costs for the resource consent (although the new regime will generally make these controlled activities). Te Ohu also approves of the options recommended by the Report with respect to the 20% entitlement outside Aquaculture Zones. The Report suggests several options but with the 20% space entitlement being a default mechanism in the case where agreement between any applicants and iwi are unable to be reached. These options (and the default) is particularly important as it is likely that settlement space entitlements outside Aquaculture Zones will come on line incrementally, and possibly in small chunks – this will obviously affect the commercial viability of these iwi entitlements. Addressing this, the Report correctly, in Te Ohu's view, identifies options such as joint ventures, the exchange and re-combination of existing aquaculture assets and the selling or transferring of such space to other parties as options that should be available to iwi in such circumstances.

Should the Crown move to create Aquaculture Zones (using the tools identified elsewhere in the Report), there may also be the opportunity for iwi space to be provided 'upfront'. Te Ohu fully supports these options and believes that they have the potential to enhance the settlement, and the ability of iwi to develop commercially viable aquaculture interests. To advance this we would support the Aquaculture Agency (and through that potentially the Takutai Trust) having access to the Aquaculture Fund to create this space.

Chapter 8 – Transition

A key part of any change will be the transition. It will be critical that this is handled well. The Report sets out some suggestions but sensibly at the headline policy level that is addressed by the ATAG report. Te Ohu considers that once the key decisions set out earlier in the Report are made, specific transition regimes for each of the Councils heavily involved in aquaculture will need to be agreed. Then this agreement will need to be drafted into legislation rather than left to Councils to work through using the normal processes under the RMA. The latter would still mean very lengthy timeframes.

Other matters not covered by the Report

In accordance with the directions given to the ATAG by Ministers, the Report deliberately does not address Foreshore and Seabed issues. As iwi will understand these are being progressed in parallel. Ministers have stated that Government will be making decisions on both at the same time and made plain that the final resultant regimes will work together to give satisfactory results for both.

Where to from here?

The Report will be one of the subjects for discussion at the upcoming Te Ohu Iwi AHC workshop to be held on **26 and 27 November** in Wellington. It is hoped that this workshop will be a place for iwi to enhance their understanding of the Report and provide their initial responses.

There is a short window of opportunity to submit on the content of the Report. Te Ohu, as trustee of the Settlement, will be making a submission. Should you wish to incorporate your views into that submission we would like to receive your written or verbal views by **9 December 2009**, this should give us sufficient amount of time before the closing date which is:

5.00pm Wednesday, 16 December 2009

If you need any assistance with your submission, or further information, please contact Te Ohu.

Once the submission period is complete, ATAG has recommended that the Government undertake targeted consultation with iwi, regional councils and industry during the development of policy and the drafting of legislation. For updates on this process, please contact Te Ohu in the New Year.

Further information

The Report (including its Terms of Reference) and information on how to make a submission to the Ministry of Fisheries on the Report can be located here:

<http://www.fish.govt.nz/en-nz/Consultations/Restarting+Aquaculture/default.htm>

For further information pertaining to this Briefing Paper or relating to aquaculture issues generally (including assistance with making a submission), please contact:

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Te Ohu Kai Moana Trustee Limited is the trustee of Takutai Trust, the entity which initially receives (on behalf of Iwi Aquaculture Organisation's) any entitlements due to iwi under the Maori Commercial Aquaculture Claims Settlement Act 2004. It is tasked with allocating and transferring assets to IAOs once iwi are able to reach binding allocation agreements amongst themselves.