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1 June 2015

Committee Secretary
Senate Standing Committee on Environment and Communications
PO Box 6100
Parliament House
Canberra ACT 2600

By email: ec.sen@aph.gov.au

Dear Ms McDonald

Inquiry into the Regulation of Fin-Fish Aquaculture in Tasmania

The Environmental Defenders Office (Tas) Inc (***EDO Tasmania***) is a non-profit, community based legal service specialising in environmental and planning law. We have a long-standing interest in best practice assessment and regulation of aquaculture. Our activities in pursuit of that objective include:

- In 2012, we hosted a multi-stakeholder conference, "*Managing Marine Farming: Have We Achieved Best Practice?*", looking at the experience of marine farming planning and operation in Tasmania and internationally[1]
- Making representations to the 2012 House of Representatives Inquiry into the Role of Science in Fisheries and Aquaculture (see **Attachment 2**)
- Publishing a paper outlining regulatory regimes in a range of international jurisdictions and recommending changes to improve the Tasmanian framework (see **Attachment 3**)
- Participating in a range of constructive consultation forums with industry representatives.

The attached submission builds on those activities, focussing on the following terms of reference:

(c) the adequacy of current environmental planning and regulatory mechanisms

(d) the interaction of state and federal laws and regulation

Getting the regulatory framework right is the most effective way to ensure that the marine farming industry can continue in a sustainable manner and with community (and consumer) confidence that environmental impacts are being appropriately managed.

We would welcome the opportunity to appear at a hearing to respond to any questions or provide clarification in relation to the issues raised in this submission.

Yours sincerely,
Environmental Defenders Office

Jess Feehely
Principal Lawyer

[1] Conference papers for the *Managing Marine Farming* forum are available at www.edotas.org.au/resources/conferences/

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ATTACHMENT 1: Submission to Senate Inquiry into the Regulation of Fin-Fish Aquaculture in Tasmania

Summary of key recommendations

- Marine farming should be brought within the *Land Use Planning and Approvals Act 1993* by:
  - Requiring regional coastal and marine plans to be developed through consultation with all affected stakeholders. The plans could identify appropriate zones for marine farming, set limits on intensity of development and performance based standards that must be achieved. Regional plans could be reviewed by the Tasmanian Planning Commission and implemented through planning schemes
  - Introducing Statewide guidance for marine farming provisions in planning schemes
  - Establishing the Marine Farming Planning Review Panel as a referral agency to consider applications for individual lease developments / expansions
  - Providing resources to planning authorities to adequately assess applications for marine farming operations
- Implement a clear hierarchy of objectives to guide decision making and prioritise maintenance of natural values
- Require applications for marine farming activities to be assessed by the EPA (as Level 2 activities)
- Authorise the EPA to monitor and enforce environmental conditions attached to any authority to conduct marine farming, and require monitoring data to be published on the EPA website
- Require the Marine Farming Planning Review Panel to include members with expertise in relation to marine ecology and hydrology and a member representing community issues
- Re-authorise the Panel to refuse applications for marine farming proposals that cannot meet sustainability objectives. To ensure that natural justice is achieved, allow any person affected by the decision to appeal against a refusal
- Require sufficient scientific data to be provided in order to assess the potential impacts of aquaculture proposals and identify clear impact thresholds *before* approvals are given
- Encourage the proactive release of information including monitoring reports, number of complaints received, enforcement action taken and follow up reports
- Amend lease and licence conditions to require monitoring data to be provided regularly, rather than relying on voluntary contribution of information by regulated operators
- Allow appeals to the Resource Management and Planning Appeal Tribunal against decisions to amend a marine farming development plan
- Direct the Auditor-General to undertake a review of monitoring and compliance activities under the MFPA and *Living Marine Resources Management Act 1995*
- Allow any interested person to commence civil enforcement proceedings under the MFPA
- Introduce innovative enforcement techniques, such as remediation orders and 'name and shame' provisions, to increase deterrent value
- Develop a clear Enforcement Policy to guide marine farming enforcement activity
- Encourage the Federal Environment Minister to review the decision that the Macquarie Harbour expansion was not a controlled action

These recommendations are discussed in greater detail below.

Adequacy of current environmental planning regulation

Problems with the current framework

Unlike most other use and development in Tasmania, marine farming in State waters is explicitly excluded from the operation of the *Land Use Planning and Approvals Act 1993* (***LUPAA***).[2] Instead, the principal pieces of legislation governing fin-fish aquaculture in Tasmania are the *Marine Farming Planning Act 1995* and the *Living Marine Resources Management Act 1995*.

The key deficiencies in the current regulatory regime for aquaculture are:

- Lack of integration with other planning regimes
- Conflicting management objectives for the regulator
- Lack of independent, scientific assessment in relation to aquaculture proposals
- Restrictions on public review of resource allocation decisions
- Lack of transparency in relation to monitoring, enforcement and environmental outcomes
- Limited enforcement actions

These issues are discussed in detail in the EDO Tasmania Issues Paper at **Attachment 3**, but are summarised below.

Lack of integration

In its 2004 assessment of environmental regulatory arrangements for aquaculture, the Productivity Commission noted:

> *The fisheries or aquaculture legislation may also have multiple, and sometimes conflicting, objectives. The objects of the fisheries legislation in New South Wales, Victoria, Western Australia and Tasmania, for example, all recognise explicitly that there are alternative uses of fishery resources — for example, commercial fishing, aquaculture, recreational fishing, tourism and 'non-consumptive uses'... However, there is little guidance on the appropriate weights to be assigned to competing uses or how conflicts between uses are to be resolved.*[3]

In particular, s.4(1) of the *Marine Farming Planning Act 1995* (***MFPA***) seeks to achieve "well-planned sustainable development of marine farming activities" having regard to the need to:

> *(a) integrate marine farming activities with other marine uses; and*
>
> *(b) minimise any adverse impact of marine farming activities; and*
>
> *(c) set aside areas for activities other than for marine farming activities; and*
>
> *(d) take account of land uses; and*
>
> *(e) take account of the community's right to have an interest in those activities.*

The Department of Primary Industries, Parks, Water and Environment (***DPIPWE***) and the Marine Farming Planning Review Panel (see below) are required to take these objectives, and the general sustainable development objectives set out in Schedule 1 of the MFPA, into account in their decisions.[4] However, the separation of marine farming planning from coastal and land use planning frameworks can make it difficult to balance these objectives. In practice, DPIPWE, the agency responsible for both planning and regulation of marine farming, has a clear interest in favouring development of marine leases over other uses.

Planning authorities (i.e local councils) have jurisdiction over land use and development but generally have no jurisdiction over the marine farming planning process or decisions in relation to activities below high water mark.[5] As a result, planning schemes under LUPAA cannot regulate marine farming activities (other than land-based operations or land-based components of marine-

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[2] LUPAA, s.20(7)
[3] Productivity Commission. 2004, *Assessing Environmental Regulatory Arrangements for Aquaculture*, Canberra, p31
[4] MFPA, s. 9(1)
[5] *Living Marine Resources Management Act 1995*, s. 5

based operations).[6] In contrast, the Minister can require a planning scheme to be amended to ensure that land based activities do not affect marine farming.[7] This provides an unfair priority for marine farming activities, and confounds consideration of the other criteria outlined in s.4(1) above.

The impacts of marine farming are not restricted to the water: marine farming introduces noise and odour issues, impacts on visual amenity, requires infrastructure and access to transport routes and processing facilities, and can interfere with tourism and recreation activities. The inability of councils to plan for, or be involved in the assessment of, marine farming continues to hinder effective strategic planning at a municipal or regional level. While Marine Farming Development Plans currently provide some guidance regarding the planned location of marine farms, the regularity of applications to amend such plans to expand or relocate marine farms means that the public has little confidence regarding the limits on growth and councils cannot make strategic decisions regarding infrastructure.

EDO Tasmania is a strong advocate for the inclusion of marine farming within the standard land use planning process under LUPAA, with responsibility for strategic planning, assessment and approval of development applications and enforcement of permit conditions falling to local government. The Productivity Commission has noted some concerns with this approach, stating that:

> *[T]he Marine Farming Planning Act 1995 provides for a common approach to marine farming across state waters, and DPIWE appears to have the capacity and experience to manage the process and address environmental impacts. If individual Tasmanian local councils were responsible for marine aquaculture planning and decision-making, there could be potential capacity and consistency issues that could affect both aquaculture, and marine management.*[8]

We consider that these risks could be overcome by:

- Introducing a Planning Directive to provide statewide guidance on planning scheme provisions relating to marine farming to improve consistency[9]
- Requiring planning schemes dealing with marine farming to be reviewed by the Tasmanian Planning Commission to ensure that the Planning Directive is implemented
- Requiring the planning authority to refer development applications for marine farms, or which may affect existing marine farms, to the Marine Farming Planning Review Panel (or another body within DPIPWE) for comment prior to assessment by the planning authority[10]
- Providing resources (financial and technical) to planning authorities required to take on additional responsibilities in relation to marine farming activities.

The benefit of greater integration to achieving the sustainable development objectives of the Tasmania's Resource Management and Planning System justifies the initial costs involved in restricting the marine farming planning system to accommodate these changes. Over time, the integration of the assessment and approval process is likely to result in reduced costs and social broad benefits.

The Productivity Commission has also noted the consequences of poorly integrated coastal and marine planning:

> *State marine and coastal planning instruments are in some cases outdated, lack implementation plans for on-ground action, and fail to adequately consider adjoining land uses. These problems can constrain aquaculture development, and affect existing aquaculture operations through poor coastal water*

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[6] See, for example, MFPA, s.19(3)(c)

[7] MFPA, s. 20(3) provides that the relevant Minister may 'require the Tasmanian Planning Commission to prepare an amendment to a planning scheme under that Act in respect of land which adjoins State waters to reduce the negative impact or likely negative impact of activities or future development on the land upon marine farming or other activities in State waters'.

[8] Above n3, p61

[9] Note, current planning reforms seek to implement a Statewide Planning Scheme. This could facilitate the introduction of Statewide provisions relating to aquaculture

[10] This is consistent with the approach taken in relation to Level 2 development, developments affecting heritage places or developments which may impact on sewerage or water infrastructure.

management, with further implications for environmental management. There may also be a lack of integration between marine / coastal and natural resource management plans.[11]

The Tasmanian *State Coastal Policy 1996* provides limited guidance in relation to aquaculture planning or coastal developments causing diffuse pollution discharges that may compromise off-shore aquaculture operations. This inhibits integrated resource planning which balances all competing uses having regard to the ecological capacity of the region. A revised draft Coastal Policy released for comment in 2013 attempted to address this, but has not been progressed by the current government. Again, greater Statewide direction on coastal and marine planning matters can be delivered through a Planning Directive or the proposed Statewide Planning Scheme currently under development.

Approaches in other jurisdictions

The approaches adopted in other jurisdictions in which fin-fish aquaculture operations are common, including New Zealand and Scotland, recognise:

- the importance of an explicit hierarchy of objectives to guide decision-making; and
- that separate planning for marine farming does not deal adequately with complex interrelationships, ecosystem impacts and diverse stakeholder priorities.

For example, prior to 1991, marine farming in New Zealand was subject to sector-specific legislation[12] which identified aquaculture zones where marine farming was permitted. However, the *Resource Management Act 1991* (***RMA***) incorporated marine farming into a general "effects based management" regime for all use and development. The RMA required "rigorous analysis the effects of the proposed activity can be adequately avoided, remedied or mitigated and are otherwise consistent with sustainable management".[13] Further changes to the legislation were introduced in 2011 to give effect to policies, including the *New Zealand Coastal Policy Statement*.

All regional councils have adopted regional coastal plans that are consistent with this Coastal Policy Statement. Many regional coastal plans identify areas where marine farming cannot occur as well as specifying limits on the character, intensity, or scale of acceptable activities.

In 2014, the Environmental Defence Society Inc successfully challenged an amendment to a regional coastal plan to allow an aquaculture operation. In making its initial decision, the Board of Inquiry noted that allowing aquaculture would have "high" to "very high" effects on the landscape and natural values, but the compelling economic and biosecurity benefits of the proposal outweighed those concerns. On appeal, the Supreme Court held that the Board had erred in performing that "balancing act" – the terms of the Coastal Policy Statement clearly required that the objectives of protecting natural values be implemented, irrespective of economic or other considerations.[14] This did not mandate that no environmental harm could occur, but required the Board to be satisfied that sustainable management could be achieved.

This decision illustrates the need for legislation to provide explicit guidance on the factors to be balanced in resource management decisions and the appropriate weights assigned in the event of conflict. The decision also highlights the value of opportunities for third party review of resource management decisions (see below).

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[11] Above n.3, p50

[12] *Marine Farming Act 1971*

[13] Bret Birdsong, Adjudicating Sustainability: New Zealand's Environment Court and the Resource Management Act, October 1998. As found at http://www.fulbright.org.nz/news/1998-birdsong/.

[14] *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38

RECOMMENDATIONS

- Update *State Coastal Policy 1996* to more effectively address use and development in catchments, coastal areas and marine areas.
- Bring marine farming within the *Land Use Planning and Approvals Act 1993* by:

  Requiring regional coastal and marine plans to be developed through consultation with all affected stakeholders (including the public). The plans could identify appropriate zones for marine farming, set limits on intensity of development and performance based standards that must be achieved. Regional plans could be reviewed by the Tasmanian Planning Commission and implemented through planning schemes;

  Introducing Statewide guidance for marine farming provisions in planning schemes;

  Establishing the Marine Farming Planning Review Panel (subject to the changes discussed below) as a referral agency to consider applications for individual lease developments / expansions;

  Providing resources to planning authorities to adequately assess applications for marine farming operations
- If the *Marine Farming Planning Act 1995* remains, ensure that a clear hierarchy of objectives is set out to guide decision making. The hierarchy should prioritise maintenance of natural values.

Regulatory independence

Effective regulatory frameworks rely on the independence of the regulators. The Productivity Commission identified the risks associated with lack of independence (or the perception of lack of independence):

> *State government departments that are primarily responsible for the aquaculture regulatory arrangements often have potentially conflicting functions of policy development, implementation of regulation, industry promotion and development, and aquaculture research. There may be some size and efficiency advantages from the grouping of certain functions, but the conflict between regulatory and development roles may lead to public and industry mistrust over resource planning and allocation, regulatory approvals, monitoring and enforcement.*[15]

In Tasmania, the Marine Farming Branch within DPIPWE is responsible both for promoting and regulating the marine farming industry; potentially conflicting roles. For example, although the marine farming expansion at Macquarie Harbour was carried out by three private companies, Tassal Operations Pty Ltd, Huon Aquaculture Group Pty Ltd and Petuna Aquaculture Pty Ltd, DPIPWE was listed as the proponent for the action in the referral to the Federal Environment Minister. The referral documentation was prepared by DPIPWE and submitted only two days after the decision of the Tasmanian Minister to allow amendments to the *Macquarie Harbour Marine Farming Development Plan 2005* to facilitate the expansion, making it likely that the documentation was being prepared in advance of the Minister's decision.

The close relationship between the three companies and the regulator, a history of under-regulation and enforcement (see below), and explicit support expressed by DPIPWE for aquaculture projects all affect public trust in the rigour of the regulatory framework.

In other jurisdictions, marine farming impacts are regulated by agencies with direct responsibility for environmental management, such as Scotland's Environment Protection Agency. In contrast, the legislative role of Tasmania's Environment Protection Authority (***EPA***) is limited to the Director of the EPA being a member of the Marine Farming Planning Review Panel. While the EPA may provide advice to the Marine Farming Branch within DPIPWE, assessment, monitoring and enforcement activities remain the responsibility of DPIPWE.

[15] Productivity Commission 2004, *Assessing Environmental Regulatory Arrangements for Aquaculture*, Canberra, p168

The perceived lack of independence in the assessment, approval and regulation of marine farming operations also strengthens the case introducing third party review and enforcement options (see below).

RECOMMENDATIONS

- Require applications in relation to marine farming operations to be assessed by the EPA (either as a Level 2 activity under the Environmental Management and Pollution Control Act 1994, or by way of amendment to the MFPA to provide for the assessment. The EPA can require an operation to be refused, or allow it to be approved subject to environmental management conditions.
- Authorise the EPA to monitor and enforce environmental conditions attached to any authority to conduct marine farming

Science-based decision making

Resource management decisions must be made on the basis of scientific evidence. In Tasmania, there are three major issues in relation to this:

- Research priorities to secure baseline data
- Access to timely, objective scientific input to guide decision-making
- Public access to data

Research priorities

In his paper examining the role of science in the aquaculture debate in British Columbia, Professor Stephen Bocking notes:

> *Effective science is also a matter of genuine, two way communication between scientists and those who use scientific information: a true dialogue, ensuring that research is not only relevant, but that its results are communicated in ways consistent with public concerns and perspectives on nature and the world. Only through such dialogue are scientific assessments likely to be sensitive to political realities, and political decisions likely to be scientifically realistic.*[16]

The Tasmanian and Commonwealth governments continue to show clear support for the aquaculture industry and to provide funding (matched or otherwise) for research institutions such as IMAS and the Fisheries Research and Development Corporation. These research organisations continue to provide excellent research outcomes and direction on improved sustainability. However, the need for industry funding to sustain these research programmes risks a level of capture in terms of the research agenda, outcomes of such research and availability of research data.

To the greatest extent possible, research agendas should be developed with input from a broader range of stakeholders to improve the practical application and ensure the greatest public benefit from research initiatives.

Science in decision making

Decisions in relation to aquaculture proposals (developments or expansions) are referred to the Marine Farming Planning Review Panel (the ***Panel***) for assessment. The Panel is established under the *Marine Farming Planning Act 1995* as an independent body comprised of eight individuals with expertise in a range of disciplines relevant to marine farming, as set out in s.8(2) of the MFPA:

> ***(2)*** *The Panel consists of 8 persons appointed by the Governor of whom–*
>
> ***(a)*** *one is the chairperson of the Panel; and*

[16] Bocking, S. 2007. "Wild or Farmed? Seeking Effective Science in a Controversial Environment". Conference papers published in *Spontaneous Generations* 1:1 (2007). ISSN 1913-0465. University of Toronto, p55

(b) *one is a person nominated by the chairperson of the Tasmanian Planning Commission with ability and experience in planning issues; and*

(c) *one is the Director, Environment Protection Authority; and*

(d) *one is a person with ability in marine resource management; and*

(e) *one is a person with ability to assess boating, recreational and navigational issues; and*

(f) *one is a person with experience in marine farming; and*

(fa) *one is a person with expertise in local government issues; and*

(g) *one is a person nominated by the Minister.*

Notably, while nominees under s.8(a),(c),(d), (f) and (g) could have relevant scientific expertise, there is no explicit requirement for the Panel to include a member with qualifications in relation to marine ecology, hydrology, marine sediments or conservation management. Other than s.8(g), there is also no capacity for community concerns to be represented (e.g. residents concerned regarding nuisance impacts from marine farming).

Prior to 2011, the Panel was able to determine that unacceptable proposals could not proceed. The Panel was required to take into account public submissions, the recommendations of the Marine Farming Branch and the sustainable development objectives of the MFPA in making such a determination. However, in November 2011 the MFPA was amended to remove the power of the Panel to refuse a draft amendment to a Marine Farming Development Plan. Instead, the Panel could make a recommendation to the Minister only - the Minister would have the final decision in relation to the proposal and could also make any changes to the proposal without further consultation. The history of that amendment is discussed in more detail in **Attachment 2**.

The Panel has an explicit mandate when assessing a proposed aquaculture development to consider whether the proposal can satisfy sustainability objectives. There may be good reasons why the Minister, having responsibility for a range of portfolios, would not accept a recommendation from an expert Panel to approve a proposed aquaculture development, even though the proposal, when considered in isolation, is considered to be sustainable. For example, the Minister may consider that the proposal will have unacceptable visual or amenity impacts on nearby residents, may interfere with views from key tourist spots or may place an undue burden on local government infrastructure.

In contrast, there can be no good reason to allow proposed marine farming activities where the independent, scientific expert Panel has determined that the amendments are not sustainable and recommended refusal. Decisions made by the Panel to refuse a proposal should be final (subject to a right of review – see below).

Adaptive management

Generally, assessment and regulation of marine farming in Tasmania adopts an adaptive management approach. While we recognise that there are benefits to adaptive management which responds to unanticipated problems, adaptive management should not be used to overcome shortcomings in scientific evidence presented with an application.

If sufficient data is not provided to clearly identify risks and satisfy the decision maker that impacts on environmental values can be avoided, minimised or appropriately managed, further information should be requested from the proponent or the proposal should be refused. Reliance on adaptive management to overcome data shortfalls (rather than to deal with new information) is inappropriate, particularly in relation to impacts on endangered species.

For example, one significant concern in relation to the Macquarie Harbour expansion was the potential impact on the Maugean skate, *Zearaja maugeana*, an endangered species with a

restricted habitat range and an estimated population of only 2,500.[17] One of the identified threats to the species is increased nutrient levels, an outcome that was predicted to occur as a result of the proposed expansion. Environmental organisations raised concern that not enough was known about the ecology or biology of the Maugean skate, or the likely movement of nutrients within Macquarie Harbour, to ensure the species would not be significantly impacted.

The Marine Farming Branch within DPIPWE recommended that the expansion be approved, despite noting that IMAS advice confirmed that there was "*currently no information about the potential effects of salmon farming in Macquarie Harbour on the Maugean skate*" and a dedicated survey to identify trigger values would not be completed until September 2012 (after the anticipated commencement of operations in Macquarie Harbour).

The Panel also acknowledged the lack of data regarding nutrient enrichment, the nature or effect of that enrichment and the potential effects of the expansion on the Maugean skate. Despite this, the Panel's recommendation, and the subsequent documentation supporting the referral to the Federal Environment Minister, made a number of broad statements such as:

- "It is possible that skates will continue to be able to utilise the lease area";
- "It therefore could be concluded that solid wastes are unlikely to have a significant impact on the Skate, based on the currently available information on the biology and ecology of the species."

Those statements were not supported by the limited information available regarding the extent (and depth) of habitat of the threatened species, its grazing and breeding habits and its susceptibility to nutrient changes, as well as limited data regarding nutrient movement in the Harbour. Subsequent nutrient and dissolved oxygen levels experienced in Macquarie Harbour, and the impact of those levels on fish health and farm productivity[18] raise concerns that more rigorous baseline data should have been required as part of the assessment process rather than post-approval.

At the very least, data provided with a proposal must be sufficient to enable appropriate performance triggers to be set. In relation to the Maugean skate, this was not done.

RECOMMENDATIONS

- Require the Panel to include a member with qualifications and expertise in relation to marine ecology and hydrology.
- Require the Panel to include a member representing community issues.
- The MFPA should be amended to reverse the 2011 amendments and re-authorise the Panel to refuse applications for marine farming proposals that cannot meet sustainability objectives. To ensure that natural justice is achieved, any person affected by the decision, including third parties who made representations, should be entitled to appeal against a refusal.
- Decision-making frameworks must require sufficient scientific data to be provided in order to assess the potential impacts of aquaculture proposals *before* approvals are given. The MFPA must require the Panel and the Minister to be satisfied as to the likely impacts of a proposal and to identify clear thresholds which, if exceeded, will require operations to cease.

[17] Parsons, K. 2011. *Nowhere Else on Earth: Tasmania's Marine Natural Values*. Report prepared for Environment Tasmania, Aqenal. Available at oceanplanet.org.au/resources/nowhere-else-on-earth-tasmanias-marine-natural-values/.

[18] See, for example, "Salmon Farmers Fear for Water in Macquarie Harbour" http://www.themercury.com.au/news/politics/salmon-farmers-fear-for-water-in-macquarie-harbour/story-fnpp9w4j-1227247445832, the submission to this Inquiry by Environment Tasmania and Senate Hansard, 2 March 2015, regarding leaked industry documents.

Transparency and review options

In order to secure public support and confidence, regulatory frameworks must be transparent and subject to scrutiny. This requires public involvement in decision-making, access to information on which decisions are based, and opportunities to challenge decisions on the basis that they will not achieve stated sustainable outcomes.

> *Firstly, determining what is sustainable for a community will depend on accurately ascertaining the community's preferences, which is best done by incorporating them into the decision making process. Second, it is generally accepted that better environmental decisions will result from a greater flow of information, including information that is held or developed by the members of local communities. Finally, open public participation is encouraged on fairness grounds; if decisions are to be made that will broadly affect the community, then it is fair to provide members of the community the opportunity to participate.*[19]

Access to information - assessments

The MFPA currently provides for applications for amendments to Marine Farming Development Plans to facilitate expansion or relocation of marine lease areas to be publicly advertised. Supporting material in relation to the expansion (including Environmental Impact Statements) is also required to be published. Any person may make a representation in respect of the proposal and request to appear at the Panel hearing to outline their concerns. While there are variations in the quality of data presented with an application, the statutory obligation to provide access to information and to involve the public in the decision making process must be commended.

It is consistent with other land use processes, and with international marine farming practices, to facilitate public involvement in decisions regarding marine farming operations.

Access to information – regulatory actions

In contrast, the same level of transparency has not been achieved in relation to ongoing regulation of marine farming operations. In 2004, the Productivity Commission noted in relation to all aquaculture jurisdictions:

> *At present, there appears to be limited reporting by, and auditing of, the main agencies responsible for aquaculture and environmental regulatory arrangements in each state... Within confidentiality restrictions, aspects of regulatory and approval processes that could be reported on include: the number of applications; the number approved/rejected; discretionary approvals; exemptions; processing times; appeals; monitoring and enforcement actions. As well as potentially improving accountability and transparency, reporting such information may help to improve the application of regulation by identifying potential regulatory constraints and opportunities for improvements with approval processes.*[20]

This observation remains true a decade later. It is our experience that obtaining access to information regarding monitoring, compliance and enforcement action can be extremely difficult. The information is rarely accessible without a Right to Information request (which may take many months to be resolved), and such applications are often refused on the basis of commercial in confidence exemptions or the volume of material that would need to be supplied.

In contrast, while monitoring requirements in Canada are largely discretionary, the law requires all information regarding environmental assessments that are undertaken to be made publicly available. This assists with the transparency of monitoring and encourages performance improvements.

Another justification given for the refusal to release monitoring data voluntarily submitted by industry is that its release would discourage future voluntary data submissions. This is not a valid justification, given DPIPWE's powers to compel the submission of relevant data. While there are clear advantages to maintaining good regulatory relationships with industry, where data is in the public interest (particularly where it relates to public or environmental health), the information should be both required to be submitted and readily available to any interested person.

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[19] Bret Birdsong, "Adjudicating Sustainability: New Zealand's Environment Court and the Resource Management Act", October 1998. As found at http://www.fulbright.org.nz/news/1998-birdsong/

[20] Above n3, pp134-135

Merits review

In controversial resource management issues, including aquaculture, debate centres around scientific information (including the lack of information, or difficulty of accessing information). As a result, rigour and transparency in the assessment process is critically important. However, it is not uncommon for different stakeholders to point to conflicting scientific information to support their views, as Professor Stephen Bocking points out:

> *Science has been used by all parties, not just as a source of information about risks and benefits,but as a source of authority. Both those who favour [marine]farming and those who oppose it invoke science to support their arguments, their framing of the issue (as a question of managing an economically valuable, environmentally sound activity, or conversely, of protecting wild salmon stocks from a hazardous industry), and their claims to be presenting an objective, impartial perspective.*[21]

Recognising the ability to use evidence selectively (and politically) to further different objectives, it is critical for evidence used in decision making to be independently tested through merits review. Unfortunately, there are limited opportunities for such review under the current Tasmanian regulatory framework.

For most significant land use and development decisions under LUPAA, any person who made a representation can appeal to the Resource Management and Planning Appeal Tribunal. The appeal will be heard *de novo*, meaning that the Tribunal effectively re-hears the evidence and makes its own determination as to whether the use or development should proceed. This is also the case in New Zealand[22] and Scotland.

In contrast, there is no right to appeal against a decision under the *Marine Farming Planning Act 1995* to amend a Marine Farming Development Plan to facilitate an aquaculture proposal. Particularly given concerns regarding the independence of the decision-making structure under the MFPA (see above), a right of appeal is important and should be open to any person who made a representation in respect of the proposal (including affected residents, NGOs, other industries, tourism operators and the local government).

Allowing a right of appeal to the Resource Management and Planning Appeal Tribunal would provide appropriate scrutiny from a body with experience in resource management and procedural fairness that is required to further the sustainable development objectives of the Resource Management and Planning System. The Tribunal has powers to dismiss frivolous appeals and to awards costs in appropriate situations, which is sufficient to deter appeals which lack merit.

RECOMMENDATIONS

- Encourage the proactive release of information including monitoring reports, number of complaints received, enforcement action taken and follow up reports
- DPIPWE should amend lease and licence conditions to require monitoring data to be provided regularly, rather than relying on voluntary contribution of information by regulated operators
- Allow all parties (including the proponent and any person who made a representation) to appeal to the Resource Management and Planning Appeal Tribunal against a decision to amend a marine farming development plan to facilitate a new marine farming operation

  ***Note**: bringing marine farming planning and approvals under LUPAA would generally mean that such decisions would be subject to merits review by the Tribunal*

[21] Bocking, S. 2007. "Wild or Farmed? Seeking Effective Science in a Controversial Environment". Conference papers published in *Spontaneous Generations* 1:1 (2007). ISSN 1913-0465. University of Toronto, p55

[22] *Resource Management Act 1991*, s.120 (resource contents; First Schedule, s.14(1) (policy statements and plans)

Monitoring and enforcement

Even subject to the reservations outlined above, adaptive management will not be effective without appropriate monitoring and enforcement activities to facilitate adaptation. Encouraging improved performance will only be successful if there is a credible threat that stronger action will be taken if no improvement is demonstrated.

For example, the Marine Farming Development Plan for Tasmania's D'Entrecasteaux Channel imposes a plan-wide nitrogen cap to control nutrient impacts. However, there is currently limited monitoring to determine whether the cumulative contribution of each lease area to the nitrogen load exceeds the cap, and no ongoing assessment to determine whether the existing cap is set at a sustainable level (particularly having regard to other land0based nutrient sources contributing to the nitrogen load in the Channel.

The Productivity Commission noted in 2004 that, while critical for regulatory effectiveness, monitoring and enforcement activity often "appears to suffer from a lack resources."[23] This remains the case, and is generally used to justify the reliance on self-monitoring. In New Zealand, the costs of monitoring activities carried out by the Ministry of Conservation or the local planning authority are paid for by marine farm operators.[24] At the time of the Productivity Commission report, a similar position existed in Tasmania.[25]

The Productivity Commission also noted that regular auditing and review of monitoring and enforcement systems can have benefits for all stakeholders by improving the effectiveness and efficiency of operations.[26]

Monitoring

There is currently limited independent monitoring of marine farming operations – the Marine Farming Branch relies largely on reports and video surveillance submitted by the operators themselves every 6 or 12 months. A recent review by Hugh Kirkman[27] questioned whether this monitoring regime is adequate to identify and respond to risks. In particular, Kirkman stated that the frequency of video samples "seems inadequate for a meaningful assessment of impacts" and recommended that surveillance be conducted more regularly.[28]

The Broadscale Environmental Monitoring Program provides data on water quality across the south-east, but is collated only every three years. There are concerns that the monitoring sites selected as for that program are not representative and do not provide relevant data for modelling or managing the impacts of marine farming in the south east. Lack of pre-marine farming baseline data relating to environmental health also limits the capacity of the monitoring programme to identify the extent and impact of changes in nutrients.[29]

As outlined above, it has been our experience that it is difficult for the public to obtain access to monitoring data.

Enforcement

There are a number of enforcement options under the MFPA and *Living Marine Resources Management Act 1995*, including

- Fines up to $6,500 for marine farming equipment being located outside a lease area[30];

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[23] Above n3, p.135
[24] *Resource Management Act 1991*, s. 36(1)(c)
[25] Above n3, p.131
[26] Above n3, p134-135
[27] Kirkman, H. 2014. *Review of Monitoring the Environmental Effects of Salmon Farming in Tasmania.* Available at www.et.org.au
[28] Above n23, p4
[29] Ross, D and C. MacLeod. 2013. *Evaluation of Broadscale Environmental Monitoring Program.* Available at www.dpipwe.tas.gov.au
[30] MFPA, s.94

- Fines up to $65,000, or up to 2 years in prison, for contravening marine farming licence conditions[31];
- Issuing infringement notices (fines up to $650) for minor breaches;
- Allocation of demerit points for offences – accumulation of 200 demerit points over 5 years may lead to temporary disqualification from obtaining a marine farming licence;
- Cancellation or suspension of licence for 5 years if the licence holder contravenes the licence conditions[32].

Despite this range of options, a review of reported enforcement activities indicates that many observed breaches are unpunished and fines, if imposed, rarely exceed $500 (see **Attachment 2**). Without more consistent and effective enforcement activity, there is little incentive for marine farming operations to achieve, much less exceed, their obligations.

The objective of any enforcement activity is improved performance, rather than simply penalising the offender. However, it is clear from Attachment 2 that the approach being taken has little deterrent value and has failed to prevent ongoing environmental impacts. Similarly, while the Productivity Commission commended Tasmania's 'demerit system' for marine farming, the requirement to accumulate 200 demerit points before any serious consequences occur significantly reduces the efficacy of the system as a deterrent against breaches.

Given the 'clean, green' branding of Tasmania's marine farming companies, and their susceptibility to reputational damage, introducing penalties that require publication of transgressions may provide an appropriate deterrent.

To ensure that enforcement actions are effective, and consistently applied, DPIPWE and the EPA should adopt clear enforcement guidelines setting scientifically-based performance indicators, identifying a scale of enforcement actions, and indicating which actions will be taken in response to failure to meet those indicators (including graded increases in enforcement activity for repeat offenders).

Civil enforcement

Both LUPAA and the *Environmental Management and Pollution Control Act 1994* provide opportunities for any person with a 'proper interest' to take action in the Tribunal where the provisions of the Act are being breached (e.g. a permit is not being complied with or unlawful environmental harm is being caused). The opportunity for a third party to take action where the regulator has failed to do so is significant to public confidence and acts as a further deterrent against contraventions by proponents.

Similar opportunities are provided by the legislation in New Zealand[33] and Canada.[34] The introduction of wide civil enforcement powers such as those in place in New Zealand or under LUPAA would significantly improve enforcement outcomes in Tasmania.

RECOMMENDATIONS

- Direct the Auditor-General to undertake a review of monitoring and compliance activities undertaken under the MFPA and *Living Marine Resources Management Act 1995*
- Request advice from IMAS regarding the desired frequency of monitoring at marine farming sites, and implement any advice received
- Monitoring activities should be conducted by the EPA, with costs recovered from proponents through higher licensing fees and all data published on the EPA website
- Allow any interested person to commence civil enforcement proceedings where lease or licence conditions are not being met

[31] *Living Marine Resource Management Act 1995*, s.86A
[32] *Living Marine Resource Management Act 1995*, s.90
[33] *Resource Management Act 1991*, ss.316(5) and 338(4)
[34] *Farm Practices Protection (Right to Farm) Act*, R.S.B.C. 1996, c. 131

- Develop a clear Enforcement Policy (similar to the one currently in place for the *Environmental Management and Pollution Control Act 1994*) to guide enforcement activity, including thresholds for action, innovative enforcement techniques (such as remediation orders or 'name and shame' provisions) and escalating penalty scales.

Relationship between Commonwealth and State regulations

The Commonwealth Government has limited involvement in relation to marine farming operations, unless those operations are likely to have a significant impact on matters of national environmental significance under the *Environment Protection and Biodiversity Conservation Act 1999* (***EPBC Act***).

Significantly, the Macquarie Harbour expansion was referred to the Federal Minister under the EPBC Act but the Minister determined that the action was not a controlled action provided it was carried out in accordance with the *Macquarie Harbour Marine Farming Development Plan 2005* (as amended). For the reasons outlined above, we have concerns about whether compliance with that plan is sufficient to avoid significant impacts on the listed Maugean skate or the values of the adjacent Tasmanian Wilderness World Heritage Area.

The risk in determining that the action is not controlled is that the Federal Minister is now unable to intervene to address significant impacts, unless the Minister is satisfied that the action is not being carried out in the manner described. This unduly restricts the Minister's ability to take action to protect threatened species and World heritage values.

However, pursuant to s.78 of the EPBC Act, the Minister may revoke the decision that the action is not a controlled action and replace it with a decision that the matter IS a controlled action that requires assessment, IF satisfied that is warranted because:

- Substantial new information about the impacts of the action is available;
- A substantial change in circumstances has occurred that was not foreseen at the time of the decision

In light of recent evidence of nutrient issues, low dissolved oxygen levels and concerns regarding expected water flows, the Federal Minister should consider revoking his original decision and requiring an assessment of the Macquarie Harbour expansion under the EPBC Act. Such an assessment would allow appropriate stocking caps to be set to ensure that nutrient levels do not impact on matters of national environmental significance. Recognising the operation as a controlled action would also allow for the Federal Minister to take enforcement action where the Tasmanian government regulators have failed to do so.

RECOMMENDATION

- The Federal Environment Minister should exercise his power under s.78 of the EPBC Act to review the decision that the Macquarie Harbour expansion was not a controlled action.