

Submission on the Proposed National Environmental Standard for Marine Aquaculture

TO: aquaculture@mpi.govt.nz

Submission on behalf of the Resource Management Law Association of New Zealand Inc

Introduction

1. This is a Submission regarding the proposed National Environmental Standard for Marine Aquaculture ("NES") made on behalf of the Resource Management Law Association of New Zealand Inc ("RMLA").
2. The RMLA is concerned to promote within New Zealand:
 - (a) An understanding of Resource Management Law and its interpretation in a multi-disciplinary framework;
 - (b) Excellence in resource management policy and practice; and
 - (c) Resource management processes which are legally sound, effective and efficient and which produce high quality environmental outcomes.
3. The RMLA comprises a diverse membership. Members include lawyers, planners, judges, environmental consultants, environmental engineers, local authority officers and councillors, central government policy analysts, industry representatives etc. Currently the Association has over 1,100 members.
4. Within such an organisation there is inevitably a divergent range of interests and views.
5. It is not possible for the RMLA to form a single universally accepted view on the proposed amendments to the NPSFM. It should also be noted that a number of members may be putting in their own submissions and those may represent quite different approaches than the views expressed here.
6. For these reasons, this submission is made with a view to ensure that the amendments:

- (a) Are consistent with the general framework of existing laws, regulations and policies of relevance, and work alongside the Resource Management Act 1991 ("RMA") where relevant, (as well as regional plan and national policy statement frameworks).
 - (b) Are practicable and workable.
 - (c) Will assist in promoting best practice.
7. The submission is structured by the questions posed in the template response form. The RMLA submission does not seek to answer every question, but focuses on those raising matters identified in paragraph [6] above.

Question 1:

Do you think an NES for marine aquaculture, including guidance material, is required? Alternatively do you think the status quo (where regional councils decide the activity status for replacement consents for existing marine farms and consents for change of species which can vary from controlled to non-complying) should be maintained?

8. **Submission:** The RMLA supports achieving greater certainty and consistency in decision making, and to the extent that the NES (or other initiatives) achieve this, the NES is supported by the RMLA. However, the RMLA is concerned that the detail of the NES may not achieve as much certainty as is intended.
9. The RMLA is cautiously of the view that were a NZCPS and NES for Marine Aquaculture progressed together, there would be greater potential for consistency and guidance in the policy framework that must be applied when considering any consent application. The discussion document both appears overly dismissive of the benefits of increased national policy direction in an additional NZCPS (or an amendment to the 2010 NZCPS), and unduly pessimistic about the costs of advancing an NZCPS (despite streamlined processes being available for doing so).
10. The current experiences of the RMLA and many of its members is that the *NZ King Salmon* decision has created, and continues to contribute, to uncertainty in how objectives and policies are to be considered and applied (or developed in plan reviews). Differences in language and emphasis in objectives and policies have taken on much greater importance than previously. The issues have been compounded by the *R J Davidson* case (not mentioned in the discussion material), which creates additional uncertainty in how consent decisions are to be made. While there may be some variation in how objectives and policies in an NZCPS are interpreted by Regional Councils, or translated into lower order objectives and policies in their plans, they would provide greater consistency than the status quo. Court decisions on the meaning and application of policies in an NZCPS would soon give greater guidance across the country.
11. The RMLA's points in respect of restricted discretionary status are identified below.
12. **Recommendation:** That further consideration be given to the progression of an NZCPS on Marine Farming (or an amendment to the 2010 NZCPS) together with the proposed NES.

Question 2:

Do you think restricted discretionary is an appropriate status for replacement consents for existing marine farms? How would other activity statuses address the issues identified in section 3 of the discussion document?

13. **Submission:** If the objective is to provide applicants, industry, the community etc with greater certainty that (most) existing marine farms will be re-consented, then restricted discretionary status may not be the most appropriate activity status, even if processed on a non-notified basis. The key reason for this is that restricted discretionary consents can be declined, or granted subject to inconsistent conditions by consent authorities, particularly if the matters of discretion are (as proposed) widely cast. There are also difficulties in a restricted discretionary regime in having regard to and weighing the positive benefits of any application. At least, as proposed, these matters are not reserved as a matter for discretion – essentially, they focus solely on potential adverse effects. This is one reason that a consistent policy framework is important, if certainty and predictability is sought, such as could be provided through an NZCPS/amendment to the 2010 NZCPS.
14. Greater certainty would be provided through a controlled activity regime. This could be modified through regional plans where appropriate, or where other values (eg outstanding landscapes) have been identified and it would be more appropriate to have a discretionary or restricted discretionary status.
15. **Recommendation:** Further consideration be given to the use of a controlled activity status regime, or a revised restricted discretionary framework with narrower matters for discretion and explicit recognition of positive effects.
16. If there are concerns about controlled status in some circumstances (such as where there are competing values, or where the original farm may not have gone through a full RMA process but was transitioned through a marine farming licence) that could be addressed through the application of restricted discretionary or full discretionary status as considered appropriate.

Question 3:

Does the NES need to provide a full rule framework, including discretionary activity rules for those marine farms that cannot meet the requirements to be a restricted discretionary activity?

17. **Submission:** If the objective is to achieve the greatest certainty and consistency, then the RMLA supports provision of a full rule framework in the NES; including the circumstances where there is to be a departure from the 'base' status. The base status is currently proposed to be restricted discretionary.
18. In some areas there is likely to be uncertainty because of how the relevant plan has identified areas as being (eg) outstanding landscapes. For example, in Canterbury, the entire Banks Peninsula has been identified as an outstanding natural landscape. This means all farms in that location will not have the same certainty as others. It may be that the farms do not impact on the relevant values, or that a more up to date mapping exercise could provide greater certainty; but there will be cost and delay and continuing uncertainty in resolving these matters.
19. In addition, in terms of any rule framework that provides for discretionary (including restricted discretionary) activities the relevant objectives and

policies can take on significant importance in how that discretion is to be exercised. That is another reason why an NZCPS (or amendment to the 2010 NZCPS) could be of assistance in reducing uncertainty and increasing consistency and efficiency. Otherwise, there risks being uncertainty and inconsistency in the application and determination of such discretionary consents, depending on the status of the relevant objectives and policies in the regional coastal plans.

20. It may also be appropriate for the NES to regularise the approach to spat catching within the context of marine farming. Some Regional Coastal Plans separately define and treat the two activities, when both have similar effects including occupation of space, the use of structures, etc. The more specific effects (and benefits) considerations can be addressed through a consenting phase.
21. It is also appropriate to ensure that the NES overrides any more stringent rules in a regional coastal plan, unless the contrary is intended for a specific reason.
22. **Recommendation:** The RMLA recommends that a “full” rule framework be adopted. In order to avoid unintended or adverse consequences (both in terms of certainty as well as for the environment) there may need for a greater level of ‘sophistication’ in the rule package, rather than just applying a restricted discretionary and full discretionary regime. Consideration could be given to inclusion of a controlled activity component or option for councils to easily adopt to better reflect their circumstances.
23. Further consideration should also be given to an NZCPS (or amendment to the 2010 NZCPS) to assist in providing a consistent objective and policy framework to inform decision making under any rule regime, particularly a discretionary (including restricted discretionary) one.
24. Clearly provide within the framework for marine farming renewals, spat catching activities (including, if necessary, defining spat and spat catching).

Question 4

Do provisions covering replacement consents for existing marine farms where supplementary feeding occurs require additional terms to define what qualifies to be a restricted discretionary activity?

25. **Submission:** The RMLA supports an effects based approach. It understands that the proposed approach will enable consideration of the effects of supplementary feeding. There does not appear to be an obvious need for additional requirements beyond this.
26. **Recommendation:** No further changes appear necessary.

Question 5:

Do you have any feedback on the analysis of effects contained in Appendix G?

27. **Submission:** The analysis of effects generally appears to address the main adverse effects often associated with aquaculture. While it includes a section on “economic effects” that also touches on social and community benefits, the recognition of positive effects appears disproportionately “light”. Given the driving purpose of the NES is to provide certainty for the industry it may be appropriate to better articulate the benefits of providing that certainty.

28. While the document also has a 'place-holder' in respect of "cultural matters", and while there may be a range of views on this matter, it does not appear to recognise that some iwi and hapu support sustainable marine farming, including from a cultural perspective.
29. **Recommendation:** Consider whether to better articulate the positive economic, social and cultural effects in Appendix G.

Question 6:

Should applications for replacement consents for existing marine farms where supplementary feeding occurs be treated differently under the proposed NES or not addressed at all?

30. **Submission:** Provided that the potential effects of supplementary feeding can be considered in any consent process, unless there is a clear effects basis, it would seem unnecessary to treat replacement consents where supplementary feeding occurs differently; particularly if the 'restricted discretionary /discretionary' regime is to be applied.
31. **Recommendation:** Subject to the above submission, no change is recommended.

Question 7:

Do the provisions covering replacement consents for existing marine farms where supplementary feeding occurs require additional matters of discretion?

32. **Submission:** refer the answer to question 6.
33. **Recommendation:**

Question 8:

Should the extent of an acceptable overlap of existing marine farms with outstanding areas due to margins of error in mapping be defined?

34. **Submission:** For clarity and certainty in approach, any acceptable "overlap" or provision for a margin of error should be clearly identified. Clarification could also assist where some plans identify landward margins only as outstanding, while others also include areas of the coastal marine areas as well. There may be some benefit from providing a consistency in approach through the NES.
35. **Recommendation:** Provide as much certainty as possible so that the interpretation or identification of farms which are to be subject to additional controls because they "overlap" or are within an outstanding area is clear.

Question 9:

Outstanding natural features, outstanding natural landscapes and areas of outstanding natural character have been identified as requiring a specific matter of discretion because of the direction provided by the NZCPS 2010. Are there other areas/values that should also be identified, such as those listed in Policy 11 of the NZCPS 2010?

36. **Submission:** The existence of a notation in the relevant plan of a "King Shag feeding habitat" was a key consideration in the *RJ Davidson* case, in light of Policy

11 of the NZCPS 2010 in particular. This was despite it triggering (only) a discretionary consent requirement, rather than a non-complying requirement.

37. The NES should avoid uncertainty arising from the consideration of other values other than landscape and natural character by being very clear as to how other such values are to be considered or if they are to also trigger a different treatment in approach if present. Greater guidance could be given from a Policy perspective in a NZCPS (or amendment to the 2010 NZCPS).
38. **Recommendation:** Consider ways to make it clear how values other than landscape and natural character are to impact on any consent requirement and/or consideration.

Question 10:

If so, what are these areas/values and what are the potential effects of concern caused by existing marine farms on those areas/values?

39. **Submission:** The RMLA does not take a view on what, if any, other values or effects may require additional consideration, beyond noting the uncertainty that arose in the *R J Davidson* case from the “Kind Shag feeding habitat” notation in the relevant plan.
40. **Recommendation:** see above.

Question 11:

Should the activity status be different for replacement consents for existing marine farms in outstanding natural features, outstanding natural landscapes and areas of outstanding natural character? If so, what should it be?

41. **Submission:** As indicated above, the RMLA sees some merit (to provide greater certainty) in adopting a controlled ‘base’ activity status. In that context, where there are competing other values (eg outstanding landscapes) then restricted discretionary or discretionary status could be the starting point.
42. **Recommendation:**

Question 12:

Are there certain types of aquaculture for which replacement consent applications should be publicly notified?

43. **Submission:** If the intention is to increase certainty, and consistency in approach and administration, then generally providing for replacement consents as non-notified would assist. The “special circumstances” exemption could be retained; it generally appears to present a high threshold that is rarely used, and so would be unlikely to be triggered without good reason.
44. **Recommendation:** Consider whether relying on “special circumstances” would provide opportunity for notification in appropriate cases, if the general position for replacement consent applications is to be non-notification.

Question 13:

Are there advantages or disadvantages to allowing councils to take a more lenient approach that you would like us to be aware of?

45. **Submission:** The RMLA generally supports districts and regions making informed planning decisions that are appropriate to the values and interests of their region, and reflect community wishes through a public and participatory planning process. To that extent, the NES should enable Councils to take a more lenient approach if that better reflects what is appropriate to their local circumstances.
46. **Recommendation:** Consider enabling councils to take a more lenient approach if that is what better reflects what is most appropriate to their circumstances.

Question 14:

Do you agree that the areas zoned specifically for aquaculture in Tasman and Waikato should be exempted from the provisions of the proposed NES relating to replacement consents for existing marine farms?

47. **Submission:** RMLA does not have any specific understanding of the local circumstances, but generally supports maintenance of local decisions where they have been arrived at through a comprehensive and robust process; rather than facing a change in position, uncertainty, and “loss” the local investment of time, effort and resources in resolving a local solution.
48. **Recommendation:** Consider exempting the areas specifically zoned for aquaculture in Tasman and the Waikato based on an evaluation of the recent processes and outcomes for those areas.

Question 15:

49. Do you agree that there are sites that should be recognised in the proposed NES because of their particular importance to aquaculture? If so, what sort of provisions do you think would be appropriate?
50. **Submission:** The reasons as to why a site or sites may be of particular importance are better addressed by others. Accordingly, to the extent not already addressed above (eg in comments about benefits), the RMLA leaves others to comment further on this issue.

Question 16:

Are there other ways in which the proposed NES could usefully recognise council’s future planning processes?

51. **Submission:** The RMLA considers that the NES should provide a framework that set an appropriate national ‘base’ set of rules; but allows appropriate modification through future planning processes. Depending on the base rules established, that might (for example) allow councils to adopt more lenient rules (eg from restricted discretionary to controlled), or, in identified circumstances, allow council to adopt more stringent rules, for example, where sites of particular significance or having other significant values are identified.
52. Greater certainty, and national direction, as to what competing values might need to override (or potentially override) the general certainty being sought through the NES, would be provided through an NPS.
53. **Recommendation:** Refer above.

Questions 17 – 19

[Various questions relating to realignments]

54. **Submission:** The RMLA supports the intention to allow re-alignments, but the extent allowable is more of a technical matter that others will be more qualified to comment on.

Question 21-27

[Various matters including change in structure, categories, etc]

55. **Submission:** These are more technical matters, to the extent not already addressed above, the RMLA remains neutral in respect of them.

56. **Recommendation:**

Question 28:

Do you have any feedback on the scope of matters of discretion?

57. **Submission:** As noted above, the matters for discretion are broadly cast. It is appropriate to ensure that positive benefits in term of economic, social and cultural well-being are able to be considered, in such circumstances. It may also be appropriate to specifically include adaptive management and offsetting in the matters reserved for discretion, so there is clarity that those matters can be taken into account and conditions imposed/offered in respect of such matters where appropriate.

58. The RMLA also queries, based on member feedback, whether matter for discretion 12(b) relating to the “timing” of seasonal activities is appropriate. Those matters are dependent on a range of natural variables, and there is a concern that any operator needs sufficient flexibility to make business decisions as they need to be made in order to take that into account.

59. **Recommendation:** As above.

Question 29:

Should change of species involving finfish require additional matters of discretion?

60. **Submission:** The intended NES proposes to reserve the following matters for discretion in respect of marine farming involving supplementary feeding:

- (a) Management of effects on water quality and benthic values
- (b) Significant adverse effects on reefs and/or biogenic habitat
- (c) Use of antibiotics, therapeutants and antifouling
- (d) Fallowing and rotation
- (e) Underwater lighting
- (f) Any other lighting of structures
- (g) Discharges of odour.

61. This appears to address the potential matters requiring consideration associated with both a change in species to finfish (from non-finish) and from one finfish species to another.
62. **Recommendation:** Retain the currently proposed matters reserved for discretion (or similar) where supplementary feeding is involved.

Question 30:

Outstanding natural features, outstanding natural landscapes and areas of outstanding natural character have been identified as requiring a specific matter of discretion because of the direction provided by the NZCPS 2010. Are there other areas/values that should also be identified?

63. **Submission:** Refer answer to question 9-10.

64. **Recommendation:**

Question 31:

Should the activity status be different for changing species on existing marine farms in outstanding natural features, outstanding natural landscapes and areas of outstanding natural character? If so, what should it be?

65. **Submission:** From a principled, effects based approach, if there is to be a different activity status in respect of the re-consenting of marine farms generally in outstanding 'areas' and that involves a restricted discretionary or discretionary consent status, no further difference in activity status should be required. The matters reserved for discretion include "Effects of the aquaculture activity on the values and characteristics that make the area, feature or landscape outstanding", so the effects arising from the change in species must be considered in that context.
66. **Recommendation:** No additional change in activity status appears necessary (particularly in the absence of national policy direction on the issue, and the fact that some changes in species can reduce rather than increase effects).

Question 32:

Are there certain species or types of species where consent applications should be publicly notified?

67. **Submission:** RMLA considers that this should only be the case if clearly justified on an effects or 'special circumstances' basis.
68. **Recommendation:** refer above.

Questions 33-40

[Questions relating to BioMPs]

69. **Submission:** RMLA generally supports the concept of BioMPs, but considers the details to be technical matters better addressed by other submitters. Based on feedback from members, however, the RMLA notes that:
- (a) It may be appropriate to separate the template / provide different templates for specific types of farming;

- (b) More practical guidance on expectations could usefully be provided (for example as to what is intended by “contingency plans”);
- (c) Further clarification would be useful as to roles in managing biosecurity (in particular information provision, education, and emergency responses).

Question 41:

Have the range of costs and benefits arising from the proposed national environmental standard, and who might bear the costs or receive the benefits, been accurately reflected? Are there any costs and benefits that have been overlooked?

70. **Submission:** Refer the above comments in respect of the appropriate identification of costs and benefits of promulgating a NZCPS (or an amendment to the 2010 NZCPS) together with the NES.

Question 42:

Are the estimates of costs and benefits accurate? Do you have information on costs and benefits that could assist the second stage of our assessment (of the impacts of the final proposal)? Do you have any information on costs and benefits that have not been quantified at this stage?

71. **Submission:** As above.

If there is any further opportunity to do so, the RMLA wishes to be heard in support of this submission.



Signature of Maree Baker-Galloway on behalf of the Resource Management Law Association

Date: 8 August 2017

Address for Service: RMLA, PO Box 89187, Torbay, Auckland 0742

Telephone: 027 272 3960

Email: karol.helmink@rmla.org.nz

Contact Person: Karol Helmink