

16 June 2024

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**Clova Bay Residents Association Inc**  
**Guardians of the Sounds Inc**  
(Together the Associations)

This is a submission by the Associations on the Resource Management (Extended Duration of Coastal Permits for Marine Farms) Amendment Bill.

**Background**

The Associations support environmentally appropriate aquaculture in Marlborough and have a long history and depth of experience and knowledge in Marlborough aquaculture policy and law. We have invested thousands of hours of professional level volunteer time over the last decade toward ensuring that aquaculture in Marlborough is efficient and environmentally appropriate. This has included leading roles in many forums, hearings and cases, including High Court and Court of Appeal cases. More pertinently, we have been working actively with Marlborough District Council (Council) and industry on a statutory review of the relevant Marlborough environment plans as they relate to aquaculture. This has included numerous submission processes and 2 years of work on the Marlborough Aquaculture Rules Working Group (MARWG) – a collaboration of Council, community and industry along with delegates from the Ministry for Primary Industries and the Department of Conservation. The output of the MARWG process included a preliminary identification of areas in Marlborough that might be considered inappropriate for existing aquaculture. Planning provisions recognising areas that are inappropriate for aquaculture have since proceeded through a notification and hearing process. Residual environment court appeals on inappropriate areas for aquaculture are currently in process.

We bring two submission points to the Select Committee.

- A. The first seeks that consent terms not be extended if and to the extent area is operatively determined as inappropriate area for aquaculture through environment court appeals currently in process.
- B. The second seeks that consent terms not be extended for **expired** coastal permits (i.e. where activity is only subsisting through operation of section 165ZH(2)(c)) if the replacement coastal permit application made under section 165ZH is withdrawn or declined.

We wish to be heard by the Select Committee on this submission.

**A. Exclusion of Inappropriate Areas for Aquaculture**

- 1. We submit that the provisions should **not** apply to extend coastal permit terms in areas that are operatively determined as inappropriate for aquaculture as defined

under the Resource Management (National Environmental Standards for Marine Aquaculture) Regulations 2020 (NES MA).

2. Excluding these areas would substantially address weaknesses of the Bill in the promotion of the sustainable management of natural and physical resources, particularly in regions where the process of identifying inappropriate area has already been largely undertaken.
3. The Regulatory Impact Statement (RIS) considers excluding farms wholly within inappropriate areas an option but considers it challenging to implement due to time constraints.
4. NES MA facilitate the streamlined renewal of existing aquaculture resource consents without notification, without regard to cumulative effects and with no ability to adjust area occupied. There is nonetheless a long history of ad-hoc and substandard consenting standards and processes behind the portfolio of existing aquaculture permits in Marlborough.
5. A comprehensive process determining inappropriate areas for aquaculture has been undertaken and almost all of Marlborough's mussel farms have now had appropriate area determined for them under the notification and hearing processes of the proposed Marlborough Environment Plan.
6. There are a handful of areas where status as inappropriate area is now under appeal in the environment court. A small number of these appeals (affecting around 49 mussel farms) are community driven and address important environmental matters, such as navigation safety and ecological carrying capacity. Most seek only an **adjustment** to inappropriate area. These issues are significant but cannot be addressed through resource consent reviews or renewals.
7. A failure to recognise inappropriate area under this Bill would effectively amount to government reneging on government prescribed processes and standards and a snub to public participation in due process. This is all the worse given the lack of need for consent term extension in Marlborough. This given there is no processing bottleneck in Marlborough and that under the NES MA consent renewal demands and costs are limited and consent renewal is virtually guaranteed.
8. We submit that area prescribed as inappropriate area for aquaculture by NES MA must be recognised by the Bill. This might be achieved effectively and efficiently by way of a carve out of the provisions for inappropriate area for aquaculture. We would suggest a carve out along the following lines:
  - Areas that are operatively settled as inappropriate areas are defined as *Operative Inappropriate Areas*.
  - Areas that are under appeal as to whether or not they are 'inappropriate area' are defined as *Appeal Inappropriate Areas*.

- Coastal permits with more than one type of area (i.e. a mix of Operative Inappropriate Area and/or Appeal Inappropriate Area and/or Appropriate Area) are deemed to become **separate coastal permits** for the purposes of the RMA upon the provisions coming into force.
  - Operative Inappropriate Area coastal permits do not qualify for any coastal permit term extension.
  - All other coastal permits do, although the extension for Appeal Inappropriate Area coastal permits could be shorter than 20 years but only if and to the extent a respective area or part area of the coastal permit becomes Operative Inappropriate Area through an existing appeal process.
  - If only a part or parts of an Appeal Inappropriate Area coastal permit become Operative Inappropriate Area the coastal permit is deemed to become **separate coastal permits** for the purposes of the RMA from the point that part of the area became operatively inappropriate area.
9. The result is the consent term extension is **seamlessly applied to all** unexpired coastal permits that are not already wholly and operatively determined as being in inappropriate area. Any shortening of the extended consent term from the default 20 years will only arise **if and to the extent** that areas currently under appeal are ultimately found to be inappropriate areas.
10. We provide indicative amendments to the provisions to effect such a carve out in Appendix 1.

## **B. Expired Coastal Permits Should not be Included**

11. As currently drafted the proposals are restricted to coastal permits for aquaculture activity that are **current** on the day the new subpart comes into force. We support this restriction of the application to only **current coastal permits** when the provisions come into force.
12. We note that under section 165ZH(2)(c) a holder may continue to operate under an **expired** coastal permit until a new coastal permit is granted or declined and all appeals are determined. Whilst this enables a consent holder to continue to operate under the expired coastal permit, it may be argued that this does **not** go so far as to render the expired coastal permit a **current coastal permit**.
13. The section 165ZH(2)(c) right to continue operating under an expired coastal permit is solely a function of, and is wholly contingent upon, a new coastal permit application existing and proceeding. It is not a function of the expired coastal permit itself.
14. As such, our submission is that no change be made to the provisions to facilitate an extension of the term of a **legally expired** coastal permit just because

section 165ZH is enabling the previously consented activity to continue. It is only doing so for the purpose of facilitating the new application. All options considered and reported on by the Regulatory Impact Statement contemplate application of the provisions **only** where a coastal permit expires **after** the date that the proposed subpart comes into force. Applying the provisions to **legally expired** coastal permits would invoke **retrospectivity** and reviving expired coastal permits would also extend beyond the government's coalition agreement to deliver longer durations for marine farm permits.

15. If retrospectivity *was* to be contemplated it would be an abrogation of rights and a breach of natural justice if, in doing so, the provisions did not **also** recognise any subsisting legal rights held by the public to participate in the respective hearing and appeal process to which continuation of the current operations under section 165ZH **solely hinges on**. This would be particularly so where submissions opposing the respective section 165ZH application have been made and a hearing process has commenced through section 100 of the RMA.
16. There are a number of such instances in Marlborough and the hearing and appeal processes for these address important environmental issues such as navigation safety and ecological carrying capacity. Some of these coastal permits **expired as long as 5 years ago**, with the processing of the applications put on hold voluntarily by applicants, seemingly pending the determination of "inappropriate area for aquaculture" by the proposed Marlborough Environment Plan. As noted that process is now complete but for some residual environment court appeals. Enabling a consent term extension to these sometimes **long expired** coastal permits will **abrogate subsisting resource consent hearing and appeal rights** held by the community in relation to these areas and ironically also frustrate the attainment of the sustainable management of natural and physical resources that these applicants have themselves seemingly been waiting for.
17. We provide indicative provisions at **Appendix 2**. These are only relevant if, **contrary to our submission**, the Bill provisions are amended to facilitate consent term extension to **expired** coastal permits.
18. We note that the proposed one-off review of conditions under the Bill is of no consequence to this issue given the public exclusion from that process and because the inability to address consent area or consent term frustrates any ability to address the key issues at stake, such as navigation safety and cumulative effects.

## APPENDIX 1 – Drafted Inappropriate Area Exclusion Provisions

### New definitions:

**“Operative Inappropriate Area”** means any area that is “inappropriate area for existing aquaculture activities” as defined by Regulation 6 of the Resource Management (National Environmental Standards for Marine Aquaculture) Regulations 2020 by operative provisions of a policy statement or plan or proposed policy statement or plan.

**“Operative Inappropriate Area Coastal Permit”** means a coastal permit for Operative Inappropriate Area.

**“Appeal Inappropriate Area”** means any area for which, as at the date these provisions come into force, there is an undetermined appeal on a policy statement or plan or proposed policy statement or plan on whether or not the area is “inappropriate area for existing aquaculture activities” as defined by Regulation 6 of the Resource Management (National Environmental Standards for Marine Aquaculture) Regulations 2020.

**“Appeal Inappropriate Area Coastal Permit”** means a coastal permit for Appeal Inappropriate Area.

**“Operative Appropriate Area”** means any area that is not “inappropriate area for existing aquaculture activities” as defined by Regulation 6 of the Resource Management (National Environmental Standards for Marine Aquaculture) Regulations 2020 by operative provisions of a policy statement or plan or proposed policy statement or plan.

**“Operative Area Coastal Permit”** means a coastal permit for Operative Appropriate Area.

### New Provisions deeming separate coastal permits:

#### 165ZFHBA

- (1) This section applies if, immediately before this subpart comes into force, the area of a coastal permit (the original coastal permit) includes any combination of Operative Inappropriate Area, Appeal Inappropriate Area and Operative Appropriate Area (‘area type’).
- (2) As at the date this subpart comes into force and for the purposes of this Act there shall be deemed to be a separate coastal permit for each area type consented by a coastal permit.
- (3) Each coastal permit shall have, and be deemed to have had, the same consent term and conditions as the original coastal permit had immediately before this subpart comes into force.

- (4) All rights, powers, privileges, liabilities and obligations arising under the original coastal permit become rights, powers, privileges, liabilities and obligations arising under the new coastal permits as if the separate coastal permits had always subsisted.
- (5) Where continuous structure consented by coastal permits deemed to arise under this section extends across deemed coastal permits each coastal permit is deemed to be amended to the extent necessary and as required to practicably effect structural separation between the coastal permits.

#### **165ZFHBB**

- (1) This section applies if a part of the area of an Appeal Inappropriate Area Coastal Permit becomes Operative Appropriate Area.
  - (1) With effect from the date the part area becomes Operative Appropriate Area and for the purposes of this Act there shall be deemed to be a separate coastal permit for the Operative Appropriate Area and the Appeal Inappropriate Area.
  - (2) Each coastal permit shall have and be deemed to have had the same consent term and conditions as the Appeal Inappropriate Area Coastal Permit had immediately before the part area became Operative Appropriate Area.
  - (3) All rights, powers, privileges, liabilities and obligations arising under the Appeal Inappropriate Area Coastal Permit become rights, powers, privileges, liabilities and obligations arising under the new coastal permits as if the separate coastal permits had always subsisted.
  - (4) Where continuous structure consented by coastal permits deemed to arise under this section extends across deemed coastal permits each coastal permit is deemed to be amended to the extent necessary and as required to practicably effect structural separation between the coastal permits.

#### **Amendment to Extension Term for Operative Inappropriate Area Coastal Permits**

Amend section 165ZFHC(1) as follows:

- (1) The expiry date of the coastal permits to which this subpart applies is extended to whichever is the sooner of—
  - (a) the date that is 20 years after the date on which the permit would otherwise expire; and
  - (b) 31 December 2050; and
  - (c) the date that is 2 years after the date that a coastal permit becomes an Operative Inappropriate Area Coastal Permit under this subpart.

## **APPENDIX 2 – Drafted Amendments to the Bill to Recognise Subsisting Hearing and Appeal Rights if Provisions Altered to Extend Terms of Expired Coastal Permits**

**New 165ZFHC(5):** The extension of a coastal permit does not apply if the term of that coastal permit had expired when this subpart comes into force and a new coastal permit applied for under section 165ZH is withdrawn or declined and all appeals are determined.

**New 165ZFHD(5):** This section does not apply if the term of a coastal permit had expired when this subpart comes into force.

### **New 165ZFHEA Consent holder must confirm which permit is operational**

- (1) This section applies if the term of a coastal permit had expired when this subpart comes into force (the original consent) and a new coastal permit applied for under section 165ZH is granted and all appeals are determined (the new consent).
- (2) Not later than 2 months after all appeals are determined the permit holder must confirm with the relevant consent authority whether the holder will operate under the original consent or the new consent.

### **New 165ZFHFA Decision to operate under original coastal permit**

- (1) If the permit holder decides to operate under an original consent under section **165ZFHEA** the holder must surrender the new consent referred to in that section.
- (2) The surrender under subsection (1) takes effect when the permit holder receives a written acknowledgement from the consent authority that it has received notice that the new permit is surrendered.