

Allocating Aquaculture Management Areas

A SECTION 165I REPORT

Purpose

1. The s165I report has been prepared on behalf of the New Zealand King Salmon Company Limited. The purpose of it is to assist the Council in relation to the matters which need to be considered pursuant to s165I of the Resource Management Act 1991. Section 165I has never previously been used. Because there is no case law or precedents for how s165I works in practice, this report attempts to analyse the legislation and guide the decision-making accordingly.

Summary

2. The accompanying plan change request relates to the Marlborough Sounds Resource Management Plan. This private plan change will provide a method for allocating aquaculture management areas (AMA's) included in the Plan as a result of standard private plan changes. The default method of allocating new aquaculture space is by public tender (s165E(1)(a)). The tendering method does not reward the effort of the person who has presented the scientific, technical and professional evidence to the Council to enable that new space to be created through the standard private plan change.
3. Since the Resource Management Amendment Act (No.2) 2004 came into force on 1 January 2005, no one in New Zealand has attempted to obtain new space. The Council does not have the inclination to use alternative methods of obtaining new space: that, in its view, is a role for the private sector through the standard private plan change process. In short, this plan change is necessary for the continued development of aquaculture in Marlborough.
4. It is important to note that this plan change request will have no environmental effects. It is a plan change which solely addresses the question of allocation. What will follow from this plan change is an ordered sequence of applications for new marine farming space. Those applications will need to be accompanied by extensive scientific, technical and professional evidence. The environmental consequences of any new marine farming space will be exhaustively dealt with, first through a fisheries process, secondly through a plan change process to introduce the AMA into the Plan and lastly through a resource consent process for the marine farm itself.
5. The plan change request which accompanies this document contains none of that scientific and technical information because it does not create any new marine farming space. In the words of s5, it provides for management of the development of natural and physical resources. It will enable people and communities to provide for their social, economic and cultural wellbeing. The present default allocation mechanism for AMA's introduced to the Plan through a standard private plan change does none of those things.
6. The plan change for new AMA space and the resource consent processes which must follow are the appropriate stages to assess whether or not the potential of natural and physical resources will be sustained (s5(2)(a)), the life supporting capacity of water and eco-systems will be safeguarded (s5(2)(b)) and the adverse

effects of aquaculture on the environment will be avoided, remedied or mitigated (s5(2)(c)).

7. This document takes the place of a s32 analysis. Section 165I(2) removes the requirement for any such s32 analysis, but replaces it with an alternative test detailed in s165I(1).
8. This report will outline the provisions contained within s165I and then follow the sequence of points to be addressed in that report. It concludes that a mechanism which rewards the effort of the person who has placed the necessary scientific, technical and professional evidence before the Council complies with the requirements of s165I. The remainder of the options fail to meet that test and accordingly should not form part of the plan change.
9. As this is a plan change request, the provisions of s66 need to be considered. Many of the matters listed in s66 are directed towards the assessment of environmental effects. As noted above this plan change will have no environmental effects. However, this report considers the provisions of s66 in turn.

Section 165I analysis

10. Section 165I provides

"165I Duty to adopt most efficient and effective allocation mechanism

- (1) *Before adopting a rule in relation to the method of allocation of space in a coastal marine area, other than as provided for in this Act, a regional council must—*
 - (a) *Have regard to—*
 - (i) *The reasons for and against adopting the proposed method; and*
 - (ii) *The principal alternative means available; and*
 - (b) *Be satisfied that the adoption of the proposed method is—*
 - (i) *Necessary in the circumstances of the region; and*
 - (ii) *The most appropriate for allocation in the circumstances of the region, having regard to its efficiency and effectiveness compared with other methods.*
- (2) *Section 32(1) to (3) does not apply to the adoption of a rule in accordance with subsection (1)."*

11. Subsection (1) applies subject to an Order in Council made under section 165O. There have been no Orders in Council made under s165O and accordingly subsection 3 need not be considered.
12. The key components of s165I are:
 - a. The Council must have regard to the reasons for and against adopting the proposed method
 - b. The Council must have regard to the principal alternative means available
 - c. The Council must be satisfied that the adoption of the proposed method is necessary in the circumstances of the region and
 - d. The Council must be satisfied that the adoption of the proposed method is the most appropriate for allocation in the circumstances of the region, having regard to its efficiency and effectiveness compared with other methods.

Each of these will be addressed in turn:

The reasons for and against adopting the proposed method

13. The economist Michael Copeland has carried out an economic assessment (“the Copeland report”)¹. This assessment addresses the reasons for and against adopting the proposed method. He considers that the proposed method is the most appropriate for allocating new aquaculture space within AMA’s included in the Plan by way of a Standard Private Plan Change.

The principal alternative means available

14. Again the Copeland report in the accompanying report addresses this issue. He analyses all of the principal alternative means and concludes that all of them suffer from difficulties which the proposed alternative does not.

Necessary in the circumstances of the region

15. At first blush, “necessity” seems to be a high test to meet. It is clear that the new allocation mechanism must be more than simply desirable. However, the Resource Management Act comes from the policy perspective that it is enabling communities to provide for their economic well-being. Marine farming is an essential component of Marlborough’s economic well-being. This plan change is necessary in the sense that without it, the Marlborough region will not be able to establish whether additional marine farming will be able to promote the purposes of the Act.
16. The rationale for this high hurdle was that this provision can also be used to remove the priority which incumbents have when it comes to renew their applications (s165ZG(2)). King Salmon is of course not applying to change the allocation mechanism for existing space. However, if it (or anybody else) was attempting to do so, they would also need to meet the test under s165I. For reasons that this report will explain, that is why the word “necessary” is contained within the legislation.
17. Before the legislation went to the Select Committee there was no reference to the proposed method being “necessary in the circumstances of the region”.
18. Because this provision deals with both changing the method of allocation of existing space and changing the allocation method of new space, it has resulted in the insertion of the word “necessary”.² Indeed, during the committee stage of the debate National moved the deletion of the word “necessary” and substituting it with the word “essential”. That motion was denied. However, the whole debate on 14 December 2004 focussed on the protection of the incumbent. It is clear that Parliament thought the legislation it was passing would result in a steady flow of well-planned aquaculture development. The necessity of this plan change does not appear to have been anticipated by any Parliamentarian.
19. There are two schools of thought on the definition of “necessary”. The Court of Appeal held it to mean “*as in many others, necessary is a fairly strong word falling between expedient or desirable on the one hand and essential on the other.*”³ The Environment Court in Marlborough Ridge Limited v Marlborough District Council [1998] NZRMA 73 takes a slightly different approach and suggests that the word “necessary” (in the context of s32(1)(a)) merely means “better”.⁴
20. None of the lines of authority address the conflict. The proposed plan meets either test.
21. The test must be reached “in the circumstances of the region”. With aquaculture being a mainstay of Marlborough economy, the Copeland report concludes that further sustainable development of the industry is necessary for the region. The purpose of the Act supports the opportunity being given to enable an application for new space.

The most appropriate for allocation in the circumstances of the region, having regard to its efficiency and effectiveness compared with other matters

22. Express reference to efficiency and effectiveness compared with other methods is doubtlessly a deliberate reference to the criteria in s32(3)(b).⁵
23. The Environment Court in Marlborough Ridge undertook a detailed analysis of efficiency in the context of the RMA. That case at pages 87-88 identified three dimensions of efficiency:
 - a. Productive efficiency – where the existing, or a higher output of the economy is produced at a lower cost, or where a better quality good is produced at the same or lower cost;
 - b. Allocative efficiency – in which resources are allocated to the production of goods and services that society values the most;
 - c. Dynamic or innovative efficiency – where technological change is encouraged and productivity gains retained rather than frittered away in slackness and ‘rent seeking’ activities.
24. Despite the Resource Management Act being in force for over 16 years there is still doubt over what “efficiency” means⁶. The Environment Court has tentatively proposed that *“generally efficiency is the allocation of (limited) resources to the uses for which society values them most.”*⁷
25. In that context, allowing a situation to arise where someone puts considerable effort into a Standard Private Plan Change process to obtain new marine farming space, only to have that space allocated to another party in a tendering process, is grossly inefficient. By denying people the ability to tender, one is not costing potential unsuccessful tenderers anything. They must simply find some other way of obtaining marine farming space. As no effort is expended by them, they have no loss.
26. While it is difficult to obtain a definition of efficiency, obtaining a definition of effectiveness is even more problematic. Because transaction costs are part of the consideration of efficiency it may well be that something which is efficient is effective as well. There does not appear to be any case law on this issue.
27. The comparison of the various methods is detailed in the Copeland report. He concludes by a fair margin that the proposed allocation mechanism of rewarding effort is the most appropriate for allocation in the circumstances of the region.

Other matters

28. This being an application for a plan change, s66 requires the following matters to be taken into account:
 - a. The purposes and principles of the Act contained in part 2⁸;
 - b. The National Coastal Policy Statement⁹;
 - c. The Regional Policy Statement¹⁰;
 - d. The Crown’s interest in land of the Crown in the coastal marine area¹¹;
 - e. Other matters listed in s66¹².
29. As a general comment however, the Resource Management Act is a piece of legislation designed to manage environmental effects, not allocate resources. It is likely therefore that there will be little relevant material in any of the above documents.

Conclusion

30. The purpose of this plan change is to replace an allocation regime which is not working with an allocation regime which will. In that context it meets the requirements of s165I as well as meeting the other requirements of s66.

¹ "Economic Assessment of Alternative methods of Allocating Aquaculture Management Areas", Michael Copeland, Brown, Copeland & Co Ltd, 19 June 2008.

² The Select Committee report contains the following commentary:

Security of tenure for existing marine farmers

We recommend an amendment to clause 21, inserting section 165(1), to make it clear that the default mechanisms for allocating space are different depending on the type of space being allocated. The default mechanism for existing aquaculture space is that the incumbent user's application is considered first. Applications for other new activities are processed on a first-come first-served basis. The default for new aquaculture space created by councils is tendering.

We also recommend an amendment to section 165(1)(b) to make it clear that although a plan can provide for an allocation mechanism other than the default, this is to be used only in particular circumstances where it is "necessary" to provide for an alternative allocation. The bill as introduced allows for a change of allocation method if "appropriate". The use of the word "necessary", provides a higher threshold test for changing the default allocation method and indicates that a change in allocation method, although possible, should be used sparingly and cautiously.

The amendment to section 165 is intended to alleviate submitters' fear that the bill allows a council to override the provisions for processing reapplications of existing consent holders 6 and to "gazump" the right of an incumbent marine farmer to be considered first when his or her permit reaches the end of its term."

³ This definition on "necessary" was concluded in the context of the Town and Country Planning Act 1977, in the Court of Appeal decision of Environmental Defence Society v Mangonui County Council [1989] 3 NZLR 257, 260. That case has been adopted by the Environment Court in Western Bay of Plenty District Council v Te Whaiti A128/05 and Lytelton Port Company Limited v Canterbury Regional Council C8/2001. The High Court in Fugle LW & Hitchman v Cowie [1998] 1 NZLR 104 held at page 109 – 110

*"Necessary" is a firm term. It does not suffice that action is merely "desirable", or "useful", or even "advisable". It must be as high as "necessary" -a matter "of necessity". The term often is construed as "reasonably necessary"; cp Environmental Defence Society Inc v Mangonui County Council [1989] 3 NZLR 257, 260 per Cooke P citing Carlton & United Breweries Ltd v Minister of Customs [1986] 1 NZLR 423, 430; and Commissioner of Stamp Duties v International Packers Limited and Delsintco Limited [1954] NZLR 25, 54. The qualification "reasonably" explains the otherwise impossible distinction drawn by Cooke P between "necessary" and "essential" I consider the legislature intended this commonplace qualification in present context. There is no reason to believe it envisaged the unreasonable. As Cooke P *ibid* observed, "the test is no light one". The test is objective. Action either is necessary (in the sense of "reasonably necessary") or it is not. That does not depend upon defendant's beliefs."*

⁴ In Marlborough Ridge Limited v Marlborough District Council [1998] NZRMA 73 the Court at 91 stated:

"In our view both the necessity for and the appropriateness of a plan change needs to be weighed against the existing plan (especially when the latter is a transitional plan, because necessity is a relative concept in this situation. A plan change only needs to be preferable in resource management terms to the existing plan to be "necessary" and most appropriate for the purpose of the Act and thus pass the threshold test."

The Court in Suburban Estates Limited v Canterbury Regional Council C217/2001 held at paragraph 276 (citing Marlborough Ridge).

"In this context we hold that "necessary" merely means "better".

This approach has been taken in Sterling Trust v Whakatane District Council W028/2008; Wakatipu Environmental Society Incorporated v Queenstown Lakes District Council C153/2004; Yovich v Whangarei District Council A59/2004; Glendore (NZ) Limited v Christchurch City Council C151/2003; Kamo Veterinary Holdings Limited v Whangarei District Council A161/2003; Progressive Enterprises Limited v Christchurch City Council C98/2003; New Zealand Cashflow Control Limited v Christchurch City Council C60/2003 and Brown v Dunedin City Council C102/2002.

⁵ That section requires:

"(3) an evaluation must examine –

....

whether, having regard to the efficiency and effectiveness, the policies, rules or other methods are the most appropriate for achieving the objectives."

⁶ Long Bay-Okura Great Park Society Incorporated v Auckland Regional Council A078/2008 (16 July 2008) at [285]. At [287] the Court continued

[287] *Mr Bradbourne, the strategic planner called for Landco, admitted directly to the Court that efficiency is a value-laden concept. We agree that values are at the heart of the concept of efficiency. Our understanding is that generally efficiency is the allocation of (limited) resources to the uses for which society values them most. An internationally used economics primer – Microeconomics by Samuelson and Nordhaus – states that:*

Allocative efficiency...occurs when no possible reorganisation of production can make anyone better off without making someone else worse off.

The Court continues at paragraph [289].

[289] *Since section 5(2) is about enabling people and communities to provide for their wellbeing, then on the broad definition above section 5 – expanded on by section 7(d) – is all about efficiency – what we might call ‘environmental efficiency’: Marlborough Ridge Limited v Marlborough District Council. Mr Jarvis, a planner called by the ARC, observed of the regional framework.*

... any assessment concluding that “efficient use” of land is the over-riding policy imperative within the MUL needs to make it clear that efficiency in this context implies a balancing [we prefer ‘weighing’] of all the various objectives and policies; “efficient use” does not imply an emphasis on residential yield; this is but one of the factors to be considered.

Directions as to the most relevant (but not the only) values to be considered are ascribed by Parliament in section 5(2)(a) and (b), and sections 6 and 8 of the Act, and at a regional and local level through the provisions of Policy Statements and Plans.

⁷ *ibid* [287].

⁸ The single purpose of the Resource Management Act contains two broad components: management while addressing certain environmental objectives. The method of allocation of a particular resource does not impact on those environmental objectives. Sustaining natural and physical resources, safeguarding the life supporting capacity of water and eco-systems and avoiding, remedying or mitigating adverse affects on the environment, would all be done as part of the new space plan change applications. This plan change will have no effect on s5(2)(a)-5(2)(c).

The Act requires sustainable management which is in turn defined as use, development and protection. Without this plan change, there is unlikely to be any significant new marine farming development. Such an outcome is not sustainable management because it does not allow for use and development. Additionally, it does not enable people and communities to provide for their social, economic and cultural wellbeing. In short, the present method of allocation is not effective in promoting sustainable development.

The proposed plan change is consistent with s5(2).

The method of allocation impacts on none of the matters of national importance provided for in s6. In terms of the other matters in s7, it does allow for the efficient use and development of natural and physical resource (s7(b)). Arguably rewarding the effort of those persons who provide the scientific, technical and professional expertise to the coastal marine area does promote the ethic of stewardship (s7)(aa).

In terms of the Treaty of Waitangi provided for in s8, a consequence of new farming space is that the Tangata whenua will obtain a share of that space by virtue of the allocation process under the Act (refer s25 Maori Commercial Aquaculture Claims Settlement Act 2004). Economic development for Maori promotes the principles of the Treaty of Waitangi contained in s8.

The plan change promotes the purpose of principles of the Act contained in part 2. The alternatives (such as tendering) do not.

⁹ The New Zealand Coastal Policy Statement (1994) does not contain any provision about allocating space between users of that space with the same environmental impact. The focus of the Policy Statement are those environmental impacts. As this report has noted, these issues will be covered in the plan changes which follow.

¹⁰ The Marlborough Regional Policy Statement does contain policies dealing with the allocation of coastal space (7.2.10) however, those policies only relate to the allocation of space between different classes of users (such as marine farming and recreational boating) rather than the allocation of space within the same class of user such is as in issue here.

There is little in this document which assists.

¹¹ The consequence of this plan change will be to remove any tendering component from the allocation of resources. That is not to say that there will be no economic return to the Crown. There is a possibility of

properly implemented coastal occupancy charges. Perhaps more importantly, the Crown will receive the taxation generated by the employment and income derived from aquaculture management areas.

The default position in the legislation may result in the tendering of space. However, such tendering will only occur if somebody is prepared to fund the necessary research to enable space to be created. The lack of activity on this front throughout New Zealand since 2004 would tend to suggest that no party is prepared, in those circumstances, to undertake that research. The consequence is that the Crown has not in fact derived any benefit from the tendering process.

The Crown is only losing a theoretical right to obtain a share of any tender monies. In return it is gaining the very real possibility of taxation revenue. The Crown is not losing anything in that exchange.

¹² The foregoing analysis has not considered:

- a. Management plans and strategies prepared under other acts;
- b. Relevant entries in the Historic Places Register;
- c. Regulations related to ensuring sustainability, or conservation, management, or sustainability of Fisheries resources;
- d. The Regional Policy Statements and Plans of adjacent Regional Councils;
- e. Planning documents recognised by iwi authority and lodged with Council;
- f. Management Plans for foreshore and seabed reserves.

There are no relevant factors to be drawn from those documents.

ECONOMIC ASSESSMENT OF ALTERNATIVE METHODS OF ALLOCATING

AQUACULTURE MANAGEMENT AREAS

Prepared for New Zealand King Salmon

Mike Copeland

Brown, Copeland & Co Ltd

19 June 2008

1. INTRODUCTION

Background

- 1.1 New Zealand King Salmon wishes to expand its salmon farming operations within the Marlborough Sounds. For it to do so and for the establishment of other new marine farming areas within the Marlborough Sounds the Marlborough Sounds Resource Management Plan must be amended to establish additional Aquaculture Management Areas (AMAs).
- 1.2 Given that the Marlborough District Council does not wish to establish additional AMAs via a Council Initiated Plan Change or a Council Initiated Private Plan Change, additional AMAs must be established via a Private Plan Change. Under this process once the plan change has been approved the allocation of the additional AMA space is by way of tender or by any other method if the revised plan provides for the allocation by another method.
- 1.3 For the Council to adopt a plan change with a rule for the allocation of additional AMA space by a method other than by tender, it must have regard to the reasons for and against the proposed allocation method and the principal alternative means available. Also it must be satisfied that the proposed method is:
 - (a) Necessary in the circumstances of the region; and

- (b) The most appropriate for allocation in the circumstances of the region, having regard to its efficiency and effectiveness compared with other methods.

Objective of Report

- 1.4 Marine farming has brought significant economic benefits to the Marlborough region, and the expansion of current marine farming operations will generate additional economic benefits for the region. However expansion of current marine farming areas is frustrated by the need for investment of resources by a private party pursuing a Private Plan Change and then the risk of no recoupment of, or return on, that investment if, upon the Private Plan Change's acceptance, additional AMAs are simply put out to tender.
- 1.5 The objective of this report is to present the reasons for and against the inclusion of an alternative allocation method within a Private Plan Change, compared to alternative means, such that this risk is eliminated and an incentive remains for private parties to pursue Private Plan Changes to enable consideration of new areas of marine farming within the Marlborough Sounds so as to determine if these existing areas should be expanded.

Report Format

- 1.6 The next section of this report identifies the economic benefits for the Marlborough region from existing marine farming operations. These economic benefits are indicative of the additional economic benefits from future expansion of current marine farming operations.
- 1.7 Section 3 of the report identifies the proposed allocation method for new AMAs facilitated by a private plan change and explains why it is superior to tendering – i.e. the 'default allocation method'.
- 1.8 A number of alternative allocation methods are considered in Section 4 and their shortcomings relative to the proposed allocation mechanism identified.
- 1.9 Section 5 briefly comments on processing costs whilst the report's conclusions are contained in Section 6.

2 REGIONAL ECONOMIC BENEFITS OF MARINE FARMING

- 2.1 New Zealand King Salmon has annual sales of \$60 million, of which around 50% are exported mostly to Japan, but also to South East Asia, the Pacific, USA, the Middle East and Australia. The company has four operational farms in the Marlborough Sounds, 2 hatcheries (one in Golden Bay and one in Canterbury) and four processing factories each in Nelson. It employs 350 persons full time with 70 of its staff living in the Marlborough region earning an estimated \$3.2 million per annum in wages and salaries (based on a 2005 estimate for average earnings of \$41,662 per annum). The King Salmon shore-based facilities are in Picton and include a diving team, engineering support, a net making team, specialist data gathering and analysis staff and research and development staff.¹
- 2.2 In addition to these direct employment and income impacts as a consequence of the company's operations in Marlborough there are indirect (or multiplier) benefits resulting from
- The effects on suppliers of goods and services to the company's operations from within the region (i.e. the "forward and backward linkage" effects); and
 - The supply of goods and services to employees of the company and to those engaged in supplying goods and services to the company's operations (i.e. the "induced" effects).
- 2.3 The company's products are an important part of the 'local produce' that is sold from retail outlets and winery and other restaurants in the region and therefore salmon farming complements the region's wine and tourism industries.
- 2.4 These various economic impacts in relation to New Zealand King Salmon's activities within the Marlborough region are indicative of the increased levels of economic activity for the Marlborough region from the granting of additional AMAs – both during the construction phase of new marine farming areas and once these new areas are operational.
- 2.5 Increases in levels of economic activity from higher employment, incomes and expenditure are not in themselves measures of increases in community economic wellbeing and economic efficiency. However governments (national, regional and

¹ Data and information in this paragraph provided by New Zealand King Salmon.

district) seek to attract and retain businesses and events to enhance, or maintain, levels of economic activity because of one or more of the following:

- Increased economies of scale. Businesses and public sector agencies are able to provide increased amounts of outputs with lower unit costs, hence increasing profitability or lowering prices;
- Increased competition. Increases in the demand for goods and services allows a greater number of providers of goods and services to enter markets and there are efficiency benefits from increased levels of competition;
- Reduced unemployment and underemployment² of resources. To the extent resources (including labour) would be otherwise unemployed or underemployed, increases in economic activity can bring efficiency benefits when there is a reduction in unemployment and underemployment; and
- Increased quality of central government provided services. Sometimes the quality of services provided by central government such as education and health care are a function of population levels and the quality of such services in a community can be increased if increased economic activity maintains or enhances population levels.

2.5 Therefore expansion of the marine farming industry within the Marlborough Sounds will not only lead to increased levels of economic activity within the region, but also increase the efficiency with which resources are used within the region and increase the region's economic wellbeing.

2.6 The marine farming industry is also important to the local Marlborough economy in that it adds diversity. This helps to underpin the resilience of the local economy, especially at times when adverse weather conditions (e.g. drought, frost, hail storms and flooding) negatively impact on the land based agriculture and horticulture sectors.

2.7 At the national level increased marine farming activity will generally lead to increased central government revenues since the associated direct and indirect increases in economic activity will result in increases in income tax, company tax

² Underemployment differs from unemployment in that resources are employed but not at their maximum worth; e.g. in the case of labour, it can be employed at a higher skill and/or productivity level, reflected in higher wage rates.

and withholding taxes on returns to capital remitted abroad. To the extent such increases in central government revenues result in increases in the provision of central government provided services and/or reductions in taxation which beneficial impact on Marlborough residents and businesses there are additional regional economic benefits from expanded marine farm operations.

[This section could be strengthened with other material on the economic benefits expected of additional areas of salmon farming in the Marlborough Sounds. (There was reference at our meeting to a paper from the national body?) We could add more specific information about expenditures in Marlborough, employees and wages and salaries for firstly the construction and secondly the operation of new marine farm areas. It could also be broadened to include benefits of other types of marine farming if the application for the allocation rule is made on behalf of the broader industry.]

3. PROPOSED METHOD OF ALLOCATING ADDITIONAL AMA SPACE

Allocation Method

- 3.1 The proposed method of allocating additional AMA space is to allocate it to the Private Plan Change applicant seeking the approval of the relevant AMA. If more than one AMA Private Plan Change is considered by the Council at the same time, seeking an approved AMA over the same area of water space, then allocation would be made to the AMA Private Plan Change applicant whose Plan Change was the first “accepted” for processing by the Council for that particular area of water space.
- 3.2 If the Council (or Environment Court) approves an AMA water space in substitution for an AMA put forward by a Private Plan Change applicant, then the original Private Plan Change applicant would be allocated the AMA water space (irrespective of the size of the water space involved). If the Council (or Environment Court) approves an AMA water space which did not relate to any Private Plan Change application, then any of the alternative methods considered in the next section could be used, with tendering as the default process.
- 3.3 The Council could also set minimum requirements for “receiving” or “accepting” the authorisation, in addition to the above process – i.e. provided that the minimum requirements are met, once the AMA water space is approved the allocation would be made to the first “accepted” AMA Private Plan Change applicant for that area of water space. Minimum requirements would need to be specific and measurable and could relate to matters such as:

- Price offered per hectare – i.e. rather than a tender system there would be a fixed price per hectare set by the Council to cover direct Council and other government costs and publically known by potential applicants;
- Technical and industry expertise;
- Track record (locally?) – both business record and environmental record;
- Resources and demonstrated capability to develop the site;
- Financial viability;
- Commitment to industry best practice.

[More work required here to define these criteria with more objective rather than subjective measures]

3.4 The approval could be granted subject to lapsing provisions so that applications for an AMA for that water space could be made by other parties if development of the site had not commenced or been completed within a specified time period. This would prevent the practice of speculative investment in AMA allocations, with delays in actual additions to areas of marine farming and the associated economic benefits for the region.

3.5 However any such lapsing provisions should be sufficient flexibility to allow an applicant to seek sufficient new space to cover expected requirements for a number of years within a single private plan change application. Given the costs of the Private Plan Change application process, it would be inefficient to require separate Plan Change applications for each individual investment in establishing new marine farming areas. Once an AMA is established the applicant may initially put the space into mussels until it was ready to develop it for salmon farming.

Justification for Proposed Allocation Method Compared to Tendering

3.6 As already stated, relying on a tendering process to allocate additional AMAs is flawed because of the considerable investment required by private parties to take part in the Private Plan Change process and the high risks that with tendering there

would be no return for this investment. Compared to the tendering process, the proposed allocation method is:

- Necessary – the proposed allocation mechanism will encourage private sector interests to take part in the Private Plan Change process to enable consideration through the site specific Plan Change process of additional AMAs in terms of the RMA requirements. With tendering the risks of no recoupment and return on investment are too great for private sector interests to take part in the process. There will, therefore, be no opportunity for the wider consideration of appropriate sites necessary to secure additional AMAs. Additional AMAs are necessary in terms of providing additional economic growth opportunities for the Marlborough District economy;
- Efficient – the proposed allocation mechanism will allow additional economic benefits for the Marlborough region to be secured by enabling the potential for the marine farming industry to grow. Such benefits will be achieved at very limited economic cost to the Marlborough community (i.e. just the costs for the Council to process the application, a significant proportion of which will be recovered from the applicant). For the applicant it must be presumed that the expected net financial benefits from expanding its marine farming operation exceed the costs of seeking approval for the additional AMA, or else it would not embark on the process. Therefore for both the applicant and the community in general the economic benefits are expected to exceed the economic costs – i.e. the process is efficient.³ On the other hand allocation by tender is not efficient since no investment will be made in the Private Plan Change process and no benefits would be able to be achieved for the wider community;
- Effective – the proposed allocation mechanism is effective in incentivizing private sector interests to seek additional AMAs and therefore securing additional economic benefits for themselves and the wider community. Tendering is not effective because the high risks of

³ No cognizance is taken here of non-economic effects such as environmental, cultural and social effects. However the proposed allocation method does nothing to remove the opportunity for such effects to be considered within the process, just as these same opportunities would exist with tendering or any other alternative AMA allocation method considered in this report.

zero recoupment and return discourage private sector interests from taking part in the process of considering and securing additional AMAs.

- 3.7 In addition the preferred allocation mechanism could possibly be made more efficient and effective by having a number of minimum requirements for applicants. These could include a price per hectare set to recover the costs for the Council and the Ministry of Conservation “for achieving the purpose of the Act”⁴ and various other thresholds to ensure the capability and intention of applicants to develop and operate additional marine farming areas in a timely manner. For example one of the criteria may be a requirement for any approved AMA to be developed within a fixed time period to prevent sites being secured from competitors but the community-wide economic benefits from increased marine farming activities not being realised for a considerable period of time. Again it may be acceptable for an applicant to firstly use some of a new AMA for mussels initially before developing it for salmon farming.
- 3.8 A tender process could be varied to incorporate more than just a price component.⁵ However even if this gave weight to “industry credibility” factors it still does not prevent an investor in a Private Plan Change application being trumped by a bidder with the necessary industry credentials able to “free load” on the Private Plan Change applicant’s investment. Therefore even with these minimum requirement conditions built into the tender process there remains too great a risk that with a tender allocation method, investment in the Private Plan Change process cannot be recouped, let alone a satisfactory rate of return on investment earned.
- 3.9 The lost revenue for the Marlborough District Council (and the Ministry of Conservation) from not allowing competitive bidding in a tender may appear to be a cost of the preferred allocation method. However the potential for such windfall gains to the Council (and therefore the wider community) are illusionary in that unless the Private Plan Change process is undertaken there will be no opportunity for a tender round. The process will not be started unless there is sufficient incentive for marine farming interests to be involved in the Private Plan Change process and this requires an opportunity for the investment required for the process to be recouped with a satisfactory rate of return.

⁴ To charge more than is required for this purpose would be inefficient, since it would constitute an additional tax on economic activity.

⁵ I.e. just as with contracts for services, Councils (and other customers) frequently consider factors other than price when selecting a preferred provider.

4 ALTERNATIVE ALLOCATION METHODS

Ballot

- 4.1 A ballot suffers from the same defects as a tender. There would be no incentive for private sector interests to invest in the Private Plan Change process if it is only by chance that there will be an opportunity to recoup that investment together with a satisfactory rate of return. As with tendering, a ballot would be less efficient and less effective than the preferred allocation mechanism.

Maximum Council Discretion

- 4.2 Instead of a pure tender system or a ballot, the Council could instead allocate new AMAs approved via a Private Plan Change according to a set of criteria in which price tendered per hectare may or not be included as one of the criteria. If the price tendered per hectare was excluded or at least given only limited weight, it could be argued that a well-resourced industry incumbent may be sufficiently confident of its own track record and performance capabilities to risk investing in the Private Plan Change process with no guarantee that should it be successful in establishing new AMAs it will have the opportunity to use the additional AMAs. It would do so if it believed that the likelihood of success in being allocated the new AMA(s) is sufficiently high.
- 4.3 However this approach suffers from the introduction of subjectivity – it essentially requires the Council to “pick a winner” from among competing applications rather than assessing whether a single specific application is appropriate in terms of the requirements of the RMA. Also the still considerable risks of failing to secure access to any new AMAs may still be too high to encourage participation in the Private Plan Change process. There is nothing to stop a well-resourced industry player who has not been party to the Private Plan Change application submitting a competitive bid by virtue of their resources, capabilities and experience and being preferred to a party which did invest in the Private Plan Change process. So long as this chance exists, there is a significant disincentive for any party to invest in the Private Plan Change process and as a consequence the economic benefits from expanding marine farming within Marlborough Sounds will not materialise.

Occupiers of Existing Water Space

- 4.4 Under this alternative first priority of an authorisation within an approved AMA goes to the existing legal occupier of the immediately adjoining water space. There

would need to be spatial limits to the extent of this priority (e.g. for 200 metres adjoining each side of existing legally occupied space) and a process for sharing new AMA space between two existing legally occupied areas of water space.

- 4.5 In reality this approach is a variant of the proposed allocation method in that for adjoining water space it is only the existing occupier who would be incentivised to seek a Private Plan Change for the space to become an AMA. In this sense it is also rewarding effort by the AMA Private Plan Change proposer. ***[Sarah suggests NZKS may not agree with this paragraph – Mark and Stewart to comment?]***
- 4.6 This approach would need to be combined with the preferred allocation method for ‘blue-water’⁶ space.

5 PROCESSING COSTS

- 5.1 Part of an assessment of efficiency and (cost) effectiveness involves a comparison of the process costs for the Marlborough District Council, the applicants and other submitters under each of the alternatives. There is nothing to suggest that there is a discernable difference between these costs for each of the options other than the obvious point that unless the process is initiated there will be no processing costs. On the presumption that the economic benefits for the applicant and the wider community from additional marine farming are positive and outweigh the costs of processing the Private Plan Change and the authorisation application, the preferred allocation method is an efficient and (cost) effective use of the resources required.

6 CONCLUSIONS

- 6.1 There are significant economic benefits for the Marlborough region from an expansion of the areas of marine farming in the Marlborough Sounds.
- 6.2 The proposed method for allocating additional AMAs established via a Private Plan Change is to allocate the additional AMA space to the Private Plan Change applicant seeking the approval of the relevant AMA. This proposed allocation method is necessary to provide sufficient incentive for private sector interests to take part in the Private Plan Change process. It is efficient and effective because it will lead to appropriate RMA consideration of areas for the expansion of marine farming within

⁶ I.e. that space not adjacent to existing AMAs.

the Marlborough Sounds and the potential to realise the associated economic benefits for the region.

- 6.3 Other allocation methods (including tendering, balloting and Council discretionary approaches) provide insufficient incentive for the private sector to invest in the Private Plan Change process and therefore will not result in potential expansion of marine farming areas and the associated regional economic benefits.