



# edotasmania

using the law to protect the natural and built environment

131 Macquarie Street  
Hobart TAS 7000

tel: (03) 6223 2770  
email: [edotas@edotas.org.au](mailto:edotas@edotas.org.au)

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Environment Protection Authority  
GPO Box 44  
Hobart TAS 7001

By email: [epaenquiries@environment.tas.gov.au](mailto:epaenquiries@environment.tas.gov.au)

Dear Madam / Sir,

## Draft Finfish Farming Environmental Regulation Bill 2017

EDO Tasmania is a non-profit, community legal service specialising in environmental and planning law. We have a long-standing interest in the assessment and regulation of aquaculture and welcome the opportunity to comment on the draft Finfish Farming Environmental Regulation Bill 2017 (*the Bill*).

Recent marine developments on both the East and West Coast of Tasmania have raised serious concerns about the transparency of Tasmania's marine farming planning and assessment processes, the lack of integration with other Resource Management and Planning System processes,<sup>1</sup> and the rigour of, and responsibility for, environmental compliance and enforcement. In response to growing community concern, the government announced reforms to this system to improve "the transparency and accountability of regulatory functions".<sup>2</sup>

The steps the government is taking to separate the functions of the promotion of the industry from its regulation and strengthen environmental controls for finfish farm operators through new environmental licences are to be applauded. While we generally support the amendments proposed in the Bill as an interim measure, we consider that a more comprehensive review of the regime is warranted to ensure that marine farming is fully integrated into Resource Management and Planning System in Tasmania.

Our comments on the detail of the proposed amendments to the *Environmental Management and Pollution Control Act 1994 (EMPCA)*, *Living Marine Resources Management Act 1995 (LMRMA)* and the *Marine Farming Planning Act 1995 (MFPA)* are set out below.

### Environmental licences

Subject to the following comments, EDO Tasmania is generally supportive of the proposal to regulate finfish farms as level 2 activities and require that all finfish farms to hold an environmental licence issued under EMPCA.

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<sup>1</sup> For example, to facilitate the Okehampton Bay finfish farm, separate applications were required for the onshore facility development permit and rezoning, the freshwater pipeline development permits, the water licence, the dam permit and marine farming sub-lease and licence. Referral was also made to the Commonwealth Minister for Environment and Energy under the EPBC Act.

<sup>2</sup> "Salmon Industry FAQ" on the DPIPWE website <http://dpiipwe.tas.gov.au/sea-fishing-aquaculture/marine-farming-aquaculture/changes-to-salmon-industry-regulation/salmon-industry-changes-faqs> accessed on 27 July 2017.

## Assessment of new finfish farms

Different assessment processes are proposed for the granting of environmental licences for new finfish farms depending on the type of finfish activity being undertaken.

While we are supportive of applications for new finfish farm operations in inland waters involving mandatory referral to the EPA Board for assessment in accordance with the ordinary process under EMPCA, it is unclear why the Bill proposes to give the EPA Director the discretion not to refer applications for new finfish farms in State waters to the EPA Board for assessment.

We understand that the intent of providing this discretion to the EPA Director is to avoid new farms for which an environmental impact statement has been prepared and assessed by the Marine Farming Planning Review Panel (**the Panel**) under the process set out in the MFPA being subjected to further round of detailed assessment under EMPCA. However, as currently drafted, the Bill provides no criteria against which the EPA Director is to decide which projects are to be referred to the EPA Board for assessment or which projects will be subjected solely to the EPA Director's assessment. The criteria in Schedule 5 of EMPCA will guide decision in relation to assessment classification by the Board, but does not appear to guide the decision about *whether* an application is referred to the Board under s.42I(2).

The EPA Director's decision on whether to refer a proposal to the EPA Board is significant as the public will have no rights to make representations or appeal environmental licences issued for finfish farms assessed by the EPA Director alone.

In order to improve the efficiency, consistency, and transparency of finfish farm assessments, we suggest the Bill be amended so that:

- all applications for environmental licences for new finfish farms are referred to the EPA Board for assessment, irrespective of whether they are land-based or marine;
- new marine finfish farms are assessed by the EPA Board (as per the usual process provided in EMPCA for level 2 activities) concurrently with any Panel assessment under the provisions of MFPA;
- if the EPA Board considers that an environmental licence should not be issued for the finfish farm, it should have the power to direct the refusal of a new Marine Farming Development Plan (**MFD Plan**) or amendment to a MFD Plan (in much the same way as the EPA Board may direct a planning authority to refuse to grant development permit for any other level 2 activity).

Such an integrated assessment would achieve an additional streamlining of the environmental approval processes, as only minor amendments would be required to the *Environment Protection and Biodiversity Conservation Act 1999* bilateral assessment agreement with the Commonwealth in order to cover assessments by the EPA Board for finfish farms.

Alternatively, if there must be a distinction between assessment processes for new marine finfish farms, we suggest that clear criteria be inserted into the Bill to outline how the EPA Director is to decide the limited circumstances where an EPA Board referral is unnecessary.

## Criteria for decisions to grant environmental licences

The Bill and the current provisions of EMPCA provide that the EPA Director and Board may grant an environmental licence only if they are "satisfied that it is appropriate to do so". While the EPA Board must assess an application in accordance with the Environmental Impact Assessment Principles outlined in section 74 of EMPCA, these Principles do not provide clear criteria against which projects should be assessed.

To ensure consistency and transparency of decision-making for all level 2 activities, any decision to grant or amend an environmental licence or environment protection notice under EMPCA should not only be required to further the objectives of the Resource Management and Planning System in Tasmania, but also be required to consider prescribed assessment criteria such as:

- whether the activity complies with any applicable Environment Protection Policies or State Policies;

- any relevant environmental impact study, assessment or report;
- the pollution or impact caused or likely to be caused by carrying out the activity;
- all viable alternatives to the activity;
- whether the likely impact of the activity on the character, resilience and values of the receiving environment is acceptable;
- all submissions made by the applicant and any representors;
- whether the activity accords with best practice environmental management for the proposed activities; and
- the public interest.

Historically, “adaptive management” has been used by the Panel to overcome deficiencies in baseline assessments for proposed finfish farms (including regarding potential impacts of farms on critically endangered species). The current situation in Macquarie Harbour, where dangerously low benthic dissolved oxygen levels resulting from salmon farming may be having a significant impact on the endangered Maugean Skate, suggests that such an approach is not always satisfactory for the environment or the industry.

To prevent a repeat of such a situation, we recommend that the EPA publish strict guidelines outlining how adaptive management will be considered in the environmental licence assessment process and applied in practice. At a minimum, the guidelines should provide that:

- adaptive management should not be used to compensate for a lack of baseline data, or where a proposed finfish farming activity has the potential to cause serious or irreversible damage to the environment;
- adaptive management may only be appropriate and effective where identification and monitoring of key environmental indicators occurs; explicit thresholds for management responses are set; and once thresholds are triggered, consistent actions are taken to enforce appropriate management responses.

### ***Process for variations to environmental licences***

The Bill provides that, if requested by a finfish operator, the EPA Director may agree to vary the environmental licence, refuse to vary the environmental licence, or refer the application to the Board for assessment. Referral of such applications to the EPA Board is only mandated where:

- the proposed change is not associated with an application for a variation to a MFD Plan to be assessed by the Panel; and
- EPA Director is satisfied that the proposed variation to the environmental licence is a major variation (for example, where the variation will significantly increase the environmental impacts).

The Bill also proposes to give the EPA Director broad power to amend environmental licences for finfish farms at the Director’s initiative if he or she is “satisfied that it is appropriate to do so”, even where the application for an environmental licence was originally assessed by the EPA Board.

We suggest that the Bill be changed so that:

- the EPA Director only has to power to vary an environmental licence where the Director is satisfied that the proposed amendment is not a major variation;
- any decision to vary an environmental licence takes into account the prescribed assessment criteria we have suggested above; and
- where the Director approves a variation on the basis that it is a “minor” variation, any person who made a representation in relation to the original environmental licence should be notified (as for modifications of planning permits under LUPAA).

## **Expiry date for environmental licences for new finfish farms**

The Bill provides the EPA Director and the Board discretion to impose an expiry date on environmental licences for new finfish farms, however they are under no obligation to ensure that it matches either the marine farming lease or licence expiry dates. Under the MFPA, MFD Plans are to be reviewed every 10 years to ensure “the objectives of resource management, having regard to any relevant changing circumstances, are achieved to the maximum extent possible”. Further, under section 65 of the MFPA, a lease may only be granted for a period not exceeding 30 years, and section 80 of the LMRMA states that a marine farming licence may only be granted for a period not exceeding 10 years.

In order to maintain consistency, we suggest that the proposed sections 42J(6) and 42K(8) of EMPCA be changed so that an environmental licence may only be granted for a period not exceeding 10 years or the period of the marine farming licence issued under the LMRMA (whichever is shorter). Such an expiry date would ensure that salmon farm operators factor rehabilitation and remediation into their plans of operations for the farms.

## **Conditions of environmental licences**

The Bill provides the EPA Director with discretion to impose conditions on environmental licences (providing they are not inconsistent with any existing LMRMA licence conditions). The Bill also provides that any conditions imposed on an environmental licence override management controls or conditions of MFD Plans to the extent of any inconsistency. Given the management controls in MFD Plans are the minimum standards that the Panel sets to ensure the management and mitigation of the negative impacts of the MFD Plan, we suggest that the proposed section 42Z(5) be amended as follows:

- (a) A condition or restriction imposed on an environmental licence in relation to an activity may only be inconsistent with –

  - (i) the conditions and restrictions, if any, included in a marine farming development plan that applies in relation to the activity under the Marine Farming Planning Act 1995; or
  - (ii) a management control, if any, included in a marine farming development plan that applies in relation to the activity under the Marine Farming Planning Act 1995 –

to the extent that it strengthens the management of the activity or improves the mitigation of the negative impacts of the activity.
- (b) Where a condition has been imposed on an environmental licence in accordance with subsection (a), the condition or restriction, or management control, included in the marine farming development plan is of no effect to the extent of the inconsistency.

## **Compliance and enforcement**

### **Maximum penalties**

We support the proposed maximum penalties for the offences of failing to hold an environmental licence or contravention of a condition of an environmental licence being equal to the penalties relating to breaches of marine farming licence conditions under the LMRMA.

We consider that in order to provide a clear deterrent, the penalties for non-compliance with marine farming laws must exceed the likely profits that can be made by the marine farming operators arising from the non-compliances. For this reason, EDO Tasmania also strongly supports the introduction of “special penalties” that may be imposed by Courts upon conviction of an operator that may take account of such profits. EDO Tasmania looks forward to the release of regulations prescribing the method for the calculation of the “special penalties”.

Currently, EMPCA distinguishes between the penalties for individuals and penalties for corporate office-holders for offences. While corporate office-holders may be prosecuted for offences committed by the corporation and be exposed to the maximum fine for individuals for the offence, they cannot be imprisoned for the offence. As the vast majority of environmental licence holders will be bodies corporate acting through their employees, we suggest that sections 58 and 60 of EMPCA be amended so that it is clarified that a person who is an officer of the body corporate is liable to

the same punishment as an individual, including where the punishment may include imprisonment. Such an approach would be consistent with the corporate liability provisions in the LMRMA.

We understand that since the EPA Division has held delegated responsibility for the regulation of finfish farming, no prosecutions have been commenced or fines issued for breaches of any of the 45 marine farming licences issued under the LMRMA, notwithstanding that there were apparently numerous contraventions of marine farming licences for finfish farms in Macquarie Harbour. EDO Tasmania notes that stronger penalties will not provide a deterrent when there is limited risk of enforcement. We therefore urge the government to commit adequate resources to the EPA's investigation and enforcement activities.

## Civil enforcement

EDO Tasmania welcomes the opportunity for third parties to commence civil enforcement proceedings under EMPCA where a finfish farm operator is causing environmental harm or not complying with EL conditions. However, we note that such proceedings may be seriously hampered without access to relevant environmental monitoring data required under the environmental licence. We therefore suggest that the EPA explore moving towards an online environmental monitoring and reporting system similar to that already developed by Sense-T for Macquarie Harbour. Even if it is not practical to publish this information in real-time, such a system may reduce the burden on EPA staff responding to information requests under the *Right to Information Act 2009*. Increasing access to environmental monitoring data and transparency around government responses to non-compliances is also likely to have the effect of encouraging better environmental performance of finfish farms.

## Other comments

### *The Marine Farming Planning Review Panel*

Currently, the Panel is dominated by members who represent the marine farming or fishing industries. The Bill proposes to amend the MFPA to remove the EPA Director as a member of the Panel and replace him with a person "with ability and experience in environmental management". While we support such a change, in order to improve community confidence in the Panel, we also suggest that section 8 of the MFPA be amended to allow for the appointment to the Panel of a person to represent the interests of the community.

The Bill also proposes changes that will require that the Panel to:

- consult the EPA Director on draft MFD Plans, and ensure any environmental management issues specified by the Director are addressed in environmental impact statements and considered by the Panel; and
- notify the EPA Director before approving an amendment to MFD Plans or issuing any emergency orders or emergency plans for finfish farms.

We note that while such provisions will ensure that the EPA Director may provide input into the Panel's decision-making, ultimately the Panel is not bound by the EPA Director's views and the Minister's decision on proposed amendments to MFD Plans is not constrained by the recommendations of the Panel. In our view, this does not accord with the government's stated objectives of enhancing assessment processes for finfish farming and supporting community and market confidence and expectations. To better achieve these objectives, we suggest amendments be made to the MFPA to ensure that where the Panel recommends the rejection of an amendment to an MFD Plan, the Minister may not otherwise approve it.

## Exclusion zones

EDO Tasmania supports the introduction of the power for the Governor to proclaim finfish farming exclusion zones in State waters. While the Bill does not provide any framework around the identification of exclusion zones, we understand that it is the government's intention that the Sustainable Growth Plan for the Tasmanian salmon industry will identify areas that are suitable and unsuitable for marine finfish farming.

We encourage the government to consult widely with the community, industry, local governments, and throughout relevant government departments before finalising the Sustainable Growth Plan. The Minister should also consider directing the Panel to review all current MFD Plans to determine whether they allow finfish farming in areas where it is unlikely to be sustainable in the future (taking into account such issues as climate and land use changes).

The Sustainable Growth Plan should make provision for the transition of finfish farming from those areas where it will be unsuitable in the future, and where appropriate, empower DPIPW and the EPA to refuse applications for renewals of leases and licences for these areas.

We also suggest that the Bill should provide that the EPA Director, Board and the Panel must have regard to the Sustainable Growth Plan when making statutory decisions in relation to both existing and proposed finfish farms.

Thank you for the opportunity to make these comments. Please do not hesitate to contact me if you would like to discuss any issues raised in this submission.

Yours sincerely

**EDO Tasmania**

A handwritten signature in blue ink, appearing to read 'Claire Bookless', written in a cursive style.

Claire Bookless  
Lawyer