

# Submission to the Review of the Marine Farming Planning Act 1995

Issues Paper PART A – Policy Review

Prepared by the Environmental Defenders Office, Tasmania.

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## 1.0 Introduction

In our view the current planning process for the marine farming industry is deficient in a number of key areas. These deficiencies have been identified within the Review as issues relating to third-party appeal rights and a lack of planning integration between land and marine based activities, and also include issues related to the formulation of Marine Farming Development Plans.

These deficiencies could be removed via the incorporation of marine farming activities within the Resource Management and Planning System (RMPS), specifically the Land Use Planning and Approvals Act (LUPAA); the joint assessment of individual marine farm applications by local councils and the Marine Farming Review Panel; and changes to the process of development of Marine Farming Development Plans. These changes would have a number of advantages, including:

Providing greater scope for community involvement in the assessment of marine farm applications. The assessment of all activities associated with marine farming within the one assessment process (assuming that land-based activities are formally brought within the provisions of LUPAA).

Third-party appeal rights, heard and determined by an independent body; and  
Achieving the sustainable development of marine resources at a social, environmental and economic level.

Our submissions are based upon two major and increasingly dominant international and national trends in decision-making. The first is the trend toward greater community participation in decision-making, including in the policy, planning and management stages. The importance of community involvement is recognised in myriad of international, national and state environmental agreements and policies, including, for example, Agenda 21 of the Rio Earth Summit and the National Strategy for the Conservation of Australia's Biodiversity and as an identified principle of resource use and development underpinning Tasmania's RMPS (DPIWE 1999).

The second is the growing importance and recognition of the precautionary principle in decision-making. This principle states that uncertainty regarding the effects of a particular action or activity should act as a constraint against the action or activity in order to avoid potential environmental harm. The precautionary principle is widely recognised internationally and nationally as a key factor in achieving ecologically sustainable development and as a key component of successful environmental management and planning.

## 1.2 Background

The Resource Management and Planning System (RMPS) of Tasmania was introduced as an integrated approach to land use planning and development in Tasmania, including the use and development of natural resources. The RMPS is underpinned by a set of sustainable development objectives that set the context for land-use planning and development. These objectives include, inter alia:

To promote the sustainable development of natural and physical resources;

To encourage public involvement in resource management and planning; and  
To promote the sharing of responsibility for resource management and planning between the government, community and industry.

Importantly, the objectives emphasise community involvement in land-use planning and development at various levels, including at a policy, planning, and enforcement level.

### 1.3 The precautionary principle and the marine farming process

The precautionary principle applies when a lack of information or poor understanding of a process, leads to uncertainty as to the consequences of a particular action. This principle has gained international and national recognition in, for example, the National Strategy for Ecologically Sustainable Development. It is part of Tasmania's State Policies, eg. the State Policy on Water Quality Management. The Precautionary Principle should be similarly applied within Tasmania's marine farming industry.

Whilst the economic benefits of the marine farming industry to Tasmania are well known and widely promoted, the ecological impacts of marine farming are poorly understood. In particular, there is conflicting scientific evidence regarding the effects of marine farming on river, estuary and ocean ecosystems. This gap in knowledge is relevant at a number of levels, including the ecological impacts of individual species on the marine environment, the consequences of farming a number of different species within one contained area, and the influence of local conditions on ecological outcomes.

The lack of scientific certainty as to the ecological effects of marine farming should be compensated for by a rigorous Environmental Impact Assessment process as per sections 73 and 74 of the Environmental Management and Pollution Control Act 1994 (EMPCA), and a consultation process, allowing the presentation of all evidence for and against a proposal, and the independent assessment of this evidence.

The current system creation of Marine Farming Development Plans (MFDP's) allows for public representations in relation to a MFDP, including ecological evidence to support or reject the proposal.

### 1.4 A strategic approach

This submission recognises that the sustainable development of any natural resource is best achieved via a strategic approach. The current marine farming planning system which identifies marine farm zones, develops MFDP's and allocates individual leases based on the MFDP's, represents such a strategic approach. The current system of MFDP's is generally supported, however the legislative process of MFDP's development should be brought under LUPAA.

It is also recognised that, in addition to a strategic approach, the sustainable development of a natural resource requires expert knowledge and reliable information regarding the ecological, economic and social aspects of the resource use to ensure that the use is ecologically sustainable, socially fair and economically viable. To this end, the input of specialised knowledge and expertise regarding both the marine farming industry and the ecological and social consequences of marine farming, is a necessary component of the marine farming process.

### 1.5 Issue 1: Integration of land use and marine farming planning

We support the full integration of water and land-based marine farming activities within the local council process, and submit that:

Individual leases be assessed jointly by local councils and the Marine Farming Review Panel; and

Marine Farming Development Plans be incorporated as amendments to local council planning schemes, and that these plans provide the basis for assessment of individual leases.

These changes would ensure a strategic and co-ordinated planning approach between local councils and the marine farming industry, whilst still providing a strategic approach to the planning and management of marine farming resources via MFDP's.

A number of arguments have been advanced opposing the integration of marine farming within the local council process, including:

Regional variation in local council approaches to marine farming.

The incorporation of MFDP's in local council planning schemes and the use of MFDP's as a basis for decision-making between the local council and the Panel, will continue to provide a strategic approach to the use of marine resources in Tasmania. The use of MFDP's as a decision-making tool and as a statutory amendment to planning schemes will force all local councils to make decisions regarding marine farming within a similar decision-making environment, thereby minimising local and regional variations in the assessment of marine farming activities.

The Marine Farming Planning Act differs from LUPAA in its regulation of water resources.

It is difficult to see how this argument can be used to support an exemption from the RMPS, and how a strategic and coordinated approach to marine resources can be achieved based upon the arbitrary separation of land and water. Three points must be noted. Firstly, the effects of marine farming extend beyond the water environment, as evidenced by community complaints regarding marine farming which include noise and water pollution, restricted access to waterways and visual pollution.

Secondly, few - if any - marine farming operations are solely confined to the water, requiring land, for example, to conduct processing operations and launch boats. Thus, there is no operational separation of land and water resources.

Lastly, the inter-connectedness inherent within ecological systems, and the connections between physical and social environments, suggests that the separation of land and water for planning purposes to be contrary to physical and social relationships.

Increased delays, resulting in increased costs, as a result of third-party appeals within the local council planning process.

It is argued that potential investors and marine farm operators will be forced to endure lengthy costs and delays as a result of community appeals against proposed farms. In particular, that proposals could be subject to frivolous and vexatious appeals. However, given many of the problems the marine farming industry has historically faced in relation to the community, a rigorous community consultation process, including the opportunity to appeal to the Tribunal, could potentially reduce community opposition to marine farming. We note that the Tribunal is able to award costs against any party bringing a frivolous or vexatious appeal. In our experience this is taken seriously by those contemplating such an appeal.

In addition, under the Resource Management and Planning System the community has a right both to be heard and to have reasonable opportunity to be heard - which includes the right to make representations in respect to planning and management policies, and to pursue legal avenues against particular decisions.

1.6 Issue 2: Membership of the Marine Farming Review Panel

In line with other recommendations made in this submission, it is suggested that the Panel include a member from the community with expertise in conservation and also a member representing the interests of local councils. The latter could be nominated by the Local Government Association of Tasmania, based on relevant expertise in the area of marine farming and/or environmental management.

### 1.7 Issue 3: Third-party appeal rights in relation to marine farm zones

The arguments against the inclusion of marine farming activities within the provisions of LUPAA are probably derived more from economic concerns than any arguments to support sound planning and management practices. In particular, investor certainty seems to be an overriding concern within the current marine farm planning process. Whilst it is recognised that some degree of certainty is necessary for potential developers, especially given the economic benefits of the marine farming industry, a desire to establish this certainty should not override other considerations such as community involvement and the proper assessment of environmental impacts, within the planning process. This is consistent with the sustainable development objectives of the Resource Management and Planning System.

Some have argued that the inclusion of marine farming within LUPAA would lead to time delays, resulting in increased costs, as a result of community objections. However, the use of waterways by the marine farming industry is a privilege, not a right and developers should be required to prove that the activity will be socially and environmentally sustainable within the context of the local environment. It cannot be assumed that the planning process as it now stands, with limited community involvement and appeal rights, provides an adequate assessment process, and is inconsistent with the requirements for land-based industrial developments.

The Panel is not required to hold hearings in relation to representations received in relation to draft plans, and need only take any public representations into consideration in its final decision. Thus, even though it can be said that the community has had a chance to voice its concerns, where there is disagreement, the community has no right of appeal against the final decision. It is assumed that the Panel will reach a fair and equitable decision in every case – an extremely difficult task.

The lack of third-party appeal rights within the marine farming planning process should be viewed in the light of above stated considerations, including the precautionary principle; the lack of scientific certainty regarding the ecological effects of marine farming; and the important role of the community in the policy, planning and management levels of any natural resource regime. These factors support broad stakeholder involvement at all levels of the planning process, including, importantly, the right of third-parties to enforce legislative provisions.

It is suggested that hearings on MFDP's be heard by a separate sub-body within the Resource Planning and Development Commission, convened specifically to hear marine farming related disputes. The body would be composed of members with relevant environmental, planning and, possibly, fisheries expertise. It is argued that this would lead to a fairer outcome for all parties by allowing for the assessment of MFDP's by an independent and experienced board, whereupon the former will be of importance to the community, and the latter to marine farm operators.

### 1.8 An industry Code of Conduct

It is strongly argued that a marine farming code of conduct be developed and adopted by the marine farming industry, as provided for in the Living Marine Resources Management Act, to regulate the planning and management of marine farming activities. Such a code would serve two purposes. It would establish best practice environmental management practices and standards for the industry; and provide a behavioural benchmark from which the community can assess the activities of individual operators.

## 1.9 Final recommendation for the marine farming planning process

In recognition of the above issues, the following changes are suggested to the marine farming planning process.

### 1.9.1 Changes to the process for the development of MFDP's

MFDP's should continue to be used to identify and establish those areas available for marine farming, with marine farms confined to identified areas. This allows for a strategic planning approach to the development of the marine resource at both a state and regional level.

Provision should be made within the Marine Farming Planning Act to establish a legal right for the community to be heard by the Panel in relation to draft MFDP's. Currently, there is no such right, though hearings are generally held.

Hearings on proposed MFDP's should take into account the specialised nature of the marine farming industry and a special sub-body should be set up within the Resource Planning and Development Commission for this purpose. The body would be composed of members with relevant environmental, planning and, possibly, fisheries expertise.

### 1.9.2 Individual applications for marine farm leases.

Individual applications for marine farming leases should be assessed under the local government development approvals process.

This assessment process should be a joint assessment between the relevant local council and the Marine Farming Review Panel. Assessment by the Panel would provide scientific, technical and economic expertise that would generally be absent if the assessment process were to be conducted solely by local councils.

The application should be assessed according to two factors - the relevant MFDP and the environmental impact assessment principles contained within sections 73 and 74 of EMPCA. The MFDP would set the context for the assessment process enabling an ecological and social assessment based upon such factors as existing users of the zone, species farmed and total leasable area.

The principles relating to environmental impact assessment under EMPCA are broader than those governing EIA's under the Marine Farming Planning Act. The principles require an EIA to address:

- the potential environmental impacts arising from the proposed activity
- the issues arising from the proposed activity which might give rise to public concern
- the level of assessment required; and
- the timing for each stage of the assessment.

The EIA criteria contained within the Marine Farming Planning Act only require that an EIA, prepared as part of a MFDP, contain information appropriate to the environmental and social significance of the MFDP, and disclose all available information relating to the environmental impact of the proposal.

Appropriate conditions for a marine farming application would be set by both the Panel and the local council.

There would be a right of appeal for both third-parties and the proponent to the Resource Management and Planning Appeal Tribunal, against the decision of the Panel and the council.

## 1.10 Civil Enforcement Proceedings

The Marine Farming Planning Act should be made consistent with the civil enforcement provisions of EMPCA (s.48) and LUPAA (s.64), thereby allowing members of the public with a "proper interest" to bring such proceedings for breaches of the Act. This process would engender public confidence in the Marine Farming Planning system.

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