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Finfish Farming Environmental Regulation Bill 2017

On 9 July 2017, the Minister has released the draft *Finfish Farming Environmental Regulation Bill 2017* (the **Bill**) for public comment.

The Bill is designed "to enable the appropriate regulation of the environmental impact of farming of finfish such as Atlantic salmon and trout farms." The following Acts are affected by the proposed changes:

- *Environmental Management and Pollution Control Act 1994 (EMPCA)*
- *Living Marine Resources Management Act 1995 (LMRMA)*
- *Marine Farming Planning Act 1995 (MFPA)*

Since 1 July 2016, the Director of the Environment Protection Authority (**EPA**) has been delegated responsibilities for managing environmental impacts of finfish farms under the LMRMA and MFPA. The Bill creates direct regulatory powers under EMPCA, officially giving the EPA responsibility for environmental regulation of finfish farms.

Comments on the draft Bill can be sent to epaenquiries@environment.tas.gov.au until **28 July 2017**.

To read the Bill, and explanatory notes, [click here](#). The most significant changes are discussed below.

KEY CHANGES

- Finfish farming operations will be classed as "Level 2 activities" under Schedule 2 of EMPCA
- New and existing finfish farm operators will need an Environmental Licence to operate
- Applications for a new Environmental Licence will be made to the EPA Director. For activities in State waters, the EPA Director will have discretion as to whether or not the application requires a full assessment by the EPA Board
- Applications for Environmental Licences for inland finfish farm activities or related land-based activities must be referred to the EPA Board for assessment
- Applications referred to the EPA Board will be subject to public consultation and rights of appeal
- Conditions of an Environmental Licence can include limits on biomass, monitoring and reporting obligations, security bonds for remediation and restrictions on the volume or source of water used in the operations. The conditions of an Environmental Licence prevail over any inconsistent conditions in a Marine Farming Development Plan.
- Environmental Licences for finfish farming may be suspended or cancelled where the operator fails to comply with conditions, commits an offence under EMPCA, or where the relevant marine farming lease
- Any person with a "proper interest" can seek civil enforcement orders against a finfish farm operator who is not complying with Environmental Licence conditions
- Marine farm exclusion zones can be declared (and revoked) by Parliament. The Bill proposes an exclusion zone for Mercury Passage (excluding the existing Okehampton Bay lease), but also allows for additional exclusion zones to be declared in future.

Disclaimer: Every effort has been made to ensure this briefing note accurately reflects the changes proposed by the Bill, however it does not constitute legal advice and EDO Tasmania will not accept responsibility for any actions taken in reliance on the information presented.

ENVIRONMENTAL LICENCES

- The Bill applies to the farming of finfish, being any bony fish in the Osteichthyses class, other than eels. Regulated activities include farming, culturing, hatching, rearing, ranching, breeding and related activities, involving annual production of over 5 tonnes of fish, or more than 2 tonnes biomass.
- The Bill introduces a new Environmental Licence (**EL**) for both existing and new finfish farms. The EL will be required in addition to any Marine Farming Lease, Marine Farming Licence or Development Permit that may be required for the farm.
- An EL may be limited to one location, or may cover farms in more than one location, provided certain criteria are satisfied. These criteria have yet to be finalised.
- ELs may be granted for a limited or indefinite period. However, if an existing authorisation (such as a Marine Farming Licence or Environment Protection Notice) includes an expiry date, any EL issued for the same operation must expire on that day. This would not prevent the operator from re-applying for a new EL after the existing licence expires.
- ELs are to be recorded on the EPA's register of environmental management and enforcement instruments, and available for the public to search (subject to a small search fee).

Existing Finfish Farms

- When the legislation commences, ELs will be automatically granted for all existing authorised finfish farms with substantially similar environmental conditions as applied to existing licences or permits for the farm.
- The Director may also impose additional environmental conditions, provided they do not conflict with the conditions the farm is already subject to.
- Existing finfish farm operators have a limited right of appeal to the Resource Management and Planning Appeal Tribunal (**RMPAT**) to challenge any additional conditions imposed on an EL.

New finfish farms

- Different assessment processes are proposed for new finfish farms¹ depending on the type of finfish activity being undertaken:
 - Where an application relates to finfish farms in State waters, the EPA Director has discretion as to whether to refer the application to the EPA Board for assessment.

There are no criteria for how the EPA Director is to decide which projects are to be referred to the Board. If the application is not referred, it will not be publicly advertised.
 - Where an application relates to finfish farms in inland waters, or on land (for example, hatcheries)², the application must be referred to the EPA Board for assessment in accordance with the Environmental Impact Principles.

These applications will be publicly advertised and representations invited. After considering the application representations, the Board may grant an environmental licence, or direct that the environmental licence be refused.

If a planning permit is also required for the activity, the permit must not be granted if the Board refuses to grant an environmental licence.
- The Director and Board may grant Environmental Licence only if they are "satisfied that it is appropriate to do so".

¹ Where a finfish farm is declared to be a Project of Regional Significance, these application processes will not apply

² Which will generally require a development permit under *Land Use Planning and Approvals Act 1993*

Conditions

- If an EL is granted, it may be subject to conditions regulating a range of matters, such as:
 - Limits on finfish biomass to be kept on, or produced from, a lease
 - Introduction of raw materials (including smolt) to a lease
 - Limits on the amount of water or energy used to conduct finfish farming
 - Limits on the types, quantities or concentrations of pollutants from the lease
 - Environmental monitoring obligations
 - Rehabilitation requirements at the conclusion of farming operations
- If there are any inconsistencies between conditions of a Marine Farming Development Plan and an EL, the EL conditions will prevail.
- The EL may require operators of new and existing finfish farms to pay financial assurances (bonds), which can be used to cover the expense of any future remediation.

Variations

- The EPA Director has a broad power to vary the conditions of an EL, including conditions imposed by the Board, if "satisfied that it is appropriate to do so".
- Variations can be requested by the finfish operator or imposed at the initiative of the Director.
- If a variation is requested by the finfish operator, the EPA Director may agree to vary the EL, refuse to vary the EL, or refer the application to the Board for assessment.
- Where no changes are required to the relevant Marine Farming Licence, but the EPA Director is satisfied that the proposed variation to the EL is a major variation (for example, where the variation will significantly increase the environmental impacts), the Director must refer the proposed variation to the Board for assessment as if it was a new level 2 activity.
- Where a proposed variation requires a planning permit, the EPA Director cannot vary the EL until the permit is granted.

ENFORCEMENT

- Breaches of the conditions of an EL (or operating without an EL) can attract fines up to \$159,000 for a corporation, or \$79,500 for an individual.
- The Bill allows for regulations to prescribe "special penalties" that must be imposed by the Court in particular circumstances (no "special penalties" are prescribed, yet).
- If a finfish farming operation causes serious or material environmental harm, it will be a defence for the farm operator to demonstrate that it has complied with the conditions of an EL. However, compliance with conditions relating to biomass, the amount of finfish capable of being produced, the volume of raw materials, or the volume of water used in operations will not automatically provide a defence.
- ELs may be suspended or cancelled by the EPA Director where the holder of the EL has:
 - breached a condition
 - been convicted of an offence under EMPCA or another law
 - had their Marine Farming Lease cancelled
 - failed to pay the fees due, or
 - caused, or is likely to cause, serious or material environmental harm which cannot be mitigated within a reasonable time by simply varying the EL.

- The EPA Director will also have the power to:
 - require EL holders to implement environment improvement programs,
 - issue an Environment Protection Notice to secure compliance with the Act, or
 - require renewal of an Environmental Licence if the Director considers it necessary to continue to regulate the area to reduce environmental harm, or to provide for decommissioning or rehabilitation.
- Where a finfish farm operator is not complying with EL conditions, the EPA, a local council, or a person with a “proper interest in the subject matter” may commence civil enforcement proceedings in the RMPAT against a finfish farm operator seeking compliance and / or remediation orders.

APPEALS

- Finfish farm operators may appeal to the RMPAT against various decisions of the EPA Director and EPA Board, including refusing EL applications, imposing conditions on an EL, or variations to the EL.
- Where applications have been referred to the EPA Board, any person who made a representation during the public comment period can appeal against the EPA Board’s decision.
- All appeals will need to be lodged within 14 days of the decision being challenged.

OTHER AMENDMENTS

- The Bill proposes to remove the EPA Director as a member of the Marine Farming Planning Review Panel (the **Panel**). Instead, the Panel must:
 - consult the EPA Director on draft Marine Farming Development Plans, and ensure any environmental management issues specified by the Director are addressed in environmental impact statements and considered by the Panel
 - notify the EPA Director before approving an amendment to Marine Farming Development Plan or issuing any emergency orders or emergency plans for finfish farms
- The Bill also provides for Parliament to declare finfish farming exclusion zones within State waters. The first exclusion zone proposed will cover Mercury Passage, excluding the lease areas already approved for Tassal’s Okehampton Bay operation.

***If you have any questions regarding the Bill,
please feel free to contact EDO Tasmania on 6223 2770.***

Any person can submit comments on the draft Bill until 28 July 2017.