



MINISTRY OF FISHERIES

Te Tautiaki i nga tini a Tangaroa

26 August 2005

Minister of Fisheries
cc Associate Minister of Fisheries

Amended Final Advice Paper: Review of Regulation 27 Offences and Penalties

Purpose

1 On 8 July 2005 you approved an amendment to Regulation 27 of the Fisheries (Amateur Fishing) Regulation 1986 (r 27). The Cabinet Economic Development Committee (EDC) approved this amendment on Wednesday 3 August 2005 ((EDC Min (05) 14/6, CAB Min (05) 21/4). The amendment would introduce offences and penalties where issuers breach the requirements for the issuing and management of r 27 authorisations.

2 This paper proposes a technical amendment to the previous advice on the way these offences and penalties would be prescribed. This change is the result of legal advice from Crown Law that addresses Parliamentary Counsel Office (PCO) concerns arising during drafting of the amendment to r 27.

3 A Cabinet Business Committee (CBC) paper is attached for your approval to allow promulgation of the regulatory amendments.

Background

4 A range of legislative and non-legislative proposals were developed during a review of R 27. These proposals were designed to provide solutions to ongoing problems with the issuing and management of r 27 authorisations. The legislative proposals were limited to:

- an amendment to r 27 to include offences and penalties for the issuing of authorisations by persons not eligible to issue authorisations or the issuing of authorisations that breached requirements;
- amendments by the Chief Executive of the Ministry of Fisheries (the Chief Executive) to the gazette notice pursuant to r 27(1)(b) to clarify definitions and processes relating to the issuing and management of r 27 authorisations.

5 These proposals were released for consultation completed in 2005. After considering submissions, particularly in relation to issues raised that affected implementation, a Final Advice Paper (FAP) was provided to you on 22 June 2005. (Attached as Appendix A and

includes a copy of r 27 and the gazette notice in its appendices) Key implementation considerations addressed the potential complexity of implementation including:

- the impact on resources that are more desirably focussed on facilitating implementation of the Fisheries (Kaimoana Customary Regulations) 1998 and the Fisheries (South Island Customary Fishing) Regulations 1999 (the customary regulations); and
- the extent to which the submissions proposed detailed aspects of implementing the proposed solutions necessitated either significant rework to r 27 or effectively began to mean r 27, to a large extent, mirrored the provisions of the customary regulations.

6 The above considerations limited the final extent of particularly legislative amendments to r 27 that were proposed in the FAP. The FAP legislative amendments were limited to a regulatory amendment to include offences and penalties under r 27 and a proposal by the Chief Executive to amend the gazette notice pursuant to r 27(1)(b) to require issuers of r 27 authorisations to retain copies, and access for Ministry staff, to all authorisations issued.

7 On 8 July you approved the progression of the regulatory amendment to r 27 to EDC. EDC, and subsequently Cabinet, approved these proposals. The Ministry of Fisheries (the Ministry) has been working with Parliamentary Council Office (PCO) on the necessary amendments to r 27 resulting from these approvals.

8 Since the completion of consultation the Ministry of Fisheries has been implementing the non-legislative aspects of the r 27 proposals, as part of the Ministry's wider Deed of Settlement Implementation Programme (DoSIP). While the DoSIP focuses on the customary regulations and wider Treaty of Waitangi fisheries obligations, there is significant overlap with r 27 that has allowed the review outcomes to largely be accommodated in this process. The non-legislative aspects include the need for increased liaison with tangata whenua, amendments to Ministry training programmes (both internal and external) and consideration of procedures and systems that could simplify tangata whenua implementation of the wider customary fishing framework including those relevant to r 27.

Comment

Offences and Penalties

9 The initial means to introduce offences and penalties for breaches relating to aspects of the r 27 authorisation process was to include an offence description that incorporated aspects of the gazette notice, promulgated pursuant to r 27(1)(b), relevant to the procedures and mandate of those persons issuing r 27 authorisations. The proposed offence description would also capture amendment to the gazette notice to require the retention of a copy of all authorisations issued for access by the Chief Executive.

10 During discussions with PCO on the specific drafting of the offence and penalty provisions, concerns were expressed as to the manner in which the regulatory and supporting gazette notice requirements were linked. There was concern as to whether the current framework was robust enough to withstand legal challenges. This could undermine the intent to ensuring accountability through the introduction of the specified offence provisions.

11 Resulting discussions with Crown Law and PCO have identified an alternative approach that is likely to be more robust. This approach requires relevant aspects of the

gazette notice to be incorporated directly into a new regulation - r 27A. Apart from addressing small language inconsistencies between the gazette and r 27, this does not require any change to the existing obligations currently provided for in the gazette notice.

12 The requirements in the gazette notice have been the subject of extensive consultation over the years with the last amendments promulgated in early 2003. This consultation process is identical to that undertaken by the Ministry for any significant management change including regulatory amendments.

13 The specific requirements that would be reworded for inclusion in the regulation itself, from the gazette notice are those that ensure appropriate persons issue authorisations and that the authorisations issued for the appropriate purpose and in accordance with the relevant process requirements. These conditions are mainly set out in clause 6 of the existing gazette notice:

6. *Authorisation forms — (1) Subject to subclause 2¹, an authorisation form may only be issued by an authorised representative of a marae committee, Māori committee, runanga or Māori Trust Board.*
- (2) *An authorisation form may only be issued under subclause (1) if:*
- (a) *the taking of fish, aquatic life or seaweed is for the purposes of a hui or tangi;*
 - (b) *the taking of fish, aquatic life or seaweed is not commercial in any way or for pecuniary gain or trade;*
 - (c) *the Marae committee, Māori committee, runanga or Māori Trust Board represents the tangata whenua of the particular area to which the authorisation form relates;*
 - (d) *the name and contact details of the authorised representative(s) of the marae committee, Māori committee, runanga or Māori Trust Board have been notified to the nearest office of the Ministry of Fisheries; and*
 - (e) *a tangata kaitiaki/tiaki or tangata tiaki/kaitiaki has not been appointed, under the Fisheries (Kaimoana Customary Fishing) Regulations 1998 or the Fisheries (South Island Customary Fishing) Regulations 1999, within the particular area to which the authorisation form relates.*

14 This drafting would result in a new regulation and a reduced gazette notice. There are no material changes to the intent and nature of the existing requirements in the gazette notice and r 27. The intent and rationale for the proposed changes, that were the subject of consultation completed this year, also remain unchanged. The change is more a technical one that substitutes a regulatory mechanism rather than the gazette to define the requirements of authorisation issuers.

¹ Subclause 2 provides that “Any term or expression that is defined in the Fisheries Act 1996 or in the Fisheries (Amateur Fishing) Regulations 1986 and used, but not defined, in this notice has the same meaning as in the Act or in the Regulations.

Retention of Copies of Authorisations Issued

15 The change in approach to regulatory amendments also requires the inclusion of the regulation to require issuers of authorisations to retain copies of all authorisations issued for access by the Chief Executive [Ministry staff]. This access is particularly relevant for enforcement purposes. While broad access to information is already available for Fishery Officers pursuant to the Fisheries Act 1996, it is considered desirable to clearly state this in the proposed amended regulations. This change was to have been included in the gazette notice by the Chief Executive but is now required to be included in r 27. This change requires your approval to progress to CBC as part of the final implementation of legislative aspects of the review of r 27.

16 The requirement to retain copies was proposed to ensure access to authorisations where required by Ministry staff to verify customary take. While fishers are required to have a copy of their authorisation with them while fishing this does not always occur. At time Fishery Officers encounter problems with authorisations that have been amended, or are in poor condition, or damaged or illegible for example through water damage.

17 This requirement was not seen as onerous particularly where the Ministry printed authorisation books are used as they automatically provide for copies.

18 The Ministry proposes that it discusses authorisation issuers voluntarily supplying copies of authorisations to the local offices as occurs in some areas. This, in association with the voluntary supply of catch information provides useful information about fishing activity and catch in local areas. The Ministry proposes to establish procedures that allow feedback of consolidated authorisation and catch information back to iwi to ensure all can benefit from this information. The retention of copies of authorisations and supply of catch information are mandatory under the customary regulations once implemented.

19 Submissions provided during consultation raised no significant objections to the proposal to require the retention of copies of authorisations. A number of submissions proposed that the Ministry extend the proposal to require the copies to be sent to the Ministry. This step was not taken as there are a number of practical implications associated with the fact that r 27 authorisations are event linked and only valid for a 48-hour period. The key information for management purposes is catch information hence authorisations are useful but less essential, particularly if Ministry staff can access copies as necessary for enforcement purposes.

20 It is proposed that you approve the inclusion of the requirement for authorisation issuers to retain copies of all authorisations issued for access by the Chief Executive as required.

Timing and Process

21 Crown Law and PCO are in agreement that this proposed approach to prescribing offences and penalties is the most robust and clear means to ensure accountability authorisation issuers — the intention of the proposed offence and penalty regime.

22 The attached CBC paper notes the technical change from the previous EDC decision of 3 August and provides the relevant information and draft regulations to complete the process

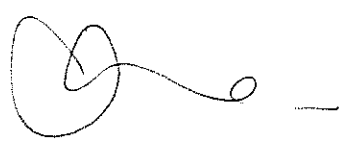
of introducing the offences and penalties for issuers who breach the requirements for the issuing and management of authorisations. This paper also outlines relevant information to allow Ministers to consider the introduction of the requirement to retain copies of authorisation issued, as proposed during consultation earlier this year.

23 It is proposed that the paper be considered at the CBC meeting of 5 September 2005.

Recommendations

24 It is recommended you:

- i. **Note** the provisions approved by the Chief Executive in the gazette notice has been the subject of extensive consultation that mirrors the process undertaken by the Ministry for any regulatory amendment;
- ii. **Approve** the revised regulatory amendments that require the incorporation of particularly clause 6 of the existing gazette notice to be included in a new regulation;
- iii. **Approve** the inclusion of the requirement for the authorisation issuer to retain copies of all authorisations issued for access as required by the Chief Executive; and
- iv. **Sign** the attached CBC paper outlining the change to the previous EDC decision that is:
 - a. the inclusion of the gazette notice provisions relevant to authorisation issuers in a new regulation; and
 - b. the inclusion of a regulatory amendment to require issuers of authorisations to retain copies of authorisations issued for access by the Chief Executive as required.



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APPROVED/NOT APPROVED/APPROVED AS AMENDED



Hon David Benson-Pope
Minister of Fisheries

28 / 08 / 2005