

ASSESSMENT CRITERIA FOR THE GRANT OR VARIATION OF AN AQUACULTURE LICENCE

EXPLANATORY NOTES

This document provides explanations, comments and additional information relating to Statements of Decision made in respect of applications for aquaculture licences.

1. LEGISLATION

The Department of Primary Industries and Regional Development (“DPIRD”) assesses applications for the Grant or Variation of an Aquaculture Licence under relevant sections of the *Fish Resources Management Act 1994* (“the Act”).

1.1 Relevant Sections of the Act for the Grant of an Aquaculture Licence

Section 92(1) of the Act, provides that –

If a person applies to the CEO for the grant of an aquaculture licence and the CEO is satisfied of all of the following –

- (a) the person is a fit and proper person to hold such a licence;*
 - (b) the person has, or will have, appropriate tenure over the land or waters on or in which the activities under the licence are to be conducted;*
 - (c) it is in the better interests of the State and the community to grant the licence;*
 - (d) the activities to be conducted under the licence are unlikely to adversely affect other fish or the aquatic environment;*
 - (e) the activities to be conducted under the licence have been approved by other relevant authorities;*
- the CEO may grant to the person an aquaculture licence.*

Section 92A of the Act provides that unless the applicant is exempt –

an application for an aquaculture licence must be accompanied by a management and environmental monitoring plan (“MEMP”) identifying how the applicant will manage any risks to the environment and public safety in relation to the proposed activity for which the licence is sought.

Section 97 of the Act provides for the grant of an aquaculture lease by the Minister for Fisheries. The aquaculture lease provides tenure over the waters in which the aquaculture activity authorised under an aquaculture licence is to be conducted.

Section 99 of the Act states that an aquaculture lease does not authorise the use of the leased area without an aquaculture licence.

1.2 Relevant Sections of the Act for the Variation of an Aquaculture Licence

Section 142 of the Act provides that –

- (1) *The CEO may vary an authorisation if —*
- (a) *the holder of the authorisation applies to the CEO for the variation; or*
 - (b) *it is necessary to correct any error in the authorisation; or*
 - (c) *it is necessary to give effect to the provisions of this Act.*
- (2) *Subject to subsection (3), if a person applies to the CEO for the variation of an authorisation the person is not entitled to the variation as of right.*
- (3) *If —*
- (a) *a management plan specifies criteria for the variation of an authorisation; and*
 - (b) *a person applies to the CEO for the variation of such an authorisation; and*
 - (c) *the CEO is satisfied that the criteria have been satisfied,*
- the CEO is to vary the authorisation.*

Section 142(1)(a) of the Act provides that an authorisation may be varied where the holder of the authorisation has applied for the variation.

Section 56 of the *Interpretation Act 1984* provides that where the word “may” is used in conferring a power, then, unless the contrary intention appears in the Act, the word will be interpreted to imply that the power may or may not be exercised; that is, the power is discretionary.

It is important to note that s.142 is intended to enable variation of an authorisation where the effect would be consistent with other provisions of the Act.

The power under s.142 to vary an existing Licence is similar to the power to grant a new licence to authorise aquaculture. Assessment of an application to vary an aquaculture licence will therefore give consideration to the requirements that would need to be satisfied had the application been for the grant of a new aquaculture licence.

On this basis, the matters in s.92 and s.92A of the Act require consideration. These matters are set out in Part 1.1 of this document.

2. RELEVANT CRITERIA TO BE SATISFIED

Based on the legislative criteria set out in s.92 of the Act, the CEO will consider various matters.

To this end, reference is made to s.246 of the Act and Administrative Guideline No. 1 *Assessment of applications for authorisations for Aquaculture and Pearling in coastal waters of Western Australia* (“AG 1”). A copy of AG1 is available on the Department’s website at:

http://www.fish.wa.gov.au/Documents/administrative_guideline/ag001.pdf

Generally, consultation will be undertaken according to the process set out in AG1; that is, with relevant Government agencies and representative community and industry groups and including the opportunity for public comment.

The matters arising by reason of s 92 and 92A of the Act are twofold:

1. The criteria specified in s 92(1); and
2. The Management and Environmental Monitoring Plan (“MEMP”).

2.1 Criteria in s.92(1)

Under s.92(1) of the Act, the CEO may grant an aquaculture licence to a person if satisfied of all of the following:

- the person is fit and proper to hold an aquaculture licence;
- the person has, or will have, appropriate tenure over the land or waters on or in which the activities under the licence are to be conducted;
- it is in the better interests of the State and the community to grant the licence;
- the proposed activities are unlikely to adversely affect other fish or the aquatic environment;
- the proposed activities have been approved by other relevant authorities; and
- any other matters prescribed for the purposes of this subsection.

(a) “Fit and proper person”

Section 92(1)(a) of the Act requires the CEO to be satisfied that a person who has applied for an aquaculture licence is a “fit and proper person” to hold an aquaculture licence.

Ministerial Policy Guideline No. 19 titled *Matters Of Importance In Respect Of The “Fit And Proper Person” Criterion For Authorisations Under The Fish Resources Management Act 1994* (“MPG 19”) provides a discussion of the types of considerations relevant to the “fit and proper person” criterion by reference to the key concepts of knowledge, honesty and ability.

- **Knowledge**

The concept of “knowledge” refers to relevant qualifications; knowledge of applicable legislation; relevant training, business and technical skills; and previous relevant experience. Knowledge can also refer to familiarity with and understanding of any scientific and technical information that may be available for the culture of the proposed species or other aspects of the aquaculture proposal.

For cases where an applicant for the grant or variation of an aquaculture licence does not personally have the requisite technical skills or knowledge to conduct the activities, the applicant would be expected to employ key officers to provide the skills or knowledge and include details of those officers and their qualifications in the application.

- Honesty

The concept of “honesty” generally refers to matters such as history of compliance with fishery legislation, various offences and convictions for falsifying returns.

When considering matters of honesty where there is a history of convictions, the CEO may take into account matters such as the nature, severity, and number of the offences, the time elapsed since the conviction, the level of penalty or sentence imposed by the Court and the likelihood that the applicant will re-offend.

- Ability

The concept of “ability” refers to the person’s financial situation and capacity to access finance; history of business success; possession of or access to relevant equipment or infrastructure; ability to keep records and ability to pay relevant fees, charges or levies.

The importance of business planning is critical because it offers a comprehensive plan of the overall project and provides the model or mechanism the applicant will use to direct resources to achieve the objectives and demonstrated a level of due diligence by the applicant. DPIRD generally requires a business plan as part of an application to enable it to evaluate the financial viability of the proposal, particularly in areas that are not fully predictable in respect of production and environmental impact.

At a minimum, a business plan would be expected to provide:

- Business details – organisational structure and the project team, governance arrangements and specified technical personnel;
- Legal considerations – an understanding of the regulatory framework that applies to aquaculture;
- Insurance and risk management – identification of risk and risk management strategies;
- Management and operations – information about the operational elements of the proposal and how it will be managed;
- Marketing – information (ideally referenced) about the prospective market for the products, including competition with existing markets; and
- Financial information – an outline of assets and liabilities, with estimates of start-up costs or analysis of financial feasibility of the proposed project; it can also provide, as relevant, information on investment funding or a financing strategy, or on the potential impact of a financing strategy on the capital structure.

The information provided in a business plan is important because it enables DPIRD to establish how the applicant will obtain, use and manage its financial resources to pursue its objectives and, consequently, to demonstrate the financial viability of the proposed project.

MPG 19 sets out two matters of importance: firstly, consideration of the extent to which persons may act on behalf of the licence holder; and secondly, the importance of accurate, complete and timely records.

With respect to the matter of persons acting on behalf of the licence holder, if the licence holder is a company, it must act through natural person agents. These persons are the officers (such as directors) and employees of the company. If the licence holder is a person, only the person and anyone employed by the person can act under the Licence. The Licence does not authorise persons to act “on behalf of” the company or person, so the company or person cannot authorise independent contractors or “lessees” to carry out aquaculture.

The discussion in MPG 19 about the importance of accurate, complete and timely records refers to commercial fisheries and fishing boat operators. The activity authorised by an aquaculture licence does not relate to fishing and is therefore not relevant. What is important, however, is the requirement under regulation 64 of the *Fish Resources Management Regulations 1995* (“the Regulations”) for the licence holder to keep records and submit returns in respect of the sale of fish and the accurate and timely communication of information relating to disease and biosecurity.

The “fit and proper person” assessment criteria of knowledge, honesty and ability are required for the assessment of “grant” applications as well as “variation” applications, where a thorough assessment of these criteria has not been conducted prior to granting the licence.

(b) Tenure

Section 92(1)(ba) requires the CEO to be satisfied that a person who has applied for an aquaculture licence has, or will have, appropriate tenure over the land or waters on or in which the activities authorised under the licence are to be conducted.¹

Under s.99(1) of the Act, an aquaculture lease does not authorise the use of the leased area without an aquaculture licence.

Under s.97(5A) of the Act, before granting a lease the Minister for Fisheries must be satisfied of all of the following:

- the person is a fit and proper person to hold the lease (refer to 2.1(a));
- it is in the better interests of the State and the community to grant or renew the lease (refer to 2.1 (c));
- the applicant will make, or has made, effective use of the area of land or water the subject of the lease for aquaculture purposes;²

¹ In this context, “tenure” means having legal ownership of or the legal right to use an area of land by way of freehold title or lease deed; or having the legal right to use an area of water by way of an aquaculture lease or its equivalent.

² “Effective use” means using the area subject to the lease for the purpose authorised by the corresponding aquaculture licence. Compliance with this criterion is determined by the lease holder meeting a defined, mutually agreed series of performance targets that form a part of the lease deed.

- the activities to be, or that are being, conducted under the lease are unlikely to adversely affect other fish or the aquatic environment (refer to 2.1(d)); and
- any other matters prescribed for the purposes of this subsection (refer to 2.1(e)).

(c) *Better interests*

Section 92(1)(b) requires the CEO to be satisfied that the granting or varying of an aquaculture licence to the applicant would be in the better interests of the State and the community.

The interests of the State and community would be best served by ensuring resources are allocated to persons who have proven ability to utilise those resources to generate a return to the State by establishing a commercial project that has the ability to provide sustainable, profitable production as well as long-term employment opportunities and associated benefits to the community.

The assessment of the “better interests of the State and the community” requires a broad balancing of the benefits against the detriments of the intended aquaculture activities, including ensuring that the proposed aquaculture would be economically and environmentally sustainable.

This consideration will be exercised in the context of the objects of the Act under s.3, which include developing and managing aquaculture in a sustainable way.

The means of achieving this object include:

- ensuring that the impact of aquaculture on the aquatic fauna and their habitats is ecologically sustainable: s.3(2)(b);
- fostering the sustainable development of aquaculture: s.3(2)(d); and
- achieving the optimum economic, social and other benefits from the use of fish resources: s.3(2)(e).

The issues to consider in respect of the “better interests of the State” relate primarily to positive economic impacts. These economic impacts include factors such as regional economic diversification, increased regional and local revenue, creation of job opportunities and improving infrastructure and technology.

The issues to consider in respect of the “better interests of the community” are more localised although not necessarily limited to the geographically adjacent area. The community will include wild-stock licensed fishers and other aquaculture licence holders.

Sustainable aquaculture projects have the potential to make a significant contribution to the State’s economy and provide community benefits such as employment opportunities and economic diversification in regional areas.

Another benefit is whether the proposed activities will provide further experience and scientific information that can assist with future aquaculture proposals. The development of science depends upon ongoing activities to provide information for analysis.

(d) Whether the proposed activities are unlikely to adversely affect other fish or the aquatic environment

Section 92(1)(c) requires the CEO to be satisfied that the proposed aquaculture activities are unlikely to adversely affect other fish or the aquatic environment.

The main considerations for this criterion include, but are not limited to –

1. Genetics, disease and pests
2. Aquaculture gear
3. Environmental impact
4. Visual amenity and noise pollution

1. Genetics, disease and pests

In respect of diseases and pests, aquaculture operations are subject to controls imposed through licence conditions and a Management and Environmental Monitoring Plan (“MEMP”), which includes biosecurity protocols and procedures. These controls are based on the requirement to demonstrate low risk of disease and pest introduction and spread.

When considering matters related to genetics and interbreeding, finfish, shellfish and other species moved into or within the State for aquaculture purposes will usually be genetically different from natural populations; however, farmed fish are normally contained within sea cages, baskets and similar structures where the chances of escape can be controlled and minimised. Methods for preventing or minimising escapes vary according to the type of aquaculture gear being used; for example, for marine finfish in sea cages these can include the use of a separate predator net and, or, the use of mesh resistant to predators.

There may be a minimal degree of risk in allowing the movement of what may be a different genetic stock; however, this risk must be balanced against the economic and social benefits that would ensue from the establishment of aquaculture in regional Western Australia.

The long term survival of an escaped population of farmed fish to the point that it would replace a wild population is unlikely unless there are continued releases or escapes of the farmed fish.

For shellfish such as mussels and oysters, the risk of genetic variation and interbreeding as a result of escapes would be unlikely given that the species is of a sedentary nature.

There are two concerns with respect to disease: firstly, that disease may be introduced into the natural environment through species that may be carrying the disease; and secondly, that a disease outbreak may occur in the species cultured at the aquaculture site, caused by the conditions at the site.

a. Disease introduction

The potential consequences of a disease outbreak include potentially serious economic impacts on the wild-stock and recreational fishers, as well as a consequential impact on the aquatic ecosystem generally.

The accidental introduction of disease pathogens into Western Australia through the movement of fish can be a major concern, particularly in view of the State's relative freedom from disease. Adequate health testing and certification are consequently an essential element of licence conditions and MEMP requirements.

Once present in the water column and under suitable conditions, disease-causing organisms have the ability to spread. Consequently, if a disease outbreak occurs it is generally difficult to control or treat. Biosecurity controls are therefore needed to prevent or minimise the risk of disease outbreaks and the introduction of pathogens into the environment, by not permitting operations to be conducted so as to predispose organisms on the site to develop disease (by preventing or minimising predisposing factors).

b. Disease development in situ

There can also be a requirement for disease testing on stock held in aquaculture farms. This approach ensures a high level of confidence in the ability to detect known disease agents.

From time to time, the Department's Diagnostics and Laboratory Services ("DDLs") may wish to undertake disease testing in the absence of a reported disease event and these requirements may change from time to time, taking into account the diseases of interest, the characteristics of the tests available and the required confidence in the result as determined by a risk assessment. A licence condition may be imposed to enable DDLs to determine any requirements for disease testing.

Any movements to the site or within the State may require a health certificate, which would deal with matters including disease.

2. Aquaculture gear

There are two aspects to the consideration of the effect of aquaculture gear on other fish or the environment; namely, its physical and spatial impact on benthic habitats (that is, its "footprint"); and failure to remove it if the aquaculture operation ceases. The environmental impact of the aquaculture activity on benthic habitats and water quality is a separate issue explained below.

In the event of aquaculture ceasing, any issues concerning the clean-up and rehabilitation of the site would be covered by the relevant provisions of the Act and clauses of the Lease.

3. *Environmental impact*

It is in the best commercial interests of the licence holder to maintain a healthy environment and to ensure any ongoing environmental impact is adequately measured, evaluated and managed. The monitoring and management of environmental factors is a separate issue dealt with in the MEMP section of the Statement of Decision (refer to 2.2).

4. *Visual amenity and noise pollution*

The application will be assessed on whether the proposed project will have any negative impact on visual amenity and result in any noise pollution.³

(d) Whether the proposed activities have been approved by other relevant authorities

Section 92(1)(d) requires the CEO to be satisfied that the proposed activities have been approved by relevant authorities; for example, an application for an aquaculture licence for an area within a marine park must obtain approval from the Minister for Environment.

As part of the assessment process, the Department refers aquaculture proposals that it considers may have a significant environmental impact to the Environmental Protection Authority (“EPA”). A decision to refer a proposal is based on consideration of “significance”, which includes matters such as the values and sensitivity of the environment likely to be impacted and the public interest of the likely effect of the proposal. The EPA considers significance when determining whether to assess a proposal. Where the EPA decides to not formally assess a proposal, it may give advice and make recommendations on environmental aspects of the proposal. It is in this area that the EPA may have regard for the Department’s ability to mitigate and manage any predicted impact through the MEMP.

(e) Other matters prescribed

Section 92(1)(e) requires the CEO to be satisfied of any other matters prescribed for the purposes of s.92(1), such as in the event of foreign ownership.

2.2 The Management and Environmental Monitoring Plan

Section 92A of the Act requires an applicant to lodge a MEMP when lodging an application for an aquaculture licence.

A MEMP forms part of an integrated management framework for aquaculture activities, which also includes relevant legislative requirements (including the Regulations and the *Biosecurity and Agriculture Management Act 2007*) as well as conditions on licences and leases.

³ “Visual amenity” means unsightliness and in this context can refer to obstructive or poorly-maintained aquaculture gear, or noise or light pollution.

The purpose of a MEMP is to satisfy the CEO that any risks to the environment and public safety will be managed in accordance with s.92A(1) of the Act. A MEMP provides information on the background and purpose of the aquaculture activity, including its objectives, other information such as the species of fish to be farmed, the location of the site and the farming method, and details of environmental monitoring and management and biosecurity.

With reference to the provisions of s.92A of the Act, MEMPs generally contain requirements in respect of the following:

1. An overview of the aquaculture operation, including information on species and quantity of fish, location and areas of land or waters, and farming methods and aquaculture gear.
2. Environmental Management and Monitoring, including information on and details of baseline information, environmental monitoring parameters; the environmental monitoring program, and response thresholds and response protocols.
3. Impact on protected species and other aquatic fauna.
4. Biosecurity, including information on and details of general facility information; administrative biosecurity procedures; operational biosecurity procedures; and biosecurity incident and emergency procedures.

In respect of the public availability of the MEMP, in accordance with s.250(1)(c) of the Act, a MEMP lodged under the Act is “confidential information” and cannot be divulged to the public by DPIRD.

3. DISCRETION TO GRANT OR VARY – MERITS OF THE APPLICATION

3.1 Discretion to Grant

Section 92 of the Act provides that an aquaculture licence may be granted where the applicant has satisfied all the above criteria. The power to grant an aquaculture licence is discretionary in nature; that is, the CEO “may” grant the licence (also see s. 56 of the *Interpretation Act 1984*).

3.2 Discretion to Vary

Section 142(1)(a) of the Act provides that an authorisation may be varied where the holder of the authorisation has applied for the variation.

The power to vary an aquaculture licence is discretionary in nature (also see s.56 of the *Interpretation Act 1984*).

In considering the exercise of discretion, the merits of the variation or grant application will be given regard. That requires balancing the opposing considerations against the

supporting considerations. For any detrimental factors, regard will be given to how detriments may be minimised and controlled.

Potential disadvantages of grant or variation

The potential disadvantages of the proposed grant or variation include, but are not limited to:

- (a) Genetics, diseases and pests (refer to 2.1(d)(1))
- (b) Environmental impact (refer to 2.1(d)(3))
- (c) Impact on compliance and resourcing
- (d) Limitation on access to the proposed waters
- (e) Impact on navigation
- (f) Impact on recreational fishing
- (g) Impact on commercial fishing and other commercial activities including tourism

Potential advantages of grant or variation

The potential advantages of the proposed grant or variation include, but are not limited to:

- (a) Suitability of the location for aquaculture and proximity to existing operation
- (b) Very low impact on other users of the resource
- (c) Potential economic benefits for the State (refer to 3.1(c))
- (d) Contribution to ongoing development of science and knowledge of aquaculture
- (e) No impact on native title.

4. LICENCE CONDITIONS

Section 95(1)(b) of the Act provides that the CEO may impose licence conditions. Where it is apparent that an application falls short of certain requirements, a licence condition may be imposed to ensure that those requirements will be met.

Conditions may be imposed in regard to the following matters:

- Aquaculture method and gear

Conditions in respect of aquaculture method and gear provide controls over the deployment of aquaculture gear to ensure that there is minimal impact on sensitive environments such as seagrass beds, coral reefs and other benthic habitats. These controls will be set out in the applicant's MEMP.

- Health management and certification

Conditions dealing with health management and certification will minimise the risk of disease being introduced by ensuring each group of fish moved to the site be tested and certified as free of signs of clinical disease.

A general condition may also be imposed requiring information on mortalities to be provided at the request of the Diagnostics and Laboratory Services Branch.

- Biosecurity (including disease and genetics)

Conditions may be imposed in respect of biosecurity including controls over record keeping, the source of broodstock, health management and certification, procedures to be followed in the event of suspicion of disease and controls over the disposal of biological waste materials.

As a licence holder does not have exclusive possession of the site and waters, an officer of the Diagnostics and Laboratory Services Branch of the Department or a Fisheries and Marine Officer can enter the site at any time to inspect stocks.

In respect of disease testing, it is important to strike a balance between the benefit derived from testing against the cost of undertaking the testing. Repeated testing of healthy stock is likely to be of low value, yet would require the licence holder to incur significant costs. On the other hand, targeted testing of dead or moribund species will likely identify the presence of any disease-causing organisms. A condition may be imposed so that a level of testing be undertaken on the recommendation of DDLS.

As with any condition, if circumstances change then the requirement for testing can be changed.

- Marking and lighting

The imposition of any licence conditions in respect of marking and lighting requirements will be determined according to the document "[Guidance Statement for Evaluating and Determining Categories of Marking and Lighting for Aquaculture and Pearling Leases and Licences \(2019\)](#)".

- Compliance issues

In addition to regulation 64 of the *Fish Resources Management Regulations 1995* ("Regulations"), conditions may be imposed in respect of compliance issues, such as making and keeping of records.

- MEMP compliance

A condition will be imposed on aquaculture licences for operators to comply with the MEMP to ensure that certain requirements such as those relating to environmental monitoring are met. This will minimise the risk of potential environmental impacts arising from the aquaculture activity.

The power to delete and add new conditions is provided for in s.95 of the Act.

The Department will liaise with the applicant in respect to the licence conditions. The indicative (intended) substance of the licence conditions will be included in the Statement of Decision.