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Deputy Secretary,
EPA Tasmania
Department of Primary Industries, Parks, Water and Environment
GPO Box 1550
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By email: enquiries@epa.tas.gov.au

Dear Mr Ford,

Draft Environmental Management and Pollution Control (Environmental Licences) Regulations 2018

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 *Environmental Management and Pollution Control (Environmental Licences) Regulations 2018* (***the Regulations***).

The Regulations have been proposed to support amendments made to the *Environmental Management and Pollution Control Act 1994* (***the Act***) by the *Finfish Farming Environmental Regulation Act 2017*. While we generally support the amendments made to the Act and, now, the Regulations as interim measures, we maintain that a more comprehensive review is warranted to integrate marine farming into Tasmania's Resource Management and Planning System and improve the rigour and transparency of marine farming planning, assessment and enforcement.

Our comments on the details of the proposed Regulations are set out below.

Special penalties and infringement notice amounts

Where a finfish farm operator has been convicted of breaching an environmental licence condition under s.42C(4) of the Act, s.42C(5) allows a special penalty to be imposed. Regulation 4 proposes a special penalty of 1,000 penalty units (or $163,000) for every extra tonne of dissolved nitrogen produced or emitted above a limit imposed by an environmental licence.

EDO Tasmania supports the introduction of speciality penalties and encourages the EPA to consider whether there are other environmental licence conditions (such as those relating to biomass, or finfish farm waste) that also warrant the imposition of a special penalty.

In order to provide a clear deterrent, penalties for non-compliance must exceed the likely profits that can be made by marine farming operators by exceeding their licence limits. We trust that the Regulatory Impact Statement for the Regulations establishes that the proposed penalty amount provided in r.4 will provide such a deterrent. If the quantum of the special penalty is not sufficient to deter excessive nitrogen emissions, the EPA should consider increasing it.

We also support the proposed infringement notice amounts proposed in regulation 6 and schedule 1 of the Regulations. However, we note that stronger penalties will not provide a deterrent when there

is limited risk of enforcement.[1] We expect that the additional $500,000 in annual industry-funding for "Salmonid Aquaculture Regulation" will result in increased monitoring and enforcement activity by EPA Tasmania to secure compliance and improve environmental outcomes.

Criteria for referral to Board

In our comments on the *Draft Finfish Farming Environmental Regulation Bill 2017,* we raised concern that the Bill provided no criteria to guide the EPA Director's decisions regarding which applications for environmental licences (or variations) will be referred to the EPA Board for assessment and which projects will be assessed solely by the EPA Director. As outlined previously, clear criteria are essential given that the public will have no rights to make representations or appeal against environmental licences assessed by the EPA Director alone.

We therefore welcome the proposed introduction of criteria by the Regulations. Our comments regarding the proposed criteria are set out below.

- The reference in Regulations 7(1)(c)(i) and r.8(2)(c)(i) to s.5C(2)(a) of the *Marine Farming Planning Act 1995* should be to s.5C(2)(a) of the *Environmental Management and Pollution Control Act 1994*.

Very high level of public interest

- Regulations 7(1)(a) and 8(2)(a) both require that the EPA Director refer an application to the EPA Board for assessment where s/he is satisfied that there is likely to be a "very high level of public interest" in the application. A similar criterion currently applies where the EPA Board is determining that the level of assessment for a project should be a 2C assessment (see s.27A and schedule 5 of the Act). As a 2C assessment is the highest level of assessment for any proposal, we are concerned that requiring applications for an environment licence or variations to an environment licence have a "very high level of public interest" before referral to the EPA Board is too high a threshold.
- We suggest that r.7(1)(a) and r.8(2)(a) be amended to remove the word "very" before "high level of public interest". We also suggest that the EPA release a policy outlining how it will determine the level of public interest in any application (e.g. by reference to the number of media articles; the receipt of petitions containing more than 500 signatures; the proximity of the proposed activity to national parks, reserves or marine protected areas etc.).

Referral under the EPBC Act

- Regulations 7(1)(b) and 8(2)(b) both require that the EPA Director refer an application to the EPA Board for assessment where s/he is satisfied that it is reasonably likely that a proposed activity will need approval under the *Environment Protection and Biodiversity Conservation Act 1999*. Again, a similar criterion applies where the EPA Board is determining that the level of assessment for a project should be a 2C assessment (see s.27A and schedule 5 of the Act).
- In our submission, r.7(1)(b) and r.8(2)(b) and Schedule 5 of the Act inappropriately require the relevant decision-maker to predetermine the Commonwealth Minister's decision under the *Environment Protection and Biodiversity Conservation Act 1999*.
- We suggest that r.7(1)(b) and r.8(2)(b) be amended so that an activity likely to require referral to the Commonwealth Minister under the *Environment Protection and Biodiversity Conservation Act 1999* should be subject to an assessment by the EPA Board. A similar amendment should be made to clause 3(b)(i) of Schedule 5 of the Act.

[1] From October 2016 to July 2017, the EPA commenced no prosecutions and issued no fines for breaches of any of the 45 marine farming licences issued under the *Living Marine Resources Management Act 1995*, despite numerous contraventions of marine farming licences or Marine Farming Development Plan controls by finfish farms. Source: EPA (20 August 2017) *EPA Active Disclosure Statement: Summary of regulatory information on marine salmon farm leases for the period from October 2016 to July 2017*, accessed at: http://epa.tas.gov.au/Documents/Active%20Disclosure%20Statement%20-%2021082017%20-%20Salmon%20Farming.pdf

Time periods

- The relevant period of time referred to in r.7(1)(d)(ii) and (e)(i)&(ii) and r.8(2)(d)(ii) and (e)(i)&(ii) is 10 years. Given the dramatic changes to oceanic conditions caused by climate change and the improvements that are made to water quality modelling in a period of 10 years, we suggest that a more appropriate period of time in each of these sub-regulations would be 5 years.
- Regulations 7(2)(a) and 8(3)(a) impose a time threshold of "2 years before the application was made to the Director". We consider that there is no justification for such a threshold if the EPA Director is of the opinion that the Marine Farming Planning Review Panel did not have satisfactory information on the environmental impacts of the activity to justify the amendment to the relevant Marine Farming Development Plan (MFDP).
- In order to improve the clarity and scope of r.7(2), we suggest it should be substituted with the following:

  The Director must refer an application to which section 42I(3) of the Act applies to the Board for assessment under section 27AA of the Act, if –

  (a) there was approved by the Minister under the Marine Farming Planning Act 1995 ("earlier decision") –

  (i) a marine farming development plan that applies to all or part of the area of State waters in which the proposed EL activity is to be conducted; or

  (ii) an amendment to a marine farming development plan that applies to all or part of the area of State waters in which the proposed EL activity is to be conducted; and

  (b) the Director is satisfied that further assessment by the Board is warranted to ensure the environmental impact of the proposed EL activity will be appropriately managed.

  (c) Without limiting paragraph (b), the Director may be satisfied that further assessment by the Board is warranted because:

  (i) information about the environmental impacts of the proposed EL activity on which the earlier decision was based was inaccurate, misleading or otherwise deficient in a material way;

  (ii) substantial new information has become available about the environmental impacts of the proposed EL activity after the earlier decision; or

  (iii) there has been a substantial change in circumstances that was not foreseen at the time of the earlier decision that changes the actual or likely environmental impact of the EL activity.

  The criteria listed in paragraph (c) are similar to those used to determine whether reconsideration of a "controlled action" decision is required under the *Environment Protection and Biodiversity Conservation Act 1999*. They seek to achieve a balance between certainty of the earlier decision and the need for the Board to re-assess an activity where evidence suggests that the impact is, or could be, greater than previously anticipated.
- Regulation 8(3) should be substituted with a provision in a similar form to that suggested for r.7(2) above.

Exceeding thresholds

- Regulations 7(3)-(6) and 8(4)-(7) require an application for an environmental licence (or variation) to be referred to the EPA Board where the applicant proposes to emit 10% more than:
  - the maximum rate of dissolved nitrogen as specified in an instrument under a MFDP, or as specified in relation to a lease or leases;
  - the maximum biomass that may be farmed under a MFDP, lease or leases.

- Under current regulatory arrangements, the EPA Director is responsible for setting and amending dissolved nitrogen caps and biomass caps under Management Controls imposed by MFDPs. The decision to amend a Management Control cap can be made unilaterally, without an opportunity for public comment.
- We seek an assurance that, where modification of the dissolved nitrogen cap or biomass cap is proposed in an environmental licence application, the EPA Director will not change the caps until the assessment of the environmental licence or variation application has been undertaken by the EPA Board. That is, Management Control caps must not be amended to allow higher emissions in order to avoid EL activities proposing higher emissions from being assessed by the EPA Board (and subject to public scrutiny).

Thank you for the opportunity to make these comments. Please do not hesitate to contact us on (03) 6223 2770 if you would like to discuss any issues raised in this submission.

Yours sincerely

EDO Tasmania
Per:

Claire Bookless
Lawyer