

FISHERIES (SOUTH ISLAND CUSTOMARY FISHING) AMENDMENT REGULATIONS 2019

Proposal

1. This paper seeks authorisation for submission to the Executive Council of the Fisheries (South Island Customary Fishing) Amendment Regulations 2019.

Policy

2. The Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 (the Settlement Act)¹ requires the government make regulations to recognise and provide for customary food gathering by Māori, and the special relationship between tangata whenua and places of customary food gathering importance. The Fisheries (South Island Customary Fishing) 1999 (the Regulations) give effect to this requirement for the iwi of the South Island and Stewart Island who are defined as tangata whenua.² These iwi can appoint tāngata tiaki/kaitiaki (tāngata tiaki) to manage fisheries resources for customary (non-commercial) purposes.
3. The Regulations also enable the Minister of Fisheries to declare important traditional fishing grounds to be mātaihai reserves. Tāngata tiaki manage mātaihai reserves. No commercial fishing is allowed within mātaihai reserves except where tangata whenua and the Minister agree to conditions for the establishment of a mātaihai reserve that allow continued commercial fishing to address the impacts of a proposed reserve on affected commercial fishers.
4. There are a number of issues with the current Regulations that mean of the nine South Island iwi, only Ngāi Tahu has been able to manage their customary fisheries. The definition of tangata whenua in the Regulations does not reflect post-settlement entities and so seven of the iwi cannot nominate tāngata tiaki. Further, the dispute resolution process in the Regulations, for use when there are disputes over who is tangata whenua, is not time-bound and does not provide any incentive for disputes to be settled.

¹ The Settlement Act gives effect to the deed between iwi and the Crown that settled all claims to fisheries under the Treaty of Waitangi.

² The South Island iwi are Ngāi Tahu, Ngāti Apa, Ngāti Kōata, Ngāti Kuia, Ngāti Rārua, Ngāti Tama, Ngāti Toa, Rangitāne and Te Ātiawa.

5. That eight iwi of the Nelson and Marlborough regions cannot manage their customary fisheries gives rise to the possibility the Crown is in breach of the requirement in the Settlement Act to make regulations that will recognise and provide for customary food gathering by Māori, and the special relationship between tangata whenua and important fishing grounds.
6. All South Island iwi requested a review of the Regulations, and engaged with the Ministry for Primary Industries (MPI) over a three-year period to identify problems with the Regulations and to develop proposed amendments to address the deficiencies.
7. The proposed amendments to the Regulations will:
 - a) update the definition of tangata whenua and clarify that more than one hapū or iwi can be tangata whenua in an area;
 - b) streamline the appointment process for tāngata tiaki, in relation to rohe³ moana and mātaihai reserves, including empowering tangata whenua to make appointments, and removing the 5 year appointment time limit;
 - c) retain the ability of tangata whenua to submit on who is tangata whenua in an area, but remove the ability to submit on who should be tāngata tiaki;
 - d) prescribe a mediation and arbitration process for disputes about who is tangata whenua in an area;
 - e) enable tangata whenua and commercial fishers to agree, prior to an application for a mātaihai reserve being made, that the commercial take of specified species, and specified commercial fishing activities, will be allowed within a reserve, if the reserve is approved; and
 - f) require tangata whenua to only have to report catch information annually, unless otherwise required by the Director-General of MPI.

Minor amendments

8. Further Cabinet approval is sought on the following minor policy changes that are required to properly give effect to the policy decisions:
 - a) If a party refuses to participate in mediation the Director-General of MPI will be empowered to determine a dispute in favour of the other party. This is necessary to address the existing problem of unresolved disputes due to some iwi refusing to participate. The proposed amendment has been requested by iwi and will encourage disputing parties to engage in the mediation and arbitration process. Existing disputes will be required to be resolved under the new process.

³ A rohe is a region or area, in this case referring to the area where an iwi or hapu are tangata whenua.

- b) If tangata whenua appoint a tangata tiaki, or cancel an appointment, the tangata whenua must publish a notice and update a list of tāngata tiaki on their representative website. This will replace the existing requirement for the Minister and the chief executive of MPI to publish such notices. Given that tangata whenua will be responsible for the appointment process, it is no longer necessary for the Minister and/or the chief executive to be involved in the administrative process. Tangata whenua will still be required to notify the Minister of appointments and cancellations.
9. The proposed amendments were developed in partnership with iwi. They are consistent with DEVs agreement to a dispute process that provides certainty a dispute will be concluded.

Timing

10. The Amendment Regulations are anticipated to come into force on 12 December 2019, 28 day days after publishing in the Gazette.

Compliance

11. The Amendment Regulations are consistent with: the principles of the Treaty of Waitangi;
- 11.1. the rights and freedoms contained in the New Zealand Bill of Rights Act 1990 or the Human Rights Act 1993;
 - 11.2. the principles and guidelines set out in the Privacy Act 1993;
 - 11.3. relevant international standards and obligations; and the Legislation Guidelines (2018 edition).

Regulations Review Committee

12. I consider that there are no grounds under Standing Order 319 for the proposed amendment regulations to be brought to the special attention of the House of Representatives.

Certification by Parliamentary Counsel

13. The Parliamentary Counsel Office has certified the attached Amendment Regulations as being in order for submission to Cabinet.

Impact Analysis

14. A regulatory impact assessment was prepared in accordance with the necessary requirements and was submitted when approval was sought from the Cabinet Economic Development Committee on 2 May 2018 (DEV-18-MIN-0057).

15. The MPI Regulatory Impact Analysis Panel reviewed the Regulatory Impact Statement “Proposed Amendments to the Fisheries (South Island Customary Fishing) Regulations 1999” (produced post-consultation) by MPI in 2017. The review panel considers that the information and analysis summarised in the Regulatory Impact Regulatory meets the quality assurance criteria. There has been no material change since that time.

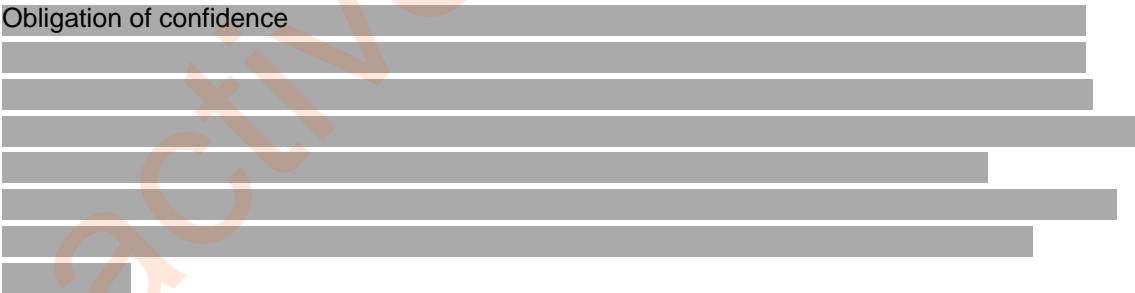
Publicity

16. The decision relating to the proposed regulations will be publicly notified via *Gazette* notice.
17. I will write to tangata whenua and submitters to inform them of the new regulations and the reasons for my decision. My letter will be published on Fisheries New Zealand’s⁴ website, and communicated via a dedicated email and letter to tangata whenua and submitters.

Proactive Release

18. Following Cabinet consideration I intend to consider the release of this paper in full.

Consultation

19. The following departments have been consulted on these amendments: Department of Conservation, Ministry for the Environment, Ministry of Justice (Criminal Law and Post Settlement Commitments Unit), and Te Puni Kōkiri. The Department of Prime Minister and Cabinet has been informed.
20. All nine South Island iwi were involved in the development of the amendments.
- Obligation of confidence
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21. Submissions were invited from the fishing industry, government departments and Te Ohu Kaimoana. Submissions were generally supportive of the proposed amendments. A joint submission was received from the Paua Industry Council and NZ Rock Lobster Industry Council regarding the mechanism providing for commercial fishing within a mātaihai reserve (that it be agreed prior to application and included as part of the mātaihai application). The iwi and the Paua Industry Council and NZ Rock Lobster Council agreed on this mechanism and it is included in the proposed amendments.

⁴ Fisheries new Zealand is a business unit of MPI.

Recommendations

The Minister of Fisheries recommends that the Cabinet Legislation Committee:

1. Note that on 2 May 2018, the Cabinet Economic Development Committee agreed to amend the Fisheries (South Island Customary Fishing) Regulations 1999, [DEV-18-MIN-0057] to:
 - a) update the definition of tangata whenua and clarify that more than one hapū or iwi can be tangata whenua in an area;
 - b) streamline the appointment process for tāngata tiaki in relation to rohe moana and mātaihai reserves, including empowering tangata whenua to make appointments, and remove the 5 year appointment time limit;
 - c) retain the ability of tangata whenua to submit on who is tangata whenua in an area, but remove the ability to submit on who should be tāngata tiaki;
 - d) prescribe a mediation and arbitration process for disputes about who is tangata whenua in an area;
 - e) enable tangata whenua and commercial fishers to agree, prior to an application for a mātaihai reserve being made, that the commercial take of certain species, and certain commercial fishing activities, will be allowed if the reserve is approved; and
 - f) require tangata whenua to only have to report catch information annually, unless otherwise required by the Director-General of MPI.
2. Agree to the following minor policy proposals to give effect to the decisions referred to above:
 - a) If a party refuses to participate in mediation the MPI chief executive will be empowered to determine a dispute in favour of the other party.
 - b) If tangata whenua appoint a tangata tiaki or cancel an appointment, the tangata whenua must publish a notice and update a list of tāngata tiaki on their representative website.
3. Note that the Fisheries (South Island Customary Fishing) Amendment Regulations 2019 will amend the Fisheries (South Island Customary Fishing) Regulations 1999 to give effect to the decision referred to in paragraphs one and two above;
4. Authorise the submission to the Executive Council of the Fisheries (South Island Customary Fishing) Amendment Regulations 2019;
5. Note that the Fisheries (South Island Customary Fishing) Amendment Regulations 2019 are intended to come into force on 12 December 2019.

Authorised for lodgement

Hon Stuart Nash
Minister of Fisheries