

MARINE FARMERS – up the creek without a paddle?



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The recent decision of the Auckland High Court in the action brought by Waikare Inlet oyster farmers* has focused attention on the devastating effects of pollution and contamination on marine farmers.

This is in contrast to the usual perspective of considering only the effects - or perceived effects - marine farming has on the environment.

The emphasis over the last decade or so has been on the need to control marine farming so as to avoid it having adverse effects on the marine environment. This is despite the fact that many experts have agreed that those effects are generally negligible at best and minor at worst.

Nonetheless, the result of the 2004 aquaculture law reform is to treat marine farming, outside of aquaculture management areas at least, as on a par with dumping radioactive matter and toxic waste.

Almost two years since the passage of the reforms, there are still no new AMAs on the horizon, so marine farming looks doomed to remain in the radioactive matter category for the time being.

The Northland Regional Council is due some credit for attempting to grapple with the reforms by proposing a variation to its Coastal Plan that would allow for private plan changes to establish AMAs.

Even if that variation becomes operative, and it will have to survive a public consultation process and overcome some technical issues in order to do so, it will only be the first step on a long road to new AMAs in the region.

In the meantime, though, the oyster farmers' case has underlined the fact that if there is one thing the industry needs even more than new AMAs, it is good water quality in existing marine farming areas.

In the case, 14 Waikare Inlet oyster farmers sued the Far North District Council (FNDC), claiming that discharges from the FNDC's Kawakawa sewerage plant were responsible for three outbreaks of gastro-enteritis linked to the consumption of oysters harvested from the farms in 1994, 1999 and 2001.

After the 2001 outbreak, the farms were subject to an emergency closure by Northland Health, and then reclassified as "restricted", meaning that harvesting of the farms' oysters was allowed only on a limited basis.

That classification remains in place today, and the farmers claimed that its effect is that the farms have not been economically viable since October 2001.

The farmers claimed damages from the FNDC for nuisance and negligence. The action failed primarily because of a lack of evidence on the timing and effect of sewage discharges. While it was clear that the inlet was subject to periodic contamination by sewage, the Court took the view that

- there was insufficient evidence that raw or partially treated sewage was discharged from the Kawakawa plant immediately prior to the 1994, 1999 and 2001 contaminations
- even if raw or partially treated sewage was discharged at the relevant times, it was unlikely that the norovirus that led to gastro-enteritis outbreaks would have survived the long journey between the plant and the farms and, if it did, it would have been highly diluted, and
- there were other, more likely, sources of faecal contamination in the inlet, such as coastal septic tanks, long-drop toilets and boats.

Even if these evidential problems had not defeated the farmers' claims, the court considered that the risk of a lengthy reclassification of the farms such as to make them economically unviable not reasonably foreseeable by the FNDC, such that the FNDC should be liable for the damage caused to farmers as result.

Notwithstanding that defeat, efforts to clean up the FNDC's act continue. It has another battle on its hands as it is prosecuted by the Northland Regional Council under the Resource Management Act for a range of sewage spills in the region.

The threshold for succeeding in such a prosecution is significantly lower than the marine farmers faced in their action, with the RMA deeming it an offence to "discharge any contaminant into water unless the discharge is expressly allowed by a rule in a regional plan, a resource consent, or regulations".

While all this is no doubt cold comfort to the Waikare Inlet farmers whose livelihoods have been devastated, their efforts may at least have played a part in highlighting a major problem.

The FNDC has announced that it will replace its sewage pipeline between Waitangi and Paihia, responsible for two spills in early 2006, at a cost of \$5.7 million. Discussions are scheduled between Waikare Inlet farmers, the council, the Ministry of Fisheries and health authorities in an attempt to find a way for farming to recommence.

If nothing else, it is nice to see that marine farmers, for once, have not been painted as the villains of the piece.

* *Tindall and others v Far North District Council* 20/20/06, Winkelmann J. Contact the author if you would like a copy of the case.



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