

New Zealand Oyster Industry Association Incorporated

("NZOIA")

AND

Northland Regional Council

("NRC")

Memorandum of Understanding

OCEANLAW NEW ZEALAND



MEMORANDUM OF UNDERSTANDING dated October 2013

This Memorandum of Understanding ("MoU") is agreed between:

The **New Zealand Oyster Industry Association Incorporated**, an incorporated society established under the Incorporated Societies Act 1908 and having its registered address at 295 Lincoln Road, Henderson, Auckland ("NZOIA"); and

The **Northland Regional Council**, the consent authority for the Northland Region, as that term is defined in the Resource Management Act 1991 ("NRC").

Background

- A** Following a review of conditions on coastal permits for marine farms commenced in 2005, the NRC resolved to impose new conditions on permits which would allow it to recover clean-up costs from permit holders in respect of any farms that were to fall into disrepair or disuse.
- B** Conditions requiring a bank bond or other surety acceptable to the NRC be posted in the amount of \$6.95 per horizontal lineal metre of racks or \$9,000 per developed hectare have been imposed on coastal permits for all oyster farms in the Northland Region, pursuant to sections 10, 20 and 21 of the Aquaculture (Repeals and Transitional Provisions) Act 2004 and section 108A of the Resource Management Act 1991.
- C** As a result of industry concerns at the effect these conditions would have on the commercial viability of their operations, NZOIA has worked, over several years, to develop an alternative scheme that would meet NRC's objectives.
- D** This MoU describes the framework of such a scheme that has been agreed between the parties.
- E** The parties agree that, on the establishment and implementation of the scheme described in this MoU to their mutual satisfaction, the NRC will accept a coastal permit holder's agreement to be a subscriber to the scheme as adequate surety for the bond provided by that permit holder whilst the Coastal Permit holder remains a Subscriber.

1 Interpretation

1.1 In the MoU, unless the context requires otherwise:

- Coastal Permit* means a permit authorising the occupation of the coastal marine area for the purposes of oyster farming, granted under the Resource Management Act 1991 and includes:
- (a) a deemed coastal permit granted under any earlier legislations; and
 - (b) any resource consent(s) ancillary to a coastal permit;
- OpCo* (short for Operating Company working title only) means the company to be established by NZOIA in accordance with clause 4.1.1 below;
- the Scheme* means the Northland Oyster Farm Remediation Scheme to be established and operated in accordance with this MoU;
- Standard Clean-Up Cost* means:
- (a) the actual cost of removal of all structures from an abandoned oyster farm; or
 - (b) \$9,000 per developed hectare within the area covered by

the relevant Coastal Permit; or

- (c) \$6.95 per horizontal lineal metre of racks within the area covered by the relevant Coastal Permit,

whichever is the lesser, with the result adjusted for inflation in accordance with the Consumer Price Index;

<i>Subscriber</i>	means a Northland Oyster Farmer who has been accepted by OpCo as eligible to enter the Scheme and who has entered into an agreement with OpCo as described in clause 5.5 below;
<i>Trust Fund</i>	means the fund established and administered in accordance with this MoU.

2 Objectives of Scheme

2.1 The over-arching objectives of the Scheme described in this MoU are to:

- 2.1.1 Encourage and incentivise compliance by oyster farmers with the terms of their Coastal Permits and the standards of industry best practice;
- 2.1.2 Ensure that Northland ratepayers are not exposed to the cost of remediating oyster farms that were to fall into disrepair or disuse; and
- 2.1.3 Minimise the negative commercial effects of remediation bonds on oyster farmers who meet their obligations.

3 Overview of the Scheme

- 3.1 The central feature of the Scheme will be the establishment of a Trust Fund, into which Subscribers will be required to pay levies.
- 3.2 Management of the Trust Fund and administration of the Scheme will be the responsibility of OpCo, a subsidiary of NZOIA, to be established for those purposes. OpCo, with the financial backing of the Trust Fund, will effectively substitute for marine farmers' banks in providing surety for the existing bond conditions.
- 3.3 In order to become Subscribers, holders of Coastal Permits will be required to enter into binding agreements with OpCo (described in more detail in clause 5.5 below), committing them to:
 - 3.3.1 Comply with the terms of their Coastal Permits and the standards of industry best practice;
 - 3.3.2 Pay levies/contributions into the Trust Fund;
 - 3.3.3 Authorise OpCo to make payments from the Trust Fund for remediation activities when necessary; and
 - 3.3.4 Provide security over their farm assets to OpCo, enforceable in the event that they default on their obligations in such a way as to require OpCo to call on the Trust Fund.
- 3.4 OpCo will also enter into a binding agreement with NRC that sets out the criteria for abandonment of a marine farm and the process to be followed in making a call on the Trust Fund.
- 3.5 This agreement will not limit NRC's discretions as a statutory authority exercising regulatory functions under the Resource Management Act 1991.
- 3.6 NRC will not waive the bond conditions on Coastal Permits, but will recognise the agreement it enters with OpCo, and the Scheme as a whole, as an acceptable surety for the bonds provided by individual Subscribers (in substitution for bank sureties).



4 Structure of the Scheme

Role of NZOIA

4.1 The Parties agree that NZOIA will:

- 4.1.1 Establish OpCo as a wholly-owned subsidiary;
- 4.1.2 Appoint, remove and re-appoint directors to OpCo as required;
- 4.1.3 Receive audited financial and operational reports from OpCo;
- 4.1.4 Monitor the operations of OpCo and oversee administration of the Scheme; and
- 4.1.5 Recommend to its members the adoption of such amendments to its own constitution as are deemed necessary to authorise and empower it to undertake these actions and do all other things necessary to establish and maintain the Scheme.

Role of NRC

4.2 The Parties agree that NRC will:

- 4.2.1 Enter an agreement with OpCo, as described in clause 5.4 below, that sets out the process and terms on which calls can be made on the Trust Fund;
- 4.2.2 Advise OpCo of results of monitoring of oyster farms and all compliance concerns, including enforcement/abatement actions initiated against Subscribers;
- 4.2.3 Accept an oyster farmer's subscription to the Scheme, by entering into an agreement with OpCo (as described in clause 5.5 below), as constituting an acceptable surety for the bond provided by that Subscriber, in terms of the relevant Coastal Permit conditions.

Role of OpCo

4.3 The Parties agree that OpCo will:

- 4.3.1 Be a wholly-owned subsidiary of NZOIA;
- 4.3.2 Have two related functions:
 - (a) Acting as the corporate trustee of the Trust Fund; and
 - (b) Administering the Scheme;
- 4.3.3 Enter into an agreement with NRC, as described in clause 5.4 below, that sets out the process and terms on which calls can be made on the Trust Fund;
- 4.3.4 Where necessary, undertake or commission farm clean-up activities funded by the Trust Fund;
- 4.3.5 Be empowered to determine, on a case-by-case basis:
 - (a) Eligibility to become a Subscriber; and
 - (b) An acceptable form and level of security to be provided by a Subscriber as part of the agreement described in clause 5.5 below;
- 4.3.6 Enter into agreements with oyster farmers, as described in clause 5.5 below, that include their commitment to subscribe to the Scheme and abide by its rules;
- 4.3.7 Advise NRC, within prescribed timeframes, whenever a Subscriber terminates its agreement with OpCo in respect of the Scheme or falls into default in payment of levies or other rules of the Scheme;
- 4.3.8 Set and adjust annual levies for Subscribers as necessary to capitalise the Trust Fund to the appropriate level and fund the administration of the Scheme; and

4.3.9 With the agreement of NZOIA, develop and implement programmes to assist and encourage best practice among oyster farmers, particularly with respect to minimising the adverse effects of farming on the environment; and

4.3.10 Report annually to NZOIA on its activities and financial position.

Role of Subscribers

4.4 The Parties agree that Subscribers will be required to:

4.4.1 Be members of NZOIA;

4.4.2 Provide a bond to the NRC acknowledging liability for the Standard Clean-Up Cost in the event of abandonment of their farm, in accordance with their Coastal Permit conditions;

4.4.3 Enter into a binding agreement with OpCo, as described in clause 5.5 below, the terms of which include providing appropriate security over farm assets, a commitment to best practice industry guidelines and monitoring conditions; and

4.4.4 Pay annual contributions to the Trust Fund.

5 Framework of the Scheme

5.1 This MoU sets out the Parties' expectations in respect of the key elements of the Scheme, as described below.

Constitution of OpCo

5.2 The Parties agree that the constitution of OpCo must be approved by them and will include the following terms:

5.2.1 The company will have a minimum of three and a maximum of five directors;

5.2.2 NZOIA shall have the right to:

(a) Appoint up to four Directors; and

(b) Promptly receive copies of all audited financial and operational reports for OpCo.

5.2.3 NRC shall have the right to:

(a) Appoint one Director; and

(b) Promptly receive copies of all audited financial and operational reports for OpCo.

5.2.4 The functions of the company will be to:

(a) Administer the Scheme;

(b) Act as corporate trustee of the Trust Fund, in accordance with the Trust Deed under which that Fund is held;

(c) Enter into and comply with an agreement with NRC as described in clause 5.4 below;

(d) Develop and undertake programmes to assist and encourage best practice among oyster farmers, as agreed to by NZOIA from time to time;

5.2.5 Obligations on the company's directors to:

(a) Set and adjust levies payable by Subscribers, and manage expenditure, at the levels necessary to capitalise the Trust Fund to the level and at the rate prescribed in clause 6 below;

(b) Ensure, at all times, that OpCo has access to sufficient capital (in the form of Trust Funds and securities) to meet its obligations to the NRC in terms of the agreement described in clause 5.4 below;

- (c) Set and adjust levies payable by Subscribers, and manage expenditure, at levels sufficient to cover the company's operational and administrative costs, but not build substantial reserves;
 - (d) Set differential levies, if necessary, and require securities over Coastal Permits, and farm and other assets of all Subscribers at levels commensurate with the compliance history, risk profile and asset base of individual Subscribers;
 - (e) Hold operational funding of the company in a bank account separate from the Trust Fund and account for such funding separately; and
 - (f) Present a budget and proposal for Trust Fund levies and operational levies to NZOIA on an annual basis; and
 - (g) In the event that reserves of operational funding build up in excess of 50% of annual average budgeted costs over the preceding five years, pay the surplus into the Trust Fund and adjust levies, if necessary; and
- 5.2.6 Boilerplate terms in relation to the indemnification of directors, appointment of auditors, conduct of meetings, conflicts of interest, remuneration of directors, etc.

Trust Deed of Trust Fund

5.3 The Parties agree that the Trust Deed of the Trust Fund must be approved by them and will include the following terms:

5.3.1 The Purposes of the Trust will be to:

- (a) Support and assist oyster farmers in minimising the adverse effects of farming on the environment; and
- (b) Ensure that the obligations of OpCo under the agreement with NRC (described in clause 5.4 below) can be met.

5.3.2 The beneficiaries of the Trust will be the Subscribers;

5.3.3 Trust Funds must be applied to the Trust's purposes;

5.3.4 The Trustee (OpCo) will invest the Trust Funds (and re-invest interest earned on those funds) in a Bank trust account in accordance with the provisions of the Trustee Act 1956. An appointee of NRC shall be one of the mandatory signatories to the Trust Fund bank account;

5.3.5 NZOIA, as settlor of the Trust, with the consent of NRC (such consent not to be unreasonably withheld) will have the power to amend the Trust Deed, but any amendments must be consistent with the terms of this MoU;

5.3.6 In the event that OpCo ceases to exist, NZOIA will have the power to appoint a replacement Trustee, but will be required to obtain the approval of NRC of any replacement;

5.3.7 The consent of NRC shall be required to any voluntary winding up of the Trust. Subject to the consent of NRC (such consent not to be unreasonably withheld), in the event of any winding up of the Trust, any remaining funds will be paid to NZOIA, to be applied to its objectives and purposes; and

5.3.8 Boilerplate provisions in respect of record-keeping, accounting, period of the Trust, etc.

Agreement between OpCo and NRC

5.4 The Parties agree that the agreement between OpCo and NRC referred to above will include the following terms:

5.4.1 Provision of security for bonds provided by Subscribers;

- 5.4.2 Definition of key terms, especially abandonment (i.e. Subscriber has derelict structures and has not complied with NRC remediation requirements for a period) and default (i.e. failure to pay bond if called on) by Subscriber;
- 5.4.3 An obligation on OpCo to keep NRC advised of those who are Subscribers (and who are therefore covered by this agreement), and those who have ceased to be Subscribers;
- 5.4.4 A process to be followed in the case of non-compliance with consent conditions by a Subscriber that:
- (a) Is consistent with NRC's statutory powers and obligations;
 - (b) Ensures that OpCo is fully informed of any compliance concerns at the earliest possible opportunity;
 - (c) Ensures that Subscribers retain the primary responsibility for undertaking or paying for any remediation work;
 - (d) Maximises opportunities for OpCo to intervene or work with Subscribers to remedy non-compliance; and
 - (e) Allows for swift action to be taken in emergencies.
- 5.4.5 Where OpCo undertakes clean-up or remediation, it will be entitled to take possession of any and non-natural material within the site, to remove some or all such material from the site and to sell or recycle or otherwise dispose of such material and retain the proceeds of sale;
- 5.4.6 Where clean-up or remediation is required and it is necessary for NRC, rather than OpCo to undertake (or contract the undertaking of) the necessary work (e.g. in an emergency situation), OpCo will reimburse NRC's clean-up and remediation costs up to the Standard Clean-Up Cost; and
- 5.4.7 The term of the agreement will be 15 years, with a right of termination on one years' notice after five (5) years and no obligation on either party to continue with the Scheme thereafter.

Agreement between OpCo and Subscribers

5.5 The Parties agree that the agreement between OpCo and each Subscriber will be a legally enforceable civil contract (independent of the terms and conditions of NZOIA membership) and will include the following terms:

5.5.1 Warranties from the Subscriber that:

- (a) They have provided the prescribed bond to NRC;
- (b) Their farm is compliant with all conditions of its Coastal Permit(s) as at the date of signing (or any non-compliance is deemed by NRC to be minor in nature) and will be maintained that way; and
- (c) Farm operations and assets are insured to industry-standard levels;

5.5.2 Commitment by the Subscriber to:

- (a) Pay an initial, one-off subscription fee;
- (b) Pay levies into the Trust Fund set by OpCo annually in accordance with its constitution and this MoU;
- (c) Pay levies to support the budgeted operational and administration costs of OpCo, set by OpCo annually in accordance with its constitution and approved by NZOIA;
- (d) Comply with any penalties imposed by OpCo for non-payment of levies or breach of other terms of this agreement;

- (e) Meet removal/remediation costs;
 - (f) Adhere to industry best practice;
 - (g) Monitor and demonstrate compliance with Coastal Permit conditions;
 - (h) Advise OpCo immediately of any significant changes in respect of their farm, including any change in the extent of the developed area of their Coastal Permit;
 - (i) Allow OpCo to undertake any action it deems appropriate as a result of notice from NRC of significant non-compliance in accordance with the Subscriber's Coastal Permit; and
 - (j) Provide adequate and appropriate security to OpCo over Coastal Permits and farm assets, enforceable in the event of default. In the event that NRC is unsuccessful in recovering all of its actual clean-up costs from the Subscriber and/or OpCo, then OpCo shall cause the defaulting Subscriber's Coastal Permit and other security to be transferred to NRC;
- 5.5.3 A requirement that Subscribers to waive their privacy in respect of communications with NRC in relation to compliance with Coastal Permit conditions, and agree that such communications should be copied to OpCo;
- 5.5.4 Provision for Subscribers to assign their rights under the agreement to a purchaser of their farm who covenants to be bound by its terms in a form approved by OpCo;
- 5.5.5 Process, criteria and consequences of termination of the agreement by either party to the agreement; and
- 5.5.6 Dispute resolution processes.

6 Capitalisation of Trust Fund

6.1 The Parties acknowledge that:

- 6.1.1 The annual average abandonment rate for oyster farms in Northland is approximately 0.5%; and
- 6.1.2 The maximum estimated cost for clean-up and remediation of derelict sites at the date of this MoU is the Standard Clean-Up cost.

6.2 The Parties agree that:

- 6.2.1 Levies payable by Subscribers (not including levies to fund OpCo operations and administration) should be set at a base level of not less than 1.5% of the Standard Clean-Up cost per developed hectare;
- 6.2.2 OpCo will have a discretion to set annual levies at levels necessary for the value of the Trust Fund to equate to between 40% and 50% of the maximum estimated clean-up and remediation costs for all farms covered by the Scheme within 15 years of the date of signing this MoU;
- 6.2.3 Once the value of the Trust Fund has reached the level prescribed in clause 6.2.2 above, OpCo will have the discretion to reduce levies below the default level prescribed in clause 6.2.1 above and/or refund some levies paid to Subscribers; and
- 6.2.4 Any measures adopted by OpCo in accordance with clause 6.2.3 above must not have the effect of reducing the value of the Trust Fund below 5% of the maximum estimated clean-up and remediation costs for all farms covered by the Scheme.

7 Review

7.1 The Parties agree that they will jointly review the operation of the Scheme:

- 7.1.1 Not less than 18 months and not more than 24 months after the execution of this MoU; and



7.1.2 Between 1 October 2018 and 30 September 2019; and

7.1.3 Between 1 October 2021 and 30 September 2022.

- 7.2 In the event that a review referred to in clause 7.1 above establishes that changes should be made to the structure and/or and framework of the Scheme in order to achieve, or better achieve, the objectives set out in clause 1 above, the Parties agree to do all things necessary in order to implement such changes.
- 7.3 If, outside of the review periods set out in clause 7.1 above, either of the Parties comes to the view that the Scheme is failing to achieve the Objectives set out in clause 1 above, that Party will, as soon as practicably, advise the other Party that they believe a review of the Scheme is required.
- 7.4 If the Parties are unable to agree on the need for a review requested in accordance with clause 7.3 above or on the need for changes to be made to the Scheme as a result of a review, the matter shall be dealt with in accordance with the dispute resolution process set out in clause 9 below.

8 Implementation

- 8.1 The Parties agree that they will use their best endeavours to implement the Scheme by:
- 8.1.1 Establishing OpCo and agreeing the constitution of OpCo and Trust Deed of the Trust Fund within one (1) month of the date of this MoU; and
- 8.1.2 Developing drafts of the agreements described in clauses 5.4 above within two (2) months of the date of this MoU;
- 8.2 The Parties record their expectation that:
- 8.2.1 OpCo and NRC will execute the agreement described in clause 5.4 above within three (3) months of the date of this MoU;
- 8.2.2 OpCo will advise the Parties of those farmers who have expressed an interest in becoming Subscribers within three (3) months of the date of this MoU; and
- 8.2.3 OpCo will use its best endeavours to execute an agreement, as described in clause 5.4 above, with all farmers who expressed an interest in becoming Subscribers within six (6) months of the date of this MoU.
- 8.3 Notwithstanding the provisions of clause 8.1, it is acknowledged that the provisions of this MoU do not create any binding legal obligations on the Parties.
- 8.4 NZOIA will bear the primary responsibility for drafting documents required for the implementation of the Scheme, and all parties (including NRC, OpCo and farmers) will bear their own costs in conjunction with agreeing those documents.

9 Dispute Resolution

- 9.1 In the event that any dispute arises between the Parties as at to the interpretation or operation of this MoU, the following process will apply:
- 9.1.1 The Party raising the dispute will give formal notice of it to the other Party;
- 9.1.2 Within ten (10) working days of notice being given, the Chairs of each of the Parties shall meet and attempt to resolve the dispute;
- 9.1.3 If the Chairs of the Parties are unable to resolve the dispute within one (1) month of the notice of dispute, the Parties may agree to submit it to mediation;
- 9.1.4 If the Parties do not agree to submit the dispute to mediation or the matter is not resolved through mediation, they shall submit it to arbitration in accordance with the Arbitration Act 1996;



9.1.5 If the Parties are unable to agree on the appointment of an Arbitrator, one will be appointed by the President of the Auckland District Law Society.

9.2 For the avoidance of doubt, the dispute resolution process set out in clause 9.1 above shall not in any circumstance limit NRC's discretions as a statutory authority exercising regulatory functions under the Resource Management Act 1991.

Signed on behalf of
New Zealand Oyster Industry Association Incorporated

by:

Name

Title

Signature

Signed on behalf of
Northland Regional Council

by:

Malcolm Charles Nicolson

Name

Chief Executive

Title

[Handwritten Signature]

Signature