

Marine biosecurity rules have come to Northland!

Members will be aware that the Ministry for Primary Industries has strengthened marine biosecurity at the border, so New Zealand's regulation is consistent with the International Maritime Organization's Biofouling Guidelines and the UN Convention on the Law of the Sea (UNCLOS). UNCLOS requires member states to work together "to prevent, reduce and control human caused pollution of the marine environment, including the intentional or accidental introduction of harmful or alien species to a particular part of the marine environment".¹

After a considerable period of consultation, public education and voluntary compliance, the Craft Risk Management Standard for Biofouling came into force in May 2018.² This regulatory change is supported by advice and guidance for specific vessel types, all of which can be found at the link in the footnote below to the Ministry for Primary Industries' web page on hull biofouling management. At the border, yachts entering New Zealand for more than 21 days are only allowed a slime layer and goose-neck barnacles on their hull. To achieve this, owners need to ideally renew antifouling paint or clean their vessel less than 30 days before arrival (including travelling time), and keep records to demonstrate these measures have been taken.

Regional Councils are turning their attention to preventing, slowing and minimising the spread of marine pests within New Zealand. Environment Southland took the lead, developing the Fiordland Marine Regional Pathway Management Plan, with consultation extending over years. The clean hull standard is the same as at the border but in addition there are requirements for clean gear and any residual seawater on board. Owners of vessels entering Fiordland are required to have a Clean Vessel Pass. The simple, free, online application asks for passage plans, hull antifouling and maintenance, and cleaning of gear and seawater.³

Northland Regional Council took a different approach. They undertook a 'Combined Consultation' on a raft of issues of importance to boaties. The 'Combined Consultation' included: a new Charging Policy that introduced a marine biosecurity charge on mooring and marina berth licensees (and a few others); a draft Regional Pest and Marine Pathway Management Plan that included a draft Marine Pathway Plan; and a revised Navigation Safety Bylaw.⁴ Hundreds and hundreds of pages of 'consultation' documents were released in 2017 for a consultation period of less than 5 weeks over Easter. The release of these documents was associated with a few 'information' evenings around Northland. Not surprisingly, Northland Regional Council received hundreds of submissions from boaties.

The main points of contention were the imposition of a marine biosecurity charge (largely on Northland marina and mooring licensees) and the Marine Pathway Plan. The first issue is still the subject of legal consideration and will not be discussed further here.

¹ <http://www.imo.org/en/OurWork/Environment/Biofouling/Pages/default.aspx>

² <http://www.mpi.govt.nz/importing/border-clearance/vessels/arrival-process-steps/biofouling/biofouling-management/>

³ <http://www.es.govt.nz/document-library/plans-policies-and-strategies/regional-plans/Pages/Fiordland-Marine-Pathway-Plan.aspx>

⁴ http://consult-nrc.objective.com/portal/corporate_planning/joint_consultation/2017_joint_consult/2017_combined_consult

The second point of contention, the Marine Pathway Plan, introduced an achievement standard for biofouling on boat hulls, both entering Northland waters and moving between 18 'designated places' (Northland harbours, marine reserves and popular anchorages). The Council is seeking to incorporate the Marine Pathway Plan into its proposed Regional Plan.⁵ The achievement standard is that the fouling on the hull and niche areas of the craft does not exceed 'light fouling'. 'Light fouling' is defined as: small patches (up to 100 mms in diameter) of visible fouling totalling less than 5% of the hull and niche areas. A slime layer and/or any species of barnacles are allowable fouling. Breach of the achievement standard is an offence under the Biosecurity Act and incurs a fine of up to \$5,000.

Many submissions pointed out that not only was this achievement standard very difficult to assess, but in remote areas, in-water assessment is required as there are no haul-out facilities. In-water assessment in all conditions, and all seasons, for owners either sailing solo or with their partner can be dangerous as they cannot meet safety recommendations (diving with a buddy and with a third person in the boat).⁶ The NZ Underwater Association also recommends regular medical check-ups by a dive doctor for divers and snorkelers because heart attacks kill more divers than any other cause.⁷ Trained and accredited commercial divers are few and far between. In addition, no methods for achieving the standard, such as Northland Marinas' "six or one" Marine Pest Management Programme (antifouled in the last six months or lifted and washed in the last one month)⁸ or Fiordland's Clean Vessel Pass, were included in the rules.

Those who have followed the saga of the leaky homes regulatory failure will be fully aware that it was the change to the statutory and regulatory environment for the building industry in 1991, with the passing of the Building Act, that resulted in leaky buildings. This has in part been attributed to the provision of achievement standards but inadequacies in the methods sanctioned by the building code to achieve the standards.⁹ Without a sanctioned method for achieving the hull biofouling standard in the Marine Pathway Plan, boaties were faced with the prospect of being blamed for marine pests 'leaking' into Northland, rather than the Council blamed for repeating the regulatory design mistakes of the past.

Interestingly, in their submissions on the Marine Pathway Plan's incorporation into the proposed Regional Plan, both the Minister of Conservation and the Ministry for Primary Industries have raised concerns with the use of 'light fouling' as the basis for a rule without also including sanctioned methods for achieving the rule. They have made recommendations for changes including that "vessels must have an anti-fouling system applied in accordance with the manufacturer's instructions, and the anti-fouling system must be within the manufacturer's timeframe of effectiveness."

The Council did not make any significant changes to the Marine Pathway Plan in response to the problems identified in the hundreds of submissions they received. The Council's decisions were passed by a majority vote.¹⁰ In response, Far North

⁵ <https://www.nrc.govt.nz/Your-Council/Council-Projects/New-Regional-Plan/>

⁶ <https://worksafe.govt.nz/topic-and-industry/occupational-diving/occupational-diving-forms-and-guidelines/>

⁷ <https://www.nzunderwater.org.nz/safety-training#medical-refresher>

⁸ <https://www.nrc.govt.nz/Maritime/Our-marine-environment/visiting-a-northland-marina-this-summer/>

⁹ <https://www.parliament.nz/resource/0000000237>

¹⁰ <https://www.nrc.govt.nz/News/news-2017/june/new-marine-pest-management-charges-plans-adopted>

Holdings, Kerikeri Cruising Club and the majority of Northland marinas appealed the decision in the Environment Court. They went to mediation, the outcome of which was agreement on incorporating a Voluntary Anti-Fouling Declaration, issued by the Council, if the vessel has had antifouling paint applied according to the manufacturer's instructions within the preceding 12 months. Owners of vessels that hold a declaration will not be prosecuted if macrofouling or filamentous algae does not exceed 15% of the visible hull surface, but instead may be issued with a Notice of Direction to get their hull cleaned. Therefore holders of an Anti-Fouling Declaration can be certain that if their hull marginally exceeds the light fouling achievement standard, they will not be prosecuted.

In the decision recently released,¹¹ Judge Jeff Smith said that the “problem is a difficult one to solve, and an absolutist approach in our view would likely be counter-productive.” He said the Voluntary Anti-Fouling Declaration:

- avoids ‘an overly technical measurement issue’ allowing a more flexible approach;
- synchronises with many of the marina requirements where marinas are wishing to protect their assets by controlling vessels coming into the marina;
- uses a positive pathway to educate and remind boat owners to apply anti-fouling;
- creates an incentive to boat owners to take action before an issue occurs;
- creates a database for the Council from which it can communicate with boat owners, plan future biosecurity measures and evaluate the effectiveness of the Plan.

The Northland compromise will obviously not satisfy boaties, but there is now a stake in the ground (water?!) that will give a good basis for evolving a more sensible approach to marine pest management in Northland. This decision may act as a precedent for Northland Regional Council's Proposed Regional Plan. Other regional councils are developing plans and hopefully they will use this decision to reconsider following Northland and coming up with the same overly technical measurement issue!

Let's hope that boaties, either in or planning to visit Northland, will apply for an anti-fouling declaration, although the process and cost of getting one has not been worked out. Hopefully it will be a simple online process at minimal or no cost!

¹¹ <https://www.environmentcourt.govt.nz/assets/Documents/Publications/2018-NZEnvC-057-Far-North-Holdings-Limited-v-Northland-Regional-Council.pdf>