

## Aquaculture Lease Allocation

POLICY NUMBER: O-071	VERSION: 3.4
AUTHORISED BY: Group Director, Commercial Fisheries & Aquaculture	AUTHORISED DATE: 03/09/2019
ISSUED BY: DPI Fisheries	EFFECTIVE DATE: 03/09/2019
CATEGORY OPERATIONS AND INDUSTRY	REVIEW DATE: 03/09/2021

### Policy Statement

This policy describes the circumstances under which NSW Department of Primary Industries (NSW DPI) will allocate new aquaculture leases by a competitive process or direct negotiation.

The *Fisheries Management Act 1994* (the Act) provides for the granting of aquaculture leases by application, public tender, auction or ballot. Section 163 of the Act and the Fisheries Management (Aquaculture) Regulation 2017 (the Regulation) describes how the competitive allocation process is conducted.

(Note: existing aquaculture leases can be renewed without competitive process in accordance with Section 168 of the Act).

NSW DPI has an obligation to “promote viable aquaculture industries” according to the objects of the Act and also has an obligation to the State to maximise returns when allocating public resources for a private/commercial use.

NSW DPI will use two processes in the allocation of aquaculture leases:

1. Competitive allocation process, to allow fair and equal opportunity for participants and ensure returns to the State are maximised; and
2. Direct negotiation process, where it is in the public interest to grant the lease by direct negotiation.

### Scope

This policy applies to all new aquaculture lease applications made under Section 163 of the Act.

### Competitive Allocation Process Requirements

1. The method of competitive allocation will be by public tender unless, in the opinion of the Group Director, Commercial Fisheries & Aquaculture, the State and/or public interest would be best served by allocating the lease(s) by auction or ballot.
2. To be eligible to participate in a competitive tender/auction/ballot, a person/corporation must:
  - a. hold a current aquaculture permit; or
  - b. have lodged an application for an aquaculture permit which has been assessed and approved ‘in principle’ prior to the tender closing date; or
  - c. have a written agreement to sublet the subject lease(s) from a current aquaculture permit holder.
3. A new lease application may be refused on the grounds specified in Clause 31 of the Regulation (for example, outstanding debt or poor record of lease management).
4. If NSW DPI receives an Expression of Interest (EOI) for an area of public water land, the department will progress the proposed lease to public tender if the proposed lease has been identified as a Priority Oyster Aquaculture Area (POAA). In the case of an area that is non-POAA, the department will assess the suitability of the area for aquaculture, as described by the NSW

Oyster Industry Sustainable Aquaculture Strategy (OISAS), before progressing the proposed lease to public tender. In such cases, the successful tenderer will have the right to make application for landowner's and development consent for that area before the lease is granted.

5. In the case of competitive allocation, the successful tenderer or bidder will be required to submit the duly made application form and pay the application fee once they are identified by the allocation process.
6. The application fee may be waived or refunded under Section 288B of the Act. A waiver or refund will be considered by the Group Director, Commercial Fisheries & Aquaculture only when it is in the public interest (for example, to correct an administrative error) or to promote viable aquaculture industries in accordance with Section 3 of the Act.
7. A minimum tender premium will be set for all areas offered by a competitive tender process. In setting the minimum tender premium, NSW DPI will consider the:
  - a. administrative time and resources that have been used to progress the new lease application; and
  - b. approvals and/or development consents sought from other agencies by NSW DPI on behalf of potential tenderers.
8. The tender premium offered by the successful tenderer for an area must be paid within 14 days of being notified in writing that their tender was successful, except where:
  - a. the tender premium offered for one lease exceeds \$100,000. In such cases, a non-refundable deposit of 10% must be paid within 14 days of notification and a payment schedule over a maximum period of six months may be negotiated for payment of the remaining amount; or
  - b. the successful tenderer is provided with a period of time after the competitive process to apply for landowner's and development consent for non-POAA. In these cases, the tender premium must be paid within 14 days of notification after development consent has been granted; or
  - c. extenuating circumstances exist. The Group Director, Commercial Fisheries & Aquaculture may approve an extension of time for a successful tenderer to pay the tender premium offered.
9. The tender premium is not refundable. Exceptions may be considered at the discretion of the Group Director, Commercial Fisheries & Aquaculture because it is in the public interest (for example, to correct an administrative error) or to promote viable aquaculture industries in accordance with Section 3 of the Act.
10. For Class 1 aquaculture leases, NSW DPI will hold two scheduled tenders, auctions or ballots per annum in March/April and September/October. Additional tenders, auctions or ballots may be held at the discretion of the Group Director, Commercial Fisheries & Aquaculture in accordance with Section 3 of the Act where it is in the public interest or to promote viable aquaculture industries. The competitive process may include areas for which the department has received an Expression of Interest (EOI) or any other available area that has been identified as POAA in OISAS.
11. For all Class 2, 3, and 4 aquaculture leases, NSW DPI will hold a competitive tender when specific areas become available and circumstances require the area to be offered by a competitive process.
12. For areas offered through a competitive tender process, the Aquaculture Lease Tender Committee (ALTC) will convene and evaluate the tenders received based on the following criteria:
  - a. tender premium offered; and
  - b. eligibility of the tenderer; and

**Note:** If a tender is accepted by the ALTC for non-POAA, NSW DPI will provide the successful tenderer with a period of time to apply for landowner's and development consent. If consent is not granted within this period, the tender will be deemed non-conforming and the area will be offered to the next conforming tenderer.

  - c. submission of a business plan, Biosecurity plan and a lease development and maintenance plan (in the case of tenderers who have submitted a new permit application to support their tender – refer to Clause 2b).

13. In cases where two or more conforming tenders are received for the same lease area and the tenders are identical in terms of the tender premium offered, then the successful tenderer will be determined via a ballot process in accordance with Cl. 36 of the Regulation.

## **Direct Negotiation Process Requirements**

### *Class 1 Aquaculture Leases*

14. All new Class 1 aquaculture lease areas for which NSW DPI has received an Expressions of Interest (EOI) will be allocated by a competitive process unless:
  - a. The Group Director, Commercial Fisheries & Aquaculture approves the allocation of the lease by a non-competitive process because it is in the public interest (for example, to correct an administrative error) or it is consistent with an Aquaculture Industry Development Plan made under Section 143 of the Act.
  - b. The applicant is a current lessee who intends to shift the boundary of a current Class 1 lease, in order to replace a section of the lease that has become unsuitable for aquaculture with a new suitable area. This exception only applies if:
    - i. the proposed lease incorporates at least 50% of the current lease;
    - ii. the total area of the proposed lease does not exceed the total area of the current lease; and  
**Note:** any area outside a Priority Oyster Aquaculture Area (POAA) that exceeds 0.1 hectares will require development consent from Council as per Clause 8A of the State Environmental Planning Policy 62.
    - iii. the applicant has a good history of managing their aquaculture lease areas and agrees to surrender the area that is being excluded from the proposed new lease and remove all improvements from that area (including cultivation material, lease markings and structures).
15. For applications that meet the criteria outlined in Clause 14 of this policy, the approval process for direct negotiations must include:
  - a. consideration given to the Independent Commission Against Corruption's Direct Negotiations – Guidelines for Managing Risks, 2018;
  - b. the decision to directly negotiate with a proponent must be clearly documented and published; and
  - c. the written approval of the Group Director, Commercial Fisheries & Aquaculture must be obtained for new lease applications involving vacant public water land.
16. For applications that meet the criteria outlined in Clauses 14 of this policy, a duly made application and the prescribed application fee is payable within 14 days of notification that the proposed area is being progressed via direct negotiation.

### *Class 2, 3 and 4 Aquaculture Leases*

17. Criteria under which direct negotiations involving Class 2, 3 and 4 aquaculture leases may be appropriate:
  - a. The Group Director, Commercial Fisheries & Aquaculture approves the allocation of the lease by a non-competitive process because it is in the public interest (for example, to correct an administrative error) or it is consistent with an Aquaculture Industry Development Plan made under Section 143 of the Act; or
  - b. the applicant has intellectual property over the proposed lease as an area suitable for aquaculture, and can demonstrate value for money capability and capacity; or
  - c. the proposal and its proponent satisfy the uniqueness test as detailed in the NSW Government's Unsolicited Proposals – Guide for Submission and Assessment (2017).
18. For applications that meet the criteria outlined in Clause 17 of this policy, the approval process for direct negotiations must include:
  - a. consideration given to the Independent Commission Against Corruption's Direct Negotiations – Guidelines for Managing Risks in Direct Negotiations, 2018;
  - b. the decision to directly negotiate with a proponent must be clearly documented and published;

- c. the written approval of the Group Director, Commercial Fisheries & Aquaculture must be obtained for new lease applications involving vacant public water land;
  - d. NSW DPI requires the proponent enter into a negotiation protocol in any situation where NSW DPI considers the probity risk sufficiently high;
  - e. any claims of intellectual property and/or uniqueness must be verified by the department's legal advisors. Any claim of uniqueness must also satisfy the uniqueness test in the Unsolicited Proposals – Guide for Submission and Assessment (2017); and
  - f. on recommendation of the Deputy Director General DPI Fisheries, an independent probity advisor will be required to oversee the process where probity risk is considered high for large scale projects.
19. For applications that meet the criteria outlined in Clause 17 of this policy, the set premium, together with the prescribed application fee, is payable within 14 days of notification that the application is being progressed via direct negotiation, unless the premium for one lease exceeds \$100,000 in which case the conditions outlined in Clause 8 will apply.
20. Where a proposal is received for an unsolicited direct negotiation the relevant Director must determine whether the proposal shall be referred to the Department of Premier and Cabinet. If required, that director must consult with DPC regarding the need to have the proposal assessed under the Unsolicited Proposals – Guide for Submissions and Assessment (2017).

### **Procedures**

- Aquaculture Administration Policy & Procedure 1.1 – New Aquaculture Lease
- Aquaculture Administration Policy & Procedure 1.2 – Public Tender

### **Roles and responsibilities**

- Senior Policy Officer, Aquaculture
- Senior Fisheries Manager, Aquaculture

### **Delegations**

- Refer to relevant Delegation Manual

### **Definitions**

- Capability and capacity: demonstrated experience of the applicant to undertake marine waters aquaculture.
- Intellectual Property: inventions, original designs and practical applications of good ideas protected by statute law through copyright, patents, registered designs, circuit layout rights and trademarks. Also trade secrets, proprietary know-how and other confidential information protected against unlawful disclosure by common law and through additional contractual obligations such as confidentiality agreements. For example, a proponent has undertaken a comprehensive assessment, and invested substantially in those investigations in a proposed lease site to undertake aquaculture.
- Marine Waters: as per Glossary of Terms in the NSW Marine Waters Sustainable Aquaculture Strategy (2018).
- Minimum tender premium: the minimum tender premium may change from time to time and will be based on advertising costs, NSW DPI administrative and management staff time (refer to NSW DPI Salary Scale/Salary Points for Clerk (General Scale), plus 23% salary related on-costs, plus 48% overheads on base salaries.
- Priority Oyster Aquaculture Area (POAA): relates to Class 1 aquaculture leases as defined in the NSW Oyster Industry Sustainable Aquaculture Strategy (OISAS). An area that has been previously assessed and identified to be suitable for estuarine oyster aquaculture.
- Terminated pending clean up: area previously leased that has expired, been surrendered or cancelled but still has improvements and/or cultivation material present and the former lessee has not completed their clean-up obligations.
- Uniqueness: a unique or original proposal that can only be undertaken by the proponent. The uniqueness must apply to both the proponent and the proposal. This may include real property rights, where the proponent holds a lease adjacent to the proposed site and that lease is unique and necessary to the proposed site.

Value for Money: the overall value to the Government and the NSW community. Consideration given to: whole of life cost and revenue; quality; risk borne by government; benefits gained; and whole of government outcome.

### Legislation

- *Fisheries Management Act 1994*
- Fisheries Management (Aquaculture) Regulation 2017

### Related policies

- State Environmental Planning Policy 62 – Sustainable Aquaculture
- O-041 Undertaking works on oyster aquaculture lease areas and permit areas and recovering costs

### Other related documents

- NSW Oyster Industry Sustainable Aquaculture Strategy (OISAS) 2016
- NSW Marine Waters Sustainable Aquaculture Strategy 2018
- ICAC Guidelines for Managing Risks in Direct Negotiations (2018)
- Unsolicited Proposals – Guide for Submission and Assessment (2017)
- Sale or lease of Crown Land by Direct Negotiation (2018)

### Superseded documents

This policy replaces:

- O-071 Aquaculture Lease Allocation Version 3.4

### Revision history

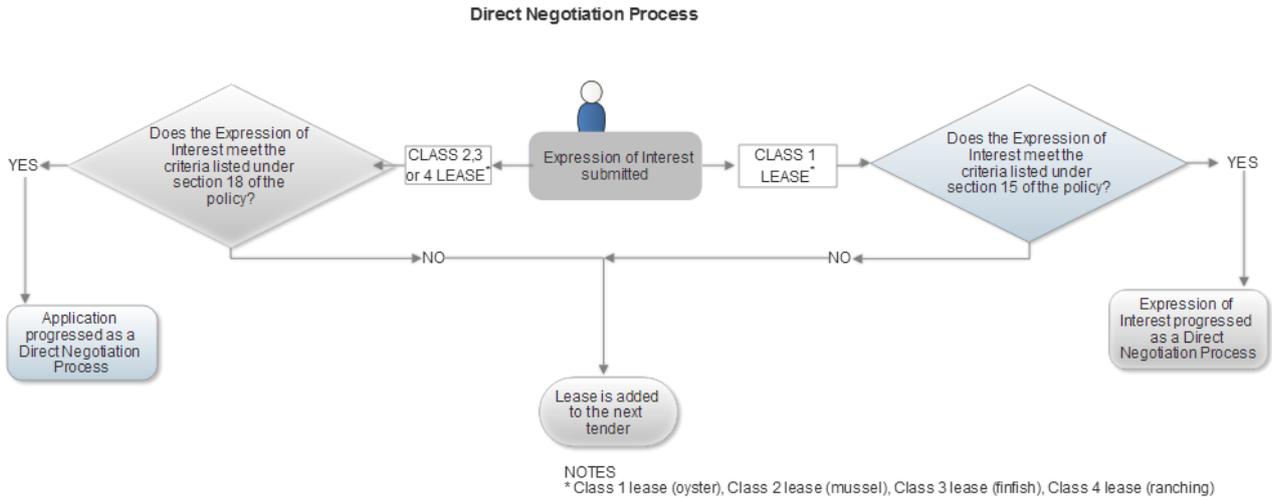
Version	Date issued	Notes	By
1	07/07/2009	NA	Senior Policy Officer Aquaculture
2	24/06/2010	Procedures removed and placed into Aquaculture Administration Policy & Procedure No's 1.1 and 1.2. Changes regarding application and tender fee.	Senior Policy Officer Aquaculture
3	07/11/2011	Department name updated.	Senior Policy Officer Aquaculture
3.1	05/09/2012	Replacement of references to 2007 Regulation with references to 2012 Regulation.	Senior Policy Officer Aquaculture
3.2	25/02/2014	Correction of error in Clause 6(a) – reference to Clause 1(d) replaced with Clause 1(c)	Senior Policy Officer Aquaculture
3.3	04/07/18	Removal of exemption relating to intellectual property. Removal of all references to phase out leases. Removal of exemption for former lease area identified as Clean up Program State to undergo tender. Simplification of the exemption relating to lease boundary modifications (Cl. 1c) Exemptions added to the 14-day time frame for payment of tender premiums. Add option to undertake direct negotiation process for aquaculture leases.	Senior Administration Officer, Aquaculture

3.4	24/05/19	<p>Removal of Cl. 3 which stated that a duly made application must be submitted with the tender documentation. This was replaced with a clause stating that an application and prescribed fee must be submitted by the successful tenderer after being advised of the tender outcome.</p> <p>Clause 4 amended to allow the department to accept Expressions of Interest (EOI) for a proposed lease area, to enable the area to be offered via a competitive process.</p>	Fisheries Manager, Aquaculture
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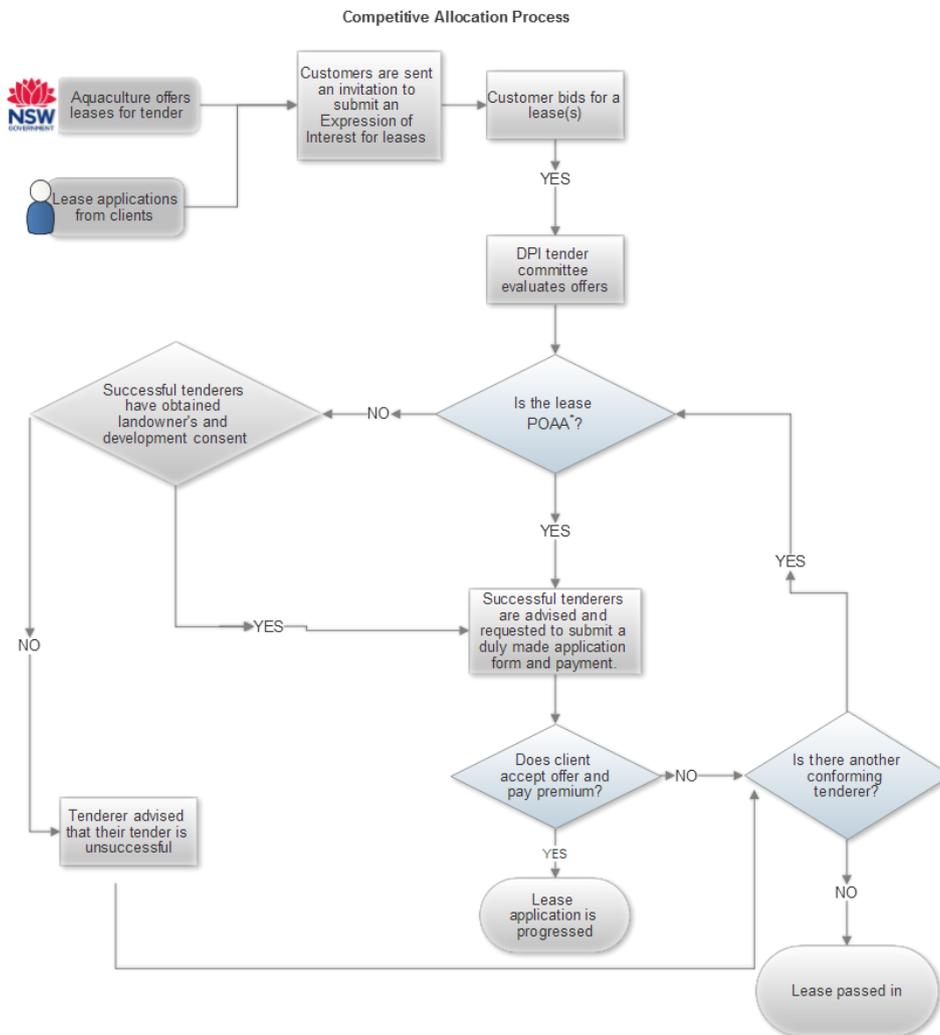
**Contact**

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## Attachment 1 – Direct Negotiation Process



## Attachment 2 – Competitive Allocation Process



\* Priority Oyster Aquaculture Area (POAA) a Class 1 lease for oyster aquaculture.