

DIVISION THREE

7.0 TWO GUIDING CONSIDERATIONS IN THE CREATION OF THE DRAFT FISHERIES ACT

There were two guiding considerations in the creation of the Draft Fisheries Law. *First*, the Draft Fisheries Law has been designed as a piece of *framework legislation* with many, though not all, of the details left to regulations and notifications. Nevertheless, the proposed legislation does include numerous detailed provisions regarding prohibited actions, management measures, and enforcement obligations.

Second, the Draft Fisheries Law has a *narrow scope* and does not attempt to extend the reach of the fisheries legislation or the *Department of Fisheries*. The primary issues covered within the Draft Fisheries Law continue to be those dealt with in the 1947 Fisheries Act and in the 1996 Draft Law, namely harvesting issues and certain post-harvesting issue. The adoption of a narrow approach should alleviate many of the concerns that might arise respecting a new fisheries act interfering with the mandates, laws and policies of other governmental departments and agencies and, therefore, enhance the probability of the new fisheries Law being adopted at the senior bureaucratic and political level.

8.0 ORGANIZATION OF THE DRAFT FISHERIES ACT

The Draft Fisheries Act is divided into sixteen chapters, with Chapter Four having six sub-chapters. The structure is based loosely on that organization of the 1947 Fisheries Act and the 1996 Draft Fisheries Law. The 1947 Fisheries Act had six chapters and the 1996 Draft Fisheries Law had nine chapters. The Draft Fisheries Act is longer since subjects such as foreign fishing activities in Thai waters, aquaculture and fish quality have been included. Also, the Draft Act is longer than the previous Acts since a chapter is given to each of the fishery zones and the major fishery activities which are the building blocks of the Draft Act.

Chapter One contains certain principles that are to guide the application, interpretation and implementation of the Draft Act. Chapter Two contains the definition section. Chapter Three sets out the zones – the Inland Fishery Zone, the Coastal Marine Fishery Zone, and the Commercial Marine Fishery Zone – which are the building blocks of the Draft Act.

Chapter Four deals with fisheries management issues which have application to all zones and activities including the gathering of statistics and research, certain prohibitions, the role of the National Fishery Policy Committee in policy development, the principal authority of the Minister, Director-General and Provincial Governors regarding management measures, the issuing of licences, permits and written permissions, the establishment and role of Local Fishery Committees, and the creation of a “Black List” of fisherman not in good standing.

Two issues of importance in recent years are community-based management and species protection and marine protected areas. The Draft Act has separate chapters on each subject. Chapter Five deals with community-based management and Chapter Twelve deals with Protected Species and Fisheries Protection Areas.

Chapters Six, Seven and Eight deal respectively with the Inland Fishery Zone, the Coastal Marine Fishery Zone and the Commercial Marine Fishery Zone.

Chapter Nine deals with the sensitive issue of the activities of Thai flag fishing vessels in waters beyond Thai national waters. Chapter Ten, “Foreign Fishing Activity in Thai Waters”, is designed to replace the 1939 Act Governing the Right to Fish Within Thai Waters.

While perhaps better dealt with through a separate act, aquaculture is in the Draft Act in Chapter Eleven and Health, Quality and Export issues are dealt with in Chapter Thirteen.

A separate chapter, Chapter Fourteen, has been created for the difficult area of monitoring, control and surveillance activities. Consistent with the 1947 Fisheries Act, Chapter Fifteen deals specifically with penalties. Finally, Chapter Sixteen contains several miscellaneous provisions.

9.0 THE PRINCIPAL BUILDING BLOCKS OF THE DRAFT FISHERIES ACT

9.1 Zones

There are vast differences in the nature of the fisheries in Thailand. Different fishery issues require different approaches. What is included in the Draft Act is a division of the waters of Thailand into three zones: the Inland Fishery Zone, the Coastal Marine Fishery Zone and the Commercial Marine Fishery Zone. This approach is designed to allow for specific laws, regulations, notifications and practices to be applied in particular zones.

The starting point for the zonal approach is the definition of Thai waters.

Section 10.

...

(36) “Thai waters” means the rivers, canals, ponds, reservoirs, lakes, swamps, marshes and flood plains located within the land boundaries of Thailand and all marine waters claimed by Thailand as being subject to its national jurisdiction including all waters claimed by Thailand as being within its internal waters, territorial seas and exclusive economic zone; and

This definition, which borrows from the definition of Thai waters used in the 1947 Fisheries Act, covers all waters within Thailand and includes the waters of the marine areas that have been claimed as being subject to the jurisdiction of Thailand and for greater clarity includes the marine waters that Thailand has claimed as being within its internal waters, territorial waters and exclusive economic zone.

Section 11. For the purposes of this Act, the “Coastal Marine Fishery Zone” means all marine waters adjacent to land seaward from the high water mark to a distance of /____/ nautical miles and waters as may be included pursuant to paragraph 2.

The Director-General by notification may designate specific water areas as being within the Coastal Marine Fishery Zone and, in particular areas, may expand the Coastal Marine Fishery Zone to a maximum distance of /____/ nautical miles.

The existing notification under the 1947 Fisheries Act directs that a zone of 3 kilometers from shore is to be primarily for small-scale fishermen. Section 11, paragraph one has adopted this idea but there is uncertainty whether the measurement should be 3 kilometers or 3 nautical miles or some other limit. This needs to be decided. Whatever the measurement “nautical miles” should be used since this is the manner of measurement on nautical charts. Section 11, paragraph 2 allows the Director-General to determine what waters are within the Coastal Marine Fishery Zone. Thus, where uncertainty arises as to whether waters are fresh or marine waters the Director-General can decide the issue. Moreover, Section 11, paragraph 2 provides that the limit of the Coastal Marine Fishery Zone can be expanded to a greater amount (for example, 10 nautical miles, again a decision would need to be made). This creates an opportunity to expand the marine area that is available to small-scale fishermen, Local Fishery Committee involvement and also for community-based management arrangements.

The Commercial Marine Fishery Zone is all Thai marine waters beyond the Coastal Marine Fishery Zone.

Section 12. For the purposes of this Act, the “Commercial Marine Fishery Zone” means all marine waters within Thai waters seaward of the Coastal Marine Fishery Zone.

The Inland Fishery Zone is defined as being all those Thai waters not within the Coastal Marine Fishery Zone or the Commercial Marine Fishery Zone. Section 13, paragraph 2 is intended to clarify what is included within the Inland Fishery Zone. Where it is uncertain whether waters are within the Inland Fishery Zone or the Coastal Marine Fishery Zone, Section 11, paragraph 2, allows the Director-General to make the determination.

Section 13. For the purposes of this Act, the “Inland Fishery Zone” means all Thai waters not in the Coastal Marine Fishery Zone or the Commercial Marine Fishery Zone.

For greater certainty, the Inland Fishery Zone means all rivers, canals, ponds, lakes, reservoirs, swamps, marshes and flood plains located within the land boundaries of Thailand and generally referred to as inland or fresh waters.

9.2 Activities

In addition to the zonal approach to Thai waters adopted by the Draft Fisheries Act, the Draft Act is also organized around three major fishery activities: aquaculture (Chapter Eleven of the Draft Act, see below, *Final Report* part 19.0), foreign fishing activity in Thai waters (Chapter Ten of the Draft Act, see below, *Final Report* part 17.0), and Thai fishing activity in non-Thai waters, referred to as overseas marine fishery activity (Chapter Nine of the Draft Act, see below, *Final Report* part 18.0). The first two activities take place in Thai waters, while the latter takes place outside Thai waters.

9.3 Constitutional Considerations: Local Fishery Committees, Public Participation, and Decentralization

The 1997 Constitution has, as one of its principal guidelines for natural resources management, the participation of the public in decision-making regarding utilization and management of natural resources (see above, *Final Report* part 4.5). A second guideline is that decision-making should be decentralized to the extent that is possible. The Draft Fisheries Act endorses these Constitutional principles in Sections 8.

Section 8. This Act shall be applied, interpreted and implemented so as to ensure that all those at the community and local level with an interest in the harvest, utilization or protection of aquatic resources are involved in the decision-making processes respecting those resources.

In fulfillment of the Constitutional guidelines, the Draft Fisheries Act includes the requirement that the Minister, Director-General or Provincial Governor in issuing any regulations and notifications is to consult with those persons and communities that may be affected by their decisions.

Section 23. Regulations and notifications which may be issued under this Act shall only be issued following, to the extent that is reasonable and feasible, consultation with all persons and communities that may be affected by them, and, where appropriate, consultation between the appropriate provincial governors and the Department of Fisheries and consultation between the Department of Fisheries and other Ministries which have an interest.

There are two important points that arise from this wording: i) it cannot be expected that a public participation requirement will prevent the government from operating, thus the consultation that is required is only that which is reasonable and feasible; and ii) consultation

does not require the Minister, Director-General, Provincial Governors or the Department of Fisheries to necessarily adopt the views of those consulted.

Specifically regarding the decentralization Constitutional guideline, respecting the issuance of regulations and notifications, the Minister, Director-General and Provincial Governors are directed to defer to the interests of the local population.

Section 23. paragraph 2.

In the creation of regulations and notifications that affect a specific province or limited geographical area, the Department of Fisheries shall, to the extent that it is reasonable and feasible, defer to the interests of the local population and their representatives.

Other specific public participation/consultation provisions exist respecting:

- the preparation of fisheries management plans (Section 17, paragraph 3);
- issuance of regulations and notifications relating to aquaculture (Section 83, paragraph 2); and
- the creation of policies, practices and guidelines respecting the exercise of authority by an authorized fisheries officer (Section 106, paragraph one).

Respecting the designation of protected species and fisheries protection areas, the Minister or Director-General may establish a process so that the public can initiate and participate in the process of designation (Section 91, paragraph (f), see below, *Final Report* part 12.5).

More generally, Section 22 of the Draft Act creates the authority for the establishment of committees, boards and other mechanisms for the purposes of gathering opinions and seeking advice from the public and specifically interests persons regarding any matter that arises under the Draft Act.

Section 22. The Minister, Director-General, provincial governor and the Department of Fisheries may establish committees, boards, consultative groups or other mechanisms for the purposes of seeking advice from the public, local communities or those with an interest in a specific matter on any matter or issue which arises under this Act.

One such committee is specifically noted in the Draft Act respecting overseas fishery activities (Section 76, see below, *Final Report* part 18.5).

Involvement of the public in decision-making respecting fisheries matters can also be effected through the National Fishery Policy Committee (see below, *Final Report* part 11.2). The Draft Act provides for the relationship between the National Fishery Policy Committee and the Minister, Director-General, Provincial Governors and the Department of Fisheries but leaves it to the Committee to determine its own procedures and processes for public participation.

Consistent with the Constitutional goal of greater public and local participation in decision-making respecting natural resources, the Draft Act allows for the establishment of *Local Fishery Committees* to deal with fisheries management issues within specific areas of the Inland Fishery Zone and the Coastal Marine Fishery Zone (see below, *Final Report* part 10.6). Local Fishery Committees are conceived as a decentralization of public participation but as different than community-based management and advisory committees. Under the Draft Act, while the Local Fishery Committees does not have direct authority over the area of Thai waters within their jurisdiction, the Local Fishery Committee can be delegated the authority to issue local fishing permits for that area. Moreover, in other harvesting or conservation related matters, the Local Fishery Committee can recommend what action should be taken and such recommendations are to be implemented where it is reasonable and

feasible to do so. Thus, a Local Fishery Committee is a committee with more than advisory powers.

Chapter V in the Draft Fisheries Act on Community-Based Management (see below, *Final Report* part 16.0) brings together both the decentralization and public participation guidelines of the 1997 Constitution in a different manner. Under community-based management, the community would have the direct authority to manage the fishery resources of the area covered by the community-based management arrangements. Thus, community-based management has authority greater than a Local Fishery Committee.

9.4 Open Access, Closed Access and Regulated Open Access

Section 16, paragraph one, of the 1947 Fisheries Act provided that “Public fisheries are fisheries in which every person has the right to fish and to cultivate aquatic animals”. Paragraph 2 of Section 16 directed that all fisheries in the “public fisheries” were subject to conditions, regulations and notifications. All waters not designated as preservations fisheries, leasable fisheries or reserved fisheries were “public fisheries” and, pursuant to Section 16, paragraph one, open to all. Thus, for marine waters the general perspective has been that all the waters are open access subject to limited restrictions (see above, *Final Report* parts 4.3.2 and 4.3.3).

There have been previous recommendations that Thailand should adopt a fisheries management structure that replaces the open access orientation with closed access (only those having permission can fish). It has been pointed out that a careful reading of the 1947 Fisheries Act does appear to provide to the Minister, under Section 32(1), the authority to determine the “number” of fishing implements (defined in Section 4(3) as including fishing vessels) which are permitted.³² Thus, even within the 1947 Fisheries Act what appears as an open access fishery can be a closed access fishery. Nevertheless, there has been a resistance to the adoption of a fishery management system that has as one of its foundation principles that marine resources within Thai waters are not available to those who wish to pursue them. The 1996 Draft Fisheries Law, despite the numerous recommendations, retained an open access orientation (see above, *Final Report* part 4.4).

What is recommended and contained in the Draft Act is a continuation of the open access orientation of the 1947 Act but an increase on the restrictions that can be imposed on harvesting activity in Thai waters.³³ The degree of restrictions on open access to the fishery resources in Thai waters contained in the Draft Act is consistent with Section 50 of the 1997 Constitution which directs that laws can be enacted to restrict a person's liberty to engage in an enterprise or an occupation in order to preserve natural resources or the environment. Given the importance given to the environment and natural resources in the 1997 Constitution, it is a reasonable belief that the government of Thailand is under a Constitutional obligation to enact laws to protect the environment and preserve natural resources.

32. Kuemlangan, *supra* note 17, at 21-22; Moore, *supra* note 19, at pp. 3-4; and Menasveta, *supra* note 1, at p. 130.

33. The choice of open or closed access was carefully considered. It is acknowledged that most states manage their fisheries based on closed, restricted access and that closed access is consistent with the “best” advice on how to achieve effective resource management. Nevertheless, the Draft Act is based on the premise of a restricted open access regime, although, as noted below, the restrictions are greater in the Final Report Draft Act than what was presented at the August 2000 Workshop.

For the Commercial Marine Fishery Zone, the restrictions in the Draft Act deal with the need for fishermen to have gear licences (fishing gear permits) rather than directly imposing a vessel licensing system which would be more restrictive of open access (see below, *Final Report* part 14.0). For the Coastal Marine Fishery Zone, no access will exist for industrial fishing activity (harvesting using vessels greater than 5 gross tones, Section 59, see below, *Final Report* part 12.3.1).

One of the most difficult issues has been that of whether those who harvest resources in the Inland Fishery Zone or the Coastal Marine Fishery Zone, who are small-scale fishermen, should be required to have some type of permit. The version of the Draft Act presented to the August 2000 Workshop provided that no such permits were necessary, although in the future a permit/licensing/registration system could be introduced.³⁴ Comments made at the Workshop by some of the Thai and FAO participants have resulted in the Draft Act now requiring that persons utilizing motorized vessels in the harvesting of fish in the Inland Fishery Zone and the Coastal Marine Fishery Zone to have a local fishing permit issued either by a competent official or a Local Fishery Committee, unless by regulation or notification this requirement is suspended. In effect, the Draft Act imposes closed access for certain types of fishing operations.

With or without permits/licences, there are a number of general restrictions on open access in all of the three zones. For example, closed seasons for breeding can be imposed by regulation and notification under Section 15. Other restrictions are detailed elsewhere in this Report.

9.5 Fisheries Habitat Protection

Fisheries habitat means all Thai waters where fish can be found, in short, where fish live. The term used in the Draft Act, Section 10 (21) is “habitat of an aquatic resource”.

Section 10. ...

(21) “Habitat of an aquatic resource” means any area of Thai waters where an aquatic resource may be found;

While the 1947 Fisheries Act is directed primarily to fish harvesting and not to means of protecting the fish or the waters in which fish live, fishery habitat protection thinking has been utilized in open and closed seasons. Nevertheless, fish habitat is usually seen as being within the mandate of environmental legislation, although such environmental laws do not focus on fishery habitat except in the most general manner.

There is a clear and obvious link between fish habitat and fish harvesting. The Draft Fisheries Law reflects this link and has adopted as a building block of the legislation that the Department of Fisheries and Thai fishermen have a responsibility to protect fish habitat. The embracing of fish habitat protection as a key principle will provide the Department of Fisheries with increased abilities to manage the fishery as a whole and not just harvesting. Fish habitat protection, protecting the waters where fish live, is also easily understandable by

34. The rationale for this was that small-scale fishermen currently pay little attention to the requirements under the 1947 Fisheries Act for licences and there was no sense perpetuating a requirement that was more honoured in the breach than in compliance. The legitimacy and authority of legislation is severely undermined if a requirement is created for which compliance is highly doubtful and there is no intention or capability to promote compliance by enforcement. Moreover, local fishermen tend to ignore current requirements since they see no benefit in paying for a licence. Without a direct benefit (fear of prosecution, a remote possibility at best, is not sufficient), local fishermen decide not to pay the fee for a licence or even bother to register their activities.

fishermen and resource users and should make it easier to attain a high degree of compliance with and enforcement of laws designed to achieve fish habitat protection.

While no specific chapter of the Draft Act is entitled fishery habitat protection, there are a number of provisions which deal specifically with the issue of habitat protection (see below, *Final Report* part 12.4).

9.6 Management, Regulation and Control of the Fisheries

The Draft Act proposes that the fisheries of Thailand be managed, regulated and controlled by the use of:

- licences, permits and written permissions;
- the creation of a “Black List” of fisherman that are not entitled to licences, permits and written permissions;
- regulations and notifications respecting fishing operations; and
- specific prohibitions within the Draft Act.

9.6.1 Licences, Permits and Written Permissions

The 1947 Act contains numerous provisions regarding the registration of vessels, fishermen and fishing gear. Generally, the approach of the 1947 Fisheries Act was that, if an individual paid the required fee, then registration had taken place and fishing could occur (see above, *Final Report* parts 4.3.3 and 4.3.6). Registration of this type is important for determining the numbers of fishermen, vessels and types of gear in use. However, registration is not the same as the exercise of management control respecting the fisheries. For this, licences, permits or written permissions are more useful since, unlike registration, they issuance of licences, permits and written permissions can be restricted to those who meet certain criteria and conditions. It is fundamental to the Draft Fisheries Act that the Department of Fisheries have the authority to manage the marine resources in Thai waters and the fishing activities of Thai flag fishing vessels and this can only be accomplished with the use of licences, permits and written permissions and not registration. To avoid confusion, both for Thai fishermen and for the Department of Fisheries itself, the Draft Act contains no requirement for vessels, fishermen or gear to be registered. Whereas, there the Draft Act does require that all fishing activities in the Commercial Marine Fishery Zone, all fishing activities involving motorized vessels in the Inland Fishery Zone and the Coastal Marine Fishery Zone, all foreign fishing activity in Thai waters, all overseas fishing activity by Thai flag fishing vessels and most aquacultural activities may only be undertaken pursuant to a permit or written permission issued under the Draft Act. Any harvesting activity done in these situations without a permit or written permission is prohibited and thus illegal under the Draft Act.

9.6.2 Fisherman Not in Good Standing

The assumption in the Draft Fisheries Act is that everyone in Thailand is entitled to request the necessary licences, permits and written permissions provided for in the Draft Act. However, where fisherman have breached the Act or had their licences, permits or written permissions withdrawn because of a failure to comply with the conditions, then the fisherman should not have the same presumption applied to them regarding the issuance of licences, permits and written permissions. This is accomplished in the Draft Act through the requirement that licences, permits and written permissions may only be given to fisherman in good standing (see Section 27 and below, *Final Report* part 13.5). The names of fisherman

who are not in good standing are to be kept on a list (“Black List”) so that the relevant officials will be aware of which persons are not eligible for licences, permits and written permissions.

9.6.3 Regulations and Notifications Respecting Fishing Operations

The authority of the Minister to issue regulations, and in some cases notifications, and the authority of the Director-General and the Provincial Governors to issue notifications respecting various matters arising under the Draft Fisheries Act will be discussed in detail below (see below, *Final Report* parts 10.1 and 10.2). In many national fisheries acts, the authority to make regulations and notifications (or the equivalents) is contained in a single provision (for example, Section 61 of the Malaysian Fisheries Act). The 1947 Fisheries Act provides the authority to make regulations and notifications in several different provisions (for example, Sections 25, 26 and 32). The Draft Act continues the pattern of the 1947 Fisheries Act and has several provisions which create the authority for the Minister, Director-General, or, with the approval of the Minister, the Provincial Governor within his jurisdiction, to issue regulations and notifications.

Section 15 is the enabling clause that is intended to deal most directly with the management, monitoring, and control of fishing activities in Thai waters and also the activities of Thai flag fishing vessels in non-Thai waters. Section 15 is based on Section 32 of the 1947 Fisheries Act but has been updated and expanded to take into account current fishing practices and to try and anticipate future fishing practices (see below, *Final Report* part 22.2).

Section 15. The Minister may issue regulations and the Director-General, and, respecting the Inland Fishery Zone and the Coastal Marine Fishery Zone, with the approval of the Minister, the provincial governor within his jurisdiction, may issue notifications relating to any matter that arises under this Act including:

...

Section 15 must be read together and is intended to work together with Section 16.

Section 16. Regulations and notifications issued under Section 15 shall indicate whether they are applicable to the Inland Fishery Zone, the Coastal Marine Fishery Zone, areas under the jurisdiction of Local Fishery Committees, the Commercial Marine Fishery Zone, Thai flag fishing vessels outside Thai waters or foreign fishing activity in Thai waters.

Thus, all regulations and notifications that are authorized and may be issued under Section 15 are to indicate whether they apply to the Inland Fishery Zone, the Coastal Marine Fishery Zone, areas under the jurisdiction of Local Fishery Committees, the Commercial Marine Fishery Zone, Overseas Marine Fishery Activity, or foreign fishing activity in Thai waters. Regulations and notifications under Section 15 can apply to one or more of the above or to all of the above. Section 16 is a provision included in the Draft Act for clarity – so that in the making of regulations and notifications, they will be clear regarding to which fishery zone and/or activity the regulations and notifications apply.

Since aquaculture is a topic that is distinctive from other fisheries matters, a specific enabling clause has been included within the Chapter on aquaculture (Section 83, see below, *Final Report* part 19.2).

9.6.4 Specific Prohibitions within the Draft Act

There are a number of provisions within the Draft Act which create specific prohibitions related to fishing activities. Chapter Four, sub-chapter IV, contains a number of these specific prohibitions:

- the use of poisons and other substances harmful to fish (Section 40);
- the use of electricity and explosives (Section 41);
- the disturbing and destruction of fish habitat (Section 42);
- importing, selling or possessing aquatic resources that may be harmful to the health of humans, other aquatic resources or to the environment (Section 43);
- the giving and receiving of permits, licences and written permissions without permission, including copied or fraudulent permits, licences and written permissions (Sections 45, 46 and 47); and
- he receiving, handling or selling of illegally caught fish (Section 48).

Other direct prohibitions exist respecting:

- fishing in the Inland Fishery Zone without a local fishing permit (Section 54);
- fishing in preservation fishery areas (Section 57);
- using stationary gear (Section 58);
- only small-scale fishermen harvesting in the Coastal Marine Zone (Section 59);
- fishing in the Coastal Marine Fishery Zone without a local fishing permit (Section 60);
- using fishing gear without a fishing gear permit in the Commercial Marine Fishery Zone (Section 63);
- a Thai flag vessel fishing outside Thai waters without an overseas fishing permit (Section 69);
- a Thai flag vessel fishing outside Thai waters in contravention of the law of a foreign state or the rules of an international arrangement (Section 71);
- foreign vessels fishing in Thai waters without the permission of the Director-General (Section 79);
- engaging in aquaculture without an aquaculture permit (Section 84);
- operating an aquaculture facility which disturbs or destroys the habitat of aquatic resources (Section 85);
- harvesting or disturbing a protected species (Section 89)
- harvesting resources in a fisheries protection area (Section 90); and
- interfering the authority of a competent official or an authorized fisheries officer carrying out their duty (Section 113).

Related to the specific prohibitions in the Draft Act are the penalties that exist when there is a violation of a prohibition. Consistent with the 1947 Fisheries Act, the Draft Act provides for fines, imprisonment and forfeiture where there is a violation of a prohibition. A major concern is the adequacy of a penalty to act as a deterrent and encourage greater compliance with the Draft Act. These issues are discussed below (see below, *Final Report* part 25.0). For the breach of certain sections of the Draft Act, an additional penalty can be imposed that is not in the 1947 Fisheries Act. This additional penalty is that the violator will be a fisherman not in good standing for a specific period and, therefore, not entitled to a licence, permit or written permission available under the Draft Act (see below, *Final Report* parts 13.5, 25.1 and 25.2). Throughout this Final Report where prohibitions are discussed, the

penalty provisions are also included. Reference should also be made the specific part of this Final report which deals with penalties (see below, *Final Report* part 25.0).

10.0 AUTHORITY AND RESPONSIBILITIES IN THE DRAFT FISHERIES ACT

The Draft Fisheries Act creates authority and responsibilities for the Minister of Agriculture and Cooperatives, the Director-General of the Department of Fisheries, Provincial Governors, the Department of Fisheries, competent officials and authorized fisheries officers. In addition, where Local Fishery Committees are established or community-based management comes into existence, the authority and responsibilities that can exist for these entities is set out in the Draft Act.

10.1 The Minister and Director-General

Throughout the Draft Fisheries Act, the terms Minister and Director-General are used. These are defined in Section 10 following the wording used in the definition section of the 1947 Fisheries Act.

Section 10.

...

- (12) “Director-General” means the Director-General of the Department of Fisheries;
- (28) “Minister” means the Minister of Agriculture and Cooperatives;

The Minister and Director-General are together given the responsibility for the execution of the Draft Fisheries Act in Section 14, paragraph one.

Section 14. The Minister and Director-General shall have charge and control of the execution of this Act.

This wording follows that of Section 5 of the 1947 Fisheries Act except that the Director-General, along with the Minister, is to have responsibility for the implementation and execution of the Draft Law. Placing the responsibility for execution of the new Act on the shoulders of both the Minister and the Director-General is important since within the Draft Act the Minister has the authority to issue regulations, which require cabinet approval, and the Director-General has the authority to issue notifications, which do not require cabinet approval. This functional split between regulations and notifications exists in Sections 15, 19, 24, 25, 51, 53, 62, 73, 83, 86, 91, 95, 99 and 116. The wording of Section 15 (repeated almost identically in the other Sections) reads:

Section 15. The Minister may issue regulations and the Director-General ... may issue notifications relating to any matter that arises under this Act including: [emphasis added]

The exception to this functional split is respecting the Minister’s authority to appoint competent officials (Section 14, paragraph 2) and authorized fisheries officers (Section 101) which may be carried out either by regulation or Ministerial notification and respecting the Minister and the Director-General each having authority to issue notifications appointing observers pursuant to Section 117 (see below, *Final Report* part 23.6).

While not exhaustive, the following paragraphs provide a listing of the principal authorities and powers that exist in the Draft Act for the Minister and Director-General.,

The *Minister* can issue *regulations* respecting:

- all matters relating to the management of both fisheries in Thai waters and the activities of Thai flag fishing vessels outside Thai waters (Section 15);
- the establishment of Local Fishery Committees (Section 19);
- the conditions, requirements and related issues regarding the issuance of licences, permits (Section 24);
- the conditions, requirements and related issues regarding the issuance of written permissions (Section 25);
- the designation of community fishery areas and the procedures for the establishment of community fishery areas (Section 51, paragraph one);
- the manner in which community fishery areas are to operate, including who is within the community and how decisions are to be made and enforced (Section 53, paragraph one);
- all matters relating to aquaculture (Section 83);
- in addition to the conditions that may be imposed pursuant to Section 24, the conditions, requirements and related issues regarding the issuance of an aquaculture permit (Section 86);
- the designation of protected aquatic resources and fisheries protection areas (Section 91);
- matters related to health and quality standards for fish and fish products (Section 95);
- conditions for the issuance of a fisheries export permit (Section 99); and
- matters related to compliance with and enforcement of the Draft Act (Section 116).

The *Minister* can issue *regulations and notifications* respecting:

- the appointment of competent officials (Section 14, paragraph 2); and
- the appointment of competent officials as authorized fisheries officers (Section 101, paragraph one).

The *Director-General* can issue *notifications* respecting:

- which waters are within the Coastal Marine Fishery Zone (Section 11, paragraph 2);
- all matters relating to the management of both fisheries in Thai waters and the activities of Thai flag fishing vessels outside Thai waters (Section 15);
- the establishment of Local Fishery Committees (Section 19);
- the conditions, requirements and related issues regarding the issuance of licences and permits (Section 24);
- the conditions, requirements and related issues regarding the issuance of written permissions (Section 25);
- that a person is a fisherman in good standing (Section 30);
- the statistical and other information that must be provided to the Department of Fisheries (Section 37, paragraph two);
- the designation of community fishery areas and the procedures for the establishment of community fishery areas (Section 51, paragraph one);
- the manner in which community fishery areas are to operate, including who is within the community and how decisions are to be made and enforced (Section 53, paragraph one);
- the designation of waters as a preservation fishery area (Section 56, paragraph one);
- all matters relating to aquaculture (Section 83);

- in addition to the conditions that can be imposed under Section 24, the conditions, requirements and related issues regarding the issuance of an aquaculture permit (Section 86);
- the designation of protected aquatic resources and fisheries protection areas (Section 91);
- matters related to health and quality standards for fish and fish products (Section 95);
- conditions for the issuance of a fisheries export permit (Section 99); and
- matters related to compliance with and enforcement of the Draft Act (Section 116).

In addition to the above powers, there are a number of provisions in the Draft Act which provide to the *Director-General* the authority to issue written permissions, usually to exempt persons from certain requirements in the Draft Act.³⁵

- prohibition on the importing, sale or possession of aquatic resources which may be harmful to the health of humans, other aquatic resources or the environment except with a written permission given by the Director-General (Section 43);
- prohibition on importing, handling, storing, selling illegally harvested fish except with a written permission given by the Director-General (Section 48);
- all foreign fishing vessels harvesting in Thai waters require the written permission of the Director-General (Section 79);
- prohibition on harvesting or having in possession a protected aquatic resource except with a written permission given by the Director-General (Section 89); and
- prohibition on fishing in a fisheries protection area except with a written permission given by the Director-General (Section 90).

35. The issue of whether there should be any exception to certain prohibitions is a difficult one. From a law enforcement perspective, it is best to make illegal activity clear and provide no exceptions. Reality suggests that exceptions always exist. The Draft Act has adopted the possibility of exceptions to certain prohibited acts preferring to regulate the exceptions rather than have exceptions take place in an unregulated environment. Moreover, many of the prohibitions that raise concerns about exceptions are worded in the Draft Act in a broad manner (Section 40, for example, deals not just with poison but with any substance that may be harmful to fish). The broader the sweep of the prohibition, (Section 40 dealing with poison, motor oil, factory effluent), while desirable from a fisheries protection perspective, creates the need for an exception. A more narrowly worded prohibition (Section 40, for example, dealing just with poison) then the less the need for an exception, but the more provisions the Draft Act must contain to achieve the fisheries protection goal.

Related to this issue is which authority should be allowed to provide the exception. The higher the authority the less likely the exception will be sought or secured. While accurate, reality suggests that for some prohibitions the need for exceptions will arise at the local level. The Draft Act has attempted to determine the authority (Director-General or competent official) which will be most appropriate for the issuing of a written permission as an exception. Choices other than those made in the Draft Act could be made. Regulations and notifications under Section 25, paragraph (a) could alleviate some of this concern. See below, *Final Report* part 13.2.

The exceptions to prohibitions that are provided for in the Draft Act usually require a written permission. See below, *Final Report* part 13.3. The wording of the exceptions usually requires the person to have “in their possession” the written permission given to them allowing the activity to take place. Note below, *Final Report* part 12.3. The requirements of having to have the written permission in possession and that the permission must be for the named person should provide some control of the use of exceptions.

The *Minister and Director-General* may:

- work together to create Local Fishery Committees (Section 18);
- establish committees and boards to provide advice (Section 22);
- enter into arrangements with other states regarding statistical and information gathering and analysis (Section 38);
- seek opportunities for Thai fishermen in non-Thai waters (Section 67);
- enter into agreements with foreign interests to allow Thai fishermen to fish in non-Thai waters (Section 68, paragraph one);
- approve an agreement entered into by Thai fishing interests with foreign interests to allow Thai fishermen to fish in non-Thai waters (Section 68, paragraph two); and
- approve a plan presented by Thai fishing interests for Thai fishermen to fish on the high seas (Section 68 paragraph 3).

The *Director-General* has some additional responsibilities or authorities which arise from the Draft Act. Respecting licences, permits and written permissions issued pursuant to the Draft Act, the Director-General can direct that they be forfeited (Section 26, paragraph (e)) or suspended (Section 26, paragraph two). Where aquatic resources have been seized by an authorized fisheries officer, the Director-General may sell the fish and place the monies in a Bank account until the case is resolved (Section 109, paragraph two) and respecting other items seized by an authorized fisheries officer, the Director-General can release the items on receipt of an appropriate bond or security (Section 110, see below, *Final Report* part 23.4). Finally, where an offender agrees to pay two-thirds of the applicable fine, accepts to be a fisherman not in good standing for the minimum time provided in the relevant provision, and forfeits what the Draft Act requires to be forfeited, the Director-General may elect not to proceed with prosecution (Section 136, see below, *Final Report* part 25.4).

10.2 Provincial Governors

Consistent with the 1947 Fisheries Act and with the decentralization of authority within Thailand, Provincial Governors can be given certain authorities by the Minister respecting the fishing activities that take place within their jurisdiction. While it is sometimes asserted that a Provincial Governor has jurisdiction and responsibility for all matters (including fisheries) which arise within the territory of a province, the jurisdiction and responsibility of a Provincial Governor arises from legislation, thus the authority of a Provincial Governor is not inherent but is delegated. Under the 1947 Fisheries Act, the Provincial Governor could be delegated authority regarding fisheries matters within his jurisdiction. This was done through administrative and governmental organization decrees, legislation, regulations and notifications (See above, *Final Report* parts 4.2 and 4.3.1). The Draft Act continues this practice respecting fishing activities which take place within the Inland Fishery Zone and the Coastal Marine Fishery Zone.³⁶ The Draft Act is premised on the view that the Provincial Governor has jurisdiction in the Coastal Marine Fishery Zone, but will not have jurisdiction or responsibility for any fishery related matters which take place in the Commercial Marine Fishery Zone. If the Coastal Marine Fishery Zone is not co-existent with the jurisdiction of a province in its coastal waters, and it need not be, even where a

36. The seaward limit of a Provincial Governor's jurisdiction and responsibility is not clear in Thai practice. Similarly, there are no boundaries which delimit the areas of jurisdiction and responsibility of one province from another in Thai waters. These are issues that may have to be dealt with at a future time but are not ones that are appropriately dealt with in a Fisheries Act.

province may have jurisdiction for other purposes in the Commercial Marine Fishery Zone, such jurisdiction will not extend to include fishery-related matters covered by the Draft Act.

The authority given to a Provincial Governor is to make notifications for the area under his jurisdiction. Again Section 15 provides an example of the wording found in various Section of the Draft Act.

Section 15. The Minister may issue regulations and the Director-General, and, respecting the Inland Fishery Zone and the Coastal Marine Fishery Zone, with the approval of the Minister, the provincial governor within his jurisdiction, may issue notifications relating to any matter that arises under this Act including: (emphasis added)

The *Provincial Governor* can, within his jurisdiction and with the permission of the Minister, issue notifications respecting:

- all matters relating to the management of fisheries in the Inland Fishery Zone and the Coastal Marine Fishery Zone (Section 15);
- the manner in which community fishery areas are to operate including who is within the community and how decisions are to be made and enforced (Section 53, paragraph one);
- the designation of waters as a preservation fishery area (Section 56, paragraph one);
- all matters relating to aquaculture (Section 83);
- the conditions, requirements and related issues regarding the issuance of an aquaculture permit (Section 86); and
- matters related to compliance with and enforcement of the Draft Act (Section 116).

The Provincial Governors have other authorities under the Draft Act. For example, where aquatic resources have been seized by an authorized fisheries officer and the alleged offender is a small-scale fisherman, the Provincial Governor may sell the fish and place the monies in a Bank account until the case is resolved (Section 109, paragraph two) and respecting other items seized by an authorized fisheries officer, the Provincial Governor can release the items on receipt of an appropriate bond or security (Section 110, see below, *Final Report* part 23.4). Finally, where an offender is a small-scale fisherman who agrees to pay two-thirds of the applicable fine, accepts to be a fisherman not in good standing for the minimum time provided for in the relevant provision, and forfeits what the Draft Act requires to be forfeited, the Provincial Governor may elect not to proceed with prosecution (Section 136, see below, *Final Report* part 25.4).

10.3 The Department of Fisheries

The Draft Fisheries Act also places certain responsibilities directly on to the Department of Fisheries. Of course, the Department of Fisheries has responsibility for the implementation of the Draft Fisheries Act as a whole.

The Department of Fisheries has responsibilities respecting:

- the preparation of fisheries management plans (Section 17);
- cooperating in the establishing of Local Fishery Committees (Section 19);
- the establishment, maintenance, review and dissemination of the list of fisherman not in good standing (Section 32);
- the collection and analysis of statistics (Section 36);
- the conducting of fisheries research (Section 39);
- involvement in the Overseas Fisheries Committee (Section 76);

- the creation and distribution of accurate maps and nautical charts (Section 145); and
- informing the public of the contents of the Draft Act (Section 146).

10.4 Competent Officials

A competent official is defined in Section 10 (9) and the authority to appoint competent officials is with the Minister pursuant to Section 14, paragraph 2. Both of these provisions are based on the equivalent provisions of the 1947 Fisheries Act.

Section 10.

...
(9) “Competent official” means a provincial governor, provincial fishery officer, district fishery officer, fishery officer or person who is appointed by the Minister, pursuant to Section 14, paragraph two, to carry out the purposes of this Act;

Section 14. paragraph 2.

The Minister shall by regulation or notification appoint persons as competent officials to carry out of the purposes of this Act.

Respecting the issuance of local fishing permits, fishing gear permits, overseas fishing permits, aquaculture permits and fisheries export permits, only those “competent officials” who have been given the authority to issue such permits may issue the permits. An example of the wording that provides for this respecting permit issuance is Section 65.

Section 65. The competent official with the authority to grant a fishing gear permit shall not issue a fishing gear permit to a person unless:

It is pursuant to Section 24, paragraph (a), that competent officials are to be given the authority to issue permits (more generally, see below, *Final Report* part 13.2). Thus, it is not every or any competent official which may grant a particular permit.

Section 24. For any licence or permit required by this Act, and for greater certainty, for a local fishing permit, a fishing gear permit, an overseas fishing permit, an aquaculture permit and a fisheries export permit, the Minister by regulation or the Director-General by notification shall establish:

- (a) the competent officials with the authority to grant a licence or permit ...;

The Draft Act provides in numerous places that a competent official can give a written permission to a person for a particular activity and that the written permission will constitute an exception for that person in carrying out an activity that is otherwise prohibited by the Draft Act.³⁷ For example:

- the prohibition on use of poisonous or harmful substances except with a written permission given by a competent official (Section 40);
- the prohibition on use of explosives except with a written permission given by a competent official (Section 41);
- the prohibition on destroying fish habitat except with a written permission given by a competent official (Section 42);
- prohibition on fishing in a preservation fishery area except with a written permission given by a competent official (Section 57);
- the prohibition on use of stationary gear except with a written permission given by a competent official (Section 58);

37. See the discussion above in footnote 35.

- the prohibition on fishing in the Coastal Marine Fishery Zone unless a small-scale fishermen except with a written permission given by a competent official or a Local Fishery Committee (Section 59); and
- the prohibition on aquaculture activities which interferes with fish habitat except with a written permission given by a competent official (Section 85).

Unlike respecting permits, in these situations the Draft Act does not qualify the term competent official by the phrase “with the authority to” provide the written permission. However, pursuant to Section 25, paragraph (a), by regulation or notification, the competent official with the authority to issue a written permission can be established (more generally, see below, *Final Report* part 13.3).

Section 25. For any written permission provided for in this Act, the Minister by regulation or the Director-General by notification may establish:

- (a) where the Act directs that the written permission is to be from a competent official, the competent officials with the authority to issue the written permission;

In several other instances, competent officials have particular authority under the Draft Act. Section 88 provides that competent officials can monitor, visit and inspect aquaculture facilities (see below, *Final Report* part 19.5). Section 95 provides that, by regulation and notification, competent officials can be appointed and given the authority to carry out the activities necessary respecting fisheries health, quality and export (see below, *Final Report* part 21.3). Finally, and of importance, pursuant to Section 109 items seized in enforcement of the Draft Act are to be delivered to a competent official who has responsibility for keeping the items (gear and vessels) until the matter is resolved (see below, *Final Report* part 23.4).

10.5 Authorized Fisheries Officers

Consistent with what is done in many other jurisdictions, the Draft Act provides for authorized fisheries officers to have special powers relating to enforcement of the Draft Fisheries Law. The authority of authorized fisheries officers is set out in Section 102 and is discussed in detail below (see below, *Final Report* part 23.0). The authority to appoint authorized fisheries officers is given to the Minister.

Section 10.

...
(8) “Authorized fisheries officer” means a competent official who is appointed by the Minister pursuant to Section 101 to carry out the responsibilities as set out in Chapter Fourteen of this Act;

Section 101. The Minister by regulation or notification shall appoint persons as authorized fisheries officers for the purposes of carrying out the responsibilities assigned in this Chapter.

10.6 Local Fishery Committees

10.6.1 Overview

Local Fishery Committees, where established, are designed to provide for decentralized involvement in fishery matters within the Inland Fishery Zone and the Coastal Marine Fishery Zone. For the waters over which a Local Fishery Committee has been given jurisdiction pursuant to a regulation or notification, the Local Fishery Committee may be given the exclusive authority to issue local fishing permits (see below, *Final Report* part 10.6.3). In this case, a Local Fishery Committee would replace the competent official

regarding the issuance of local fishery permits, the decisions regarding who should obtain such a permit and how many shall be issued. Moreover, a Local Fishery Committee can recommend to the Minister or Director-General that regulations or notifications be issued regarding the necessary forms, fees and conditions for the issuance of a local fishing permit. On these matters, the Local Fishery Committee has no independent authority. Similarly, regarding other fisheries management measures in the area under the jurisdiction of a Local Fishery Committee, a Local Fishery Committee can recommend that regulations or notifications be issued, but a Local Fishery Committee has no independent authority to adopt regulatory measures.

10.6.2 Establishment, Structure, Operation and Area of Jurisdiction of a Local Fishery Committee

Section 18 encourages the relevant authorities (the Minister, Director-General, Provincial Governors and the Department of Fisheries) to bring all the interested parties together to create Local Fishery Committees. Thus, there is a responsibility on the relevant authorities to encourage and promote the establishment of Local Fishery Committees.

Section 18. The Minister, Director-General, provincial governors and the Department of Fisheries shall encourage fishermen, fishing communities, the public, and provincial and local authorities to work together to create Local Fishery Committees for the purposes of better managing, conserving and developing the aquatic resources of specific areas of the Inland Fishery Zone or the Coastal Marine Fishery Zone.

Undefined in Section 18 is the geographic area for which Local Fishery Committees are to be established. This must be approached on a case-by-case basis since, while for some areas a Local Fishery Committee at the provincial level may be appropriate, for other areas several Local Fishery Committees within a province may be best, and for still other areas cross-provincial boundary Local Fishery Committees may be most appropriate. Rather than arbitrary political (i.e. provincial) boundaries, the guiding approach should be what is best for the local interest and for effective management and control of fishery resources.

The only geographic restriction in the Draft Act is that the area over which the Local Fishery Committee may have jurisdiction are only to be waters within the Inland Fishery Zone and the Coastal Marine Fishery Zone.

Local Fishery Committees come into existence pursuant to a regulation or notification issued under Section 19.

Section 10.

...

(25) “Local Fishery Committee” means a Local Fishery Committee established pursuant to Section 19;

Section 19. The Minister by regulation or the Director-General by notification may:

- (a) establish a Local Fishery Committee and designate an area of Thai waters within the Inland Fishery Zone or the Coastal Marine Fishery Zone which is under the jurisdiction of a Local Fishery Committee;
- (b) expand or contract the area of Thai waters which is under the jurisdiction of a Local Fishery Committee;
- (c) establish the processes and procedures for the determination of the members and operation of a Local Fishery Committee;

...

The regulation or notification establishing the Local Fishery Committee will also determine the area of Thai waters within the Inland Fishery Zone and the Coastal Marine Fishery Zone over which the Local Fishery Committee has jurisdiction, the process for determining the

membership of the Local Fishery Committee, and the procedures for the operation of the Local Fishery Committee.

The Draft Act does not elaborate what structure or membership the Local Fishery Committee should have. Given the regional differences in fishing interests and communities within Thailand, it is deemed unwise to set in the Draft Act what membership or structure all Local Fishery Committees should have. The only guideline given is in Section 20 which provides that a Local Fishery Committee is not to be established unless the Local Fishery Committee represents both the interests of fishermen and the interests of the broader Thai nation as reflected in the Principles established in Chapter One.

Section 20. No regulation or notification shall be issued under Section 19 establishing a Local Fishery Committee unless the Minister or Director-General is of the view that the Local Fishery Committees membership, structure and operation represent the local fisherman and fishing communities and that the Local Fishery Committee will operate in a manner consistent with the Principles stated in Chapter One of this Act.

If the Minister or Director-General, after a review of the membership, structure and operation of a Local Fishery Committee, determines that a Local Fishery Committee is not operating in a manner consistent with the requirements of paragraph one, the Minister by regulation or the Director-General by notification may disband the Local Fishery Committee.

The Minister, Director-General, provincial governors and Local Fishery Committees should establish a process for the regular monitoring, oversight and reviewing of the operation of Local Fishery Committees.

Paragraph two of Section 20 allows for the disbandment of a Local Fishery Committee where the Committee no longer represents local fishing interests or where it operates in a manner inconsistent with the Principles of Chapter One. Paragraph three directs that a process of monitoring and oversight of the operation of Local Fishery Committees should be established.

10.6.3 Authority of a Local Fishery Committee

The principal direct authorities available to the Local Fishery Committee are that, by regulation or notification issued under Section 19, paragraphs (d) and (e), the Local Fishery Committee may be delegated the exclusive authority (thus excluding the authority of other competent officials) for the area of Thai waters under its jurisdiction:

- (i) to issue local fishing permits; and
- (ii) to issue written permissions to fisherman, who are not small-scale fisherman, pursuant to Section 59 (b) (see below, *Final Report* part 12.3.1).

Section 19. The Minister by regulation or the Director-General by notification may:

- ...
- (d) provide to the Local Fishery Committee the exclusive authority to issue local fishing permits for the area of Thai waters under the jurisdiction of the Local Fishery Committee; and
- (e) provide to the Local Fishery Committee the exclusive authority to issue written permissions, pursuant to Section 59 (b), for the harvesting of aquatic resources in the area of Thai waters under the jurisdiction of the Local Fishery Committee by persons who are not small-scale fisherman.

A Local Fishery Committee, using the procedures established by the regulations and notifications issued under Section 19, can recommend that specific regulations and notifications be issued covering the area of Thai waters under the jurisdiction of the Local Fishery Committee respecting the management measures provided for by Section 15 (see below, *Final Report* part 12.2); respecting the issuance of a local fishing permit as provided for by Section 24 (see below, *Final Report* part 13.2); and respecting the issuance of written permissions as provided for by Section 25 (see below, *Final Report* part 13.3).

Section 21. A Local Fishery Committee may recommend to the Minister, Director-General or provincial governor, as appropriate, that regulations or notifications be issued respecting:

- (a) the matters referred to in Section 24 relating to a local fishing permit;
- (b) the matters referred to in Section 25 relating to a written permission; and
- (c) all matters referred to in Section 15.

The Minister, Director-General or provincial governor, as appropriate, shall review all recommendations from a Local Fishery Committee and, where reasonable and feasible, issue regulations or notifications implementing the recommendations.

The Minister, Director-General, provincial governors and Local Fishery Committees should establish a process for the review of recommendations from a Local Fishery Committee.

Paragraph 2 directs that recommendations from a Local Fishery Committee are to be implemented by regulation and notification where it is “reasonable and feasible” to do so. Paragraph 3 provides that a formal process or procedure should come into existence for the handling of recommendations that come from Local Fishery Committees. The Draft Act is silent on the structure of this process or body since it is better to be worked out among the various participants rather than imposing a structure by legislation.

10.7 Designated Community for the Purposes of Community-Based Management

Where an area of the Inland Fishery Zone or the Coastal Marine Fishery Zone is to be subject to community-based management, by regulation or notification (issued under Section 53), the designated community can be delegated the authority to make all decisions regarding the harvesting of the fishery resources within the community-based management area. Unlike the situation with a Local Fishery Committee, where community-based management comes into existence the “designated community” (defined in Section 10 (10)) can have independent authority regarding all harvesting activities in the area. Community-based management is given a separate Chapter in the Draft Act and is treated as a separate topic in this Report (see below, *Final Report* part 16.0).

10.8 Other Committees, Boards and Similar Advisory Mechanisms

It is important to note that the Minister, Director-General, Provincial Governors and the Department of Fisheries can establish any committee with the authority to provide advice respecting any matter that arises under the Draft Fisheries Act. This is made clear in Section 22 of the Draft Act.

Section 22. The Minister, Director-General, provincial governor and the Department of Fisheries may establish committees, boards, consultative groups or other mechanisms for the purposes of seeking advice from the public, local communities or those with an interest in a specific matter on any matter or issue which arises under this Act.

An example of such a committee is the Overseas Fishery Committee which is explicitly provided for in Section 76 of the Draft Act. The Draft Act does not provide direct authority for the Overseas Fisheries Committee except that of providing advice to the appropriate government decision-makers on issues regarding overseas fishing (see below, *Final Report* part 18.5).

10.9 No Liability for Good Faith Exercise of Authority

Pursuant to Section 144, those with authority to take or not take actions under the Draft Act are not subject to prosecution or other proceedings provided they acted in “good faith” in exercising the authority given them under the Draft Act.

Section 144. No suit, prosecution or other proceeding shall lie against a competent official, an authorized fisheries officer, a member of the Department of Fisheries, the Director-General, Minister or provincial governor, or anyone acting under their authority, for anything which is done in good faith in pursuance of this Act.

10.10 Appeals or Review of the Exercise of Authority including the Abuse of Authority

An issue that is always sensitive concerns the appeal or review of the exercise of authority given to a person under a piece of legislation (whether that person be a Minister, Director-General, Provincial Governor, competent official, authorized fisheries officer, or member of a designated community or a Local Fishery Committee). Under the 1947 Fisheries Act, a decision by a competent official not to grant a licence or other permission could be appealed to the Minister who could overturn the decision of the competent official (see above, *Final Report* part 4.3.3).³⁸ No other provisions exist in the 1947 Fisheries Act regarding appeal or review.

This ability of the Minister to intervene in the issuance of licences, permits and written permissions has not been continued in the Draft Act. Except in one situation (Section 111, see below, *Final Report* part 23.3.2), the Draft Act contains no provisions which deal directly with an appeal or review of the exercise of authority provided for under the Draft Act. It is recognized that this may be seen as a weakness of the Draft Act. Given the breadth of authority vested in the Minister to make regulations and the Director-General and, where appropriate Provincial Governors, to make notifications pursuant to Sections 15, 24, and 83, amongst other provisions, it might be implied that many decisions by competent officials and others with authorities under the Draft Act can be reversed, on a case-by-case basis, through the use of these legal instruments.

More generally respecting the exercise of authority by government officials or the abuse of authority by government officials, the government of Thailand is undertaking legislative reform in the area of administrative law including the creation of an Administrative Court system.³⁹ The goals of the new legislation and the Court structure are to make officials exercising authority under legislation more accountable and to provide a legal remedy where an official has exceeded the jurisdiction given by law or has abused that authority. These administrative law developments are an integral part of the changing legal and political processes brought about by the 1997 Constitution. In light of these developments, it was deemed not to be timely to include within the Draft Fisheries Act provisions that deal with

38. Section 46 of the 1947 Fisheries Act:

In case the competent official having the power to grant concession, permit and license refuses to grant the documents, any interested person is entitled to lodge an appeal with the Minister through the competent official within thirty days as from the day when the order comes to his knowledge. The competent official shall, without delay, submit the appeal to the Minister, whose decision shall be final.

39. Information on these developments was supplied to the Legal Consultant by his colleague Professor William Neilson who has been doing extensive work with the Government of Thailand on these issues.

appeals or reviews of exercised or abused authority until the administrative law changes become clearer.

The Draft Act does contain two provisions (Sections 49 and 50) which deal with the giving and receiving of bribes in order to facilitate the exercise of an officials duty under the Draft Act.

Section 49. No person shall give, offer, or attempt to give a gift or consideration to a competent official or an authorized fisheries officer as an inducement or reward for doing or not doing his duties under this Act.

Section 50. No competent official or authorized fisheries officer shall accept, obtain, or attempt to obtain any gift or consideration from a person as an inducement or reward for doing or not doing his duties under this Act.

The penalty provision for these offences is Section 125.

Section 125. Whoever violates Sections 45, 46, 47, 48, 49, 50, 59, 63, 69, 71, 72, or 84 shall be punished with a fine not exceeding _____ baht or with imprisonment not exceeding _____ or both and shall be a fisherman not in good standing for a minimum of ___ months and a maximum of ___ years.

11.0 APPLICATION, INTERPRETATION AND IMPLEMENTATION OF THE DRAFT ACT

11.1 Principles

Chapter One contains the set of Principles which are to guide the application, interpretation and implementation of the Draft Fisheries Act. While it is rare to include within an act a set of principles or policy directives, in the case of the Draft Fisheries Act the inclusion of the Chapter I Principles will signal to Thai fishermen, the Thai fishing industry, the international community, other Ministries and departments of the Thai government, the general public, and the Department of Fisheries itself what will guide decision-making under the Draft Act.

CHAPTER I: PRINCIPLES

Section 4. This Act shall be applied, interpreted and implemented so as to improve the welfare of all those involved in the harvesting of aquatic resources and related activities, in particular, small-scale fishermen and those who depend on aquatic resources for a large portion of their diet or income.

Section 5. This Act shall be applied, interpreted and implemented so as to promote the objective of optimum utilization and long term sustainable development of marine and freshwater aquatic resources in order to ensure an adequate supply of aquatic resources for the people of Thailand and to ensure both a sound ecological balance and biodiversity.

Section 6. This Act shall be applied, interpreted and implemented so as to promote and encourage protection of the habitat of aquatic resources and to eliminate destructive and other practices inconsistent with sustainable aquatic resource management.

Section 7. This Act shall be applied, interpreted and implemented so as to promote the adoption by all Thai fishermen, whether their harvesting activity takes place in or beyond Thai waters, of internationally-accepted responsible fishing practices.

This Act endorses and seeks to implement the 1995 Code of Conduct for Responsible Fisheries.

Section 8. This Act shall be applied, interpreted and implemented so as to ensure that all those at the community and local level with an interest in the harvest, utilization or protection of aquatic resources are involved in the decision-making processes respecting those resources.

Section 9. This Act shall be applied, interpreted and implemented so as to ensure that all aquatic resources and aquatic resource products consumed in Thailand or exported from Thailand meet all national and international health, safety and quality standards.

While the Principles are largely self-explanatory, the key points are that the Draft Fisheries Act is to be applied to:

- assist small-scale and subsistence fishermen (Section 4);
- achieve sustainable development and ensure biodiversity (Section 5);
- promote habitat protection (Section 6);
- implement the Code of Conduct for Responsible Fisheries (Section 7);
- promote public participation, decentralization and community-based management (Section 8); and
- assure the safety to consumers of seafood (Section 9).

11.2 The National Fishery Policy Committee

The National Fishery Policy Committee (NFPC) was created in 1996 as a mechanism to encourage interdepartmental cooperation and coordination on fisheries matters (see above, *Final Report* part 4.1). The NFPC can also play an important role in supporting the credibility of the Department of Fisheries where the NFPC (which includes numerous other agencies and private sector interests) supports a policy adopted by the Department of Fisheries. Finally, the NFPC can assist in and be a mechanism for public participation in fisheries policy formation.

The important role of the NFPC is recognized in Chapter Four, sub-chapter V, of the Draft Act. Since the NFPC is already in existence, the Draft Act does not legislatively create the NFPC. Rather, Section 33 acknowledges the existence of the NFPC, acknowledges the membership of the NFPC without determining who will be members of the NFPC, and provides guidance respecting the mandate of the NFPC without restricting what the NFPC may choose to do.

Section 33. For the purposes of this Act, the National Fishery Policy Committee means the committee established by the government of Thailand comprised of senior representatives from the relevant Ministries and departments with an interest in aquatic resources and such other members as are appropriate, with the mandate, amongst other things, of:

- (a) enhancing inter-Ministerial and inter-departmental coordination and cooperation related to matters which arise under this Act;
- (b) assisting in the application and implementation of this Act; and
- (c) encouraging and facilitating the involvement of persons, communities, and organizations which represent persons and organizations in matters which arise under this Act.

Again, without restricting how the NFPC operates and who can raise issues at the NFPC, Section 34 indicates that the Minister, Director-General or a Provincial Governor can raise any matter that arises under the Draft Act with the NFPC.

Section 34. The Minister, Director-General and provincial governors may consult with and seek the advice of the National Fishery Policy Committee respecting any matter that arises pursuant to this Act.

Section 35 establishes the relationship between the Department of Fisheries and the NFPC. Paragraph one directs that a recommendation or advice from the NFPC is to be

adopted and implemented by the appropriate authority (the Minister, Director-General, Provincial Governors and the Department of Fisheries).

Section 35. Advice, recommendations or directions provided by the National Fishery Policy Committee to the Minister, Director-General, provincial governors or Department of Fisheries respecting any matter that arises from this Act shall, to the extent that is reasonable and feasible, be adopted and implemented by the Minister, Director-General, provincial governors or Department of Fisheries.

In implementing the recommendations and advice of the NFPC, the Minister, Director-General, Provincial Governors and the Department of Fisheries are to take into account both the Principles contained in Chapter One of the Draft Act and the responsibilities that arise from the Draft Fisheries Act.

Section 35. paragraph 2.

For greater certainty, in determining whether to adopt or implement the advice, recommendations or directions provided by the National Fishery Policy Committee, the principles stated in Chapter One of this Act and the responsibilities that arise from this Act shall be paramount.

The relationship between the NFPC and the Department of Fisheries in the Draft Act is a careful one. A recommendation and advice of the NFPC is to be followed unless the recommendation and advice is not inconsistent with the Principles of Chapter One of the Draft Act or the responsibilities that arise under the Draft Act. The final determination of whether to follow a recommendation or advice from the NFPC rests with the person or institution to which the recommendation or advice is directed (the Minister, Director-General, Provincial Governor or the Department of Fisheries), but the decision not to follow a recommendation or the advice of the NFPC must be carefully considered.

11.3 Key Definitions Regarding Application and Interpretation

The Draft Fisheries Act is designed to apply primarily to the harvesting of aquatic resources. The definition of “harvesting” in Section 10 (22) of the Draft Act, adapted from the definition in the Namibia Fisheries Act, is intended to include all aspects of the operation of harvesting, including preparing to harvest, and is not restricted to the narrow activity of actually collecting fish from the water.

Section 10.

...

(22) “Harvesting” means

- (a) searching for, catching, taking or attempting to catch or take aquatic resources;
- (b) placing or having fishing gear in waters or using it on land;
- (c) engaging in any other activity that can reasonably be expected to result in the locating, catching or taking of aquatic resources;
- (d) any operations in Thai waters or non-Thai waters in preparation for any activity mentioned in paragraph (a), (b), or (c);

As with the definition of harvesting, so to with the definition of aquatic resource, the intent of the definition is to be broad and inclusive. The definition in the Draft Act is based upon the definition of aquatic resource used in the 1947 Fisheries Act.

Section 10.

...

(6) “Aquatic resource” means animals that inhabit or during part of their life-cycle inhabit marine or fresh waters including fish, shrimps, crabs, mollusks, tortoises, turtles, snapping turtles, crocodiles, marine mammals,

sea cucumbers, sponges, coral, marine algae and water plants, seaweed and, where relevant, the eggs of the listed aquatic resource;

The Draft Act applies primarily to "persons" which is defined in Section 10 (30).

Section 10.

...
(30) "Person" means an individual, a company, an association, or a body of individuals;

Harvesting activity in the Coastal Marine Fishery Zone, the Commercial Marine Fishery Zone and in waters outside Thai waters is conducted primarily by or on board fishing vessels. The Draft Act uses the terms fishing vessel, foreign fishing vessel, and Thai flag fishing vessel. A fishing vessel is one "used for, equipped to be used for or of a type normally used for harvesting aquatic resources". Again, the wording is intended to be broad to ensure that a vessel cannot avoid being treated as a fishing vessel under the Draft Act simply because it is not a particular time engaged in the activity of fishing (harvesting aquatic resources).

Section 10.

...
(19) "Fishing vessel" means any vessel which is used for, equipped to be used for or is of a type normally used for harvesting aquatic resources or related activities which includes being a carrier, support or mother vessel for fishing vessels and also includes both a foreign fishing vessel and a Thai flag fishing vessel;

(35) "Thai flag fishing vessel" means a vessel registered under the Thai Vessels Act of B.E. 2481 or a vessel not registered in any State but under the control of Thai nationals:

The definition of a Thai flag fishing vessel includes all vessels which are fishing vessels and are registered in (and thus are entitled to fly the flag of) Thailand. Moreover, the definition includes vessels which are registered in no State but are under the control of Thai nationals. This is intended to deal with smaller vessels owned and operated by Thai nationals which need not be formally registered under the Thai Vessels Act.

Section 10.

...
(20) "Foreign fishing vessel" means any fishing vessel that is not a Thai flag fishing vessel;

Another key definition is that of fishing gear. The term used in the 1947 Fisheries Act was fishing implement which was defined to mean the gear that could be used in the harvesting of fish but also included a fishing vessel. The Draft Act uses the term fishing gear rather than fishing implement and has removed the reference to fishing vessels.

Section 10.

...
(17) "Fishing gear" means any equipment or other thing that can be used in the act of harvesting of aquatic resources including, but not limited to, nets, hooks, traps, ropes, line, floats, winches, trawls, seines, and lights;

Section 10 (37) provides that:

Section 10.

...
(37) "This Act" includes any regulations and notifications made or issued under this Act.

This is important since it indicates that where the phrase “this Act” is used in the Draft Fisheries Act it includes the regulations and notifications that have been issued pursuant to the Draft Act.

11.4 Regulations and Notifications

It has already been noted that the Draft Fisheries Act has been designed as framework legislation with a heavy reliance to be placed on regulations and notifications to provide the necessary “fine tuning” on many issues. The authority of the Minister regarding regulations and the Director-General and Provincial Governors regarding notifications has been detailed above (see above, *Final Report* parts 10.1 and 10.2).

Because regulations and notifications are to play such an important role in the regulation of Thai fisheries, a specific provision prohibiting the violation of a regulation or notification has been included in the Draft. Section 44 is designed to ensure that it is prohibited for a person to act inconsistent with a regulation or notification. Fines and imprisonment are provided for in Section 131. As well, Section 131 provides that a violator of Section 44 may be a fisherman not in good standing for a period up to a maximum. A fisherman not in good standing is not entitled to a licence, permit or written permission that may be issued under the Draft Act. Finally, pursuant to Section 138, the Court may order forfeiture of vessels, gear and resources involved in the offence.

Section 44. No person may harvest aquatic resources or engage in any activity inconsistent with regulations and notifications issued pursuant to this Act.

Section 131. Whoever violates Section 44 shall be punished with a fine not exceeding _____ baht or with imprisonment not exceeding _____ or both and may be a fisherman not in good standing for a maximum of ___ months.

Section 138. Fishing vessels, fishing gear, aquatic resources, aquatic resource products, the proceeds from sale of aquatic resources and aquatic resource products undertaken pursuant to Section 109, any bond or security posted pursuant to Section 110, and other things used in or acquired through the commission of an offence of Sections 42, 44, 45, 46, 47, 48, 84, or 85 may be forfeited by the Court.

Also regarding regulations and notifications, the final section of the Draft Act should be noted (Section 146). Beyond the requirement that the regulations and notifications are to be in writing and widely disseminated (paragraph one), the Department of Fisheries has the responsibility to communicate the contents of the regulations and notifications (and the Draft Act as a whole) to all those who may be affected by them. Paragraph 3 notes that, notwithstanding the communication responsibility of the Department of Fisheries, all persons are to comply with the Draft Act and cannot claim lack of knowledge of the Act, including its regulations and notifications, as a valid defence to or as an excuse for non-compliance.

Section 146. All regulations and notifications made pursuant to this Act shall be made in writing and as widely disseminate as is reasonable and feasible.

The Department of Fisheries shall make every effort to inform and communicate the contents of this Act, including all regulations and notifications, to all those who have an interest in or may be affected by this Act.

Notwithstanding paragraphs 1 and 2, it is the responsibility of all those who are or may be affected by this Act to comply with this Act.

11.5 Revoked Acts

The Draft Fisheries Act is designed to replace both the 1947 Fisheries Act and the 1939 Act Governing the Right to Within Thai Fishery Waters.

Section 3. The following shall be repealed:

- (a) The Fisheries Act, B.E. 2490;
- (b) The Fisheries Act (No. 2), B.E. 2496;
- (c) The Fisheries Act (No. 3), B.E. 2528;
- (d) The Act Governing the Right to Fish Within Thai Fishery Waters, B.E. 2482;
- (e) ...

All other laws, rules, regulations and notifications insofar as they deal with matters provided for herein or are contrary to or inconsistent with the provisions of this Act, shall be replaced by this Act.

12.0 FISHERIES MANAGEMENT IN THAI WATERS: GENERAL

12.1 Responsibility and Management Plans

The general responsibility of the Minister and the Director-General for the execution of the Draft Act set out in Section 14, paragraph one, has already been noted (see above, *Final Report* part 10.1).

Section 14. The Minister and Director-General shall have charge and control of the execution of this Act.

In some States, fisheries plans are created for specific species or areas on a regular basis and provide the rationale for the controls placed on fishing activity. Thailand has not regularly undertaken such fishery management planning. Section 17, paragraph one, provides that the Department of Fisheries may prepare management, conservation and development plans for the fisheries of Thailand.

Section 17. The Department of Fisheries may prepare and keep under review plans for the management, conservation and development of aquatic resources for all of Thai waters, specific geographic areas of Thai waters, aquaculture, or respecting specific aquatic resources within Thai waters.

Moreover, Section 17, paragraph 2, provides that the Department of Fisheries is to encourage Local Fishery Committees and others to prepare management plans for their areas of specific interest.

Section 17. paragraph two.

The Department of Fisheries shall encourage fishermen, fishing communities, the public, provincial and local authorities, and Local Fishery Committees to prepare management, conservation and development plans for specific areas of the Inland Fishery Zone and the Coastal Marine Fishery Zone or respecting specific aquatic resources within the Inland Fishery Zone and the Coastal Marine Fishery Zone.

In accordance with Section 17, paragraph 3, all plans for management, conservation and development of aquatic resources are to be based on the consultation with and participation of all those who may be affected by the plans. Moreover, the plans are to be based on the best scientific information available; seek to apply the precautionary approach to attain the goals of sustainable development, biodiversity and ecological integrity; and be consistent with the Principles found in Chapter One of this Act.

Section 17. paragraph three.

All plans for the management, conservation and development of aquatic resources shall:

- (a) be based on consultation with and the participation of those persons who may be affected by the plans, in particular communities and organizations that represent persons who may be affected by or have an interest in the plans;
- (b) be based on the best scientific information available;
- (c) apply the precautionary approach to attain the goals of sustainable development, biodiversity, and ecological integrity;
- (d) be consistent with the Principles stated in Chapter One of this Act; and
- (e) not be inconsistent with any provisions of this Act.

The final paragraph of Section 17 directs that the plans are, at a minimum, to be a guide in the decision-making and the application, interpretation and implementation of the Draft Act by all of those involved. Of course, the contents of a plan can be, and it is expected will be, adopted into regulations and notifications as is appropriate.

Section 17. paragraph four.

Plans for the management, conservation and development of aquatic resources shall guide the Minister, Director-General, provincial governors, the Department of Fisheries, Local Fishery Committees, fishing communities, and fishermen respecting the application, interpretation and implementation of this Act.

12.2 Management Measures Related to Harvesting: Regulations and Notifications - Section 15

12.2.1 General Authority

Section 15 establishes the authority of the Minister to issue regulations and the Director-General and, where permitted, the Provincial Governors to issue notifications regarding the management measures that can be applied to fishing activity in Thai waters.⁴⁰ Aspects of Section 15 have been discussed above (see above, *Final Report* parts 9.6.3 and 10.1).

The introductory wording of Section 15 enables the relevant authority (Minister, Director-General, Provincial Governor) to issue regulations and notifications “relating to any matter that arises under this Act...”. This is broad wording and allows for regulations and notifications to be issued pursuant to Section 15 on any matter related to the topics, issues and matters that are covered by the Draft Act.

Section 15. The Minister may issue regulations and the Director-General, and, respecting the Inland Fishery Zone and the Coastal Marine Fishery Zone, with the approval of the Minister, the provincial governor within his jurisdiction, may issue notifications relating to any matter that arises under this Act including:

The introductory wording of Section 15 goes on to provide examples of the subject matters or measures for which regulations and notifications may be issued.

Section 15, paragraph (v), reinforces the authority to issue regulations and notifications respecting all matters related to the harvesting of marine living resources.

Section 15.

...

- (v) any matter related to the harvest of aquatic resources and related activities including the improvement of harvesting opportunities and the protection of aquatic resources and the habitat of aquatic resources from destructive and abusive practices.

40. Section 15 also creates the authority for the issuance of management measures respecting fishing activities by Thai flag fishing vessels outside Thai waters.

12.2.2 Application to Specific Zones

Three zones for Thai waters are created in the Draft Fisheries Act in Sections 11-13 and have been described above (see above, *Final Report* part 9.1). The detailed management measures regarding harvesting activities in each of the three zones are to be created through regulations and notifications issued under Section 15. For the Commercial Marine Fishery Zone, it is the Minister or Director-General who has the authority to issue regulations and notifications under Section 15. For the Inland Fishery Zone and the Coastal Marine Fishery Zone, it is the Minister, Director-General or Provincial Governor who has the authority to issue regulations and notifications under Section 15.

Section 15. The Minister may issue regulations and the Director-General, and, respecting the Inland Fishery Zone and the Coastal Marine Fishery Zone, with the approval of the Minister, the provincial governor within his jurisdiction, may issue notifications relating to any matter that arises under this Act including:

Regulations and notifications issued under Section 15 are, pursuant to Section 16, to indicate to which zone they are applicable.

Section 16. Regulations and notifications issued under Section 15 shall indicate whether they are applicable to the Inland Fishery Zone, the Coastal Marine Fishery Zone, areas under the jurisdiction of Local Fishery Committees, the Commercial Marine Fishery Zone, Thai flag fishing vessels outside Thai waters or foreign fishing activity in Thai waters.

As Section 16 notes, regulations and notifications may also be specific to areas under the jurisdiction of Local Fishery Committees. Section 21, paragraph one, provides that a Local Fishery Committee can recommend to the Minister, Director-General or Provincial Governor that a regulation or notification be issued to implement a matter which arises under Section 15 within the area of Thai waters under the jurisdiction of a Local Fishery Committee. Section 21, paragraph two, notes that, where reasonable and feasible, such a regulation or notification is to be issued. The role and authority of the Local Fishery Committee is discussed above (see above, *Final Report* parts 10.6.2 and 10.6.3).

Section 21. A Local Fishery Committee may recommend to the Minister, Director-General or provincial governor, as appropriate, that regulations or notifications be issued respecting:

...
(c) all matters referred to in Section 15.

The Minister, Director-General or provincial governor, as appropriate, shall review all recommendations from a Local Fishery Committee and, where reasonable and feasible, issue regulations or notifications implementing the recommendations.

The Minister, Director-General, provincial governors and Local Fishery Committees should establish a process for the review of recommendations from a Local Fishery Committee.

12.2.3 Fishing Gear Restrictions

The Draft Fisheries Act uses fishing gear as the principal modality (as opposed to use of fishing vessels directly) for the control of fishing activity in the Commercial Marine Fishery Zone (see below, *Final Report* part 14.0) and, more generally, fishing gear has been to manner in which fishing activity has been controlled in Thai waters.

Section 15.

...
(a) fishing gear which is approved for use in harvesting aquatic resources and this may include the size, kind, type, number, parts, size of mesh, dimension, and the place, time and method in which approved fishing gear may be used;

Paragraph (a) is based on Section 32, paragraph (1), of the 1947 Fisheries Act. Section 15, paragraph (a), is the authority for the listing of the fishing gear approved for use in Thai waters and, specifically, in the Commercial Marine Fishery Zone. In addition to determining which fishing gear is approved, pursuant to paragraph (a) regulations and notifications may be issued respecting:

- the size, type, number, mesh, etc. approved for use;
- the place where fishing gear may be used;
- the time when fishing gear may be used; and
- the manner in which fishing gear may be used.

Paragraph (a) provides broad authority to issue regulations and notifications respecting all issues and matters regarding the use of fishing gear.

For the Commercial Marine Fishery Zone, the presumption exists in the Draft Act that all fishing gear must be approved and that all fishing gear used requires a fishing gear permit (Sections 63 and 64, see below, *Final Report* parts 14.2, 14.3 and 14.4). If a fishing gear is not listed in a regulation or notification then it is not approved and no fishing gear permit may be issued for that gear.

Fishing gear for which a fishing gear permit is not required are only those listed in a regulation or notification. Section 15, paragraph (b), establishes the authority to exempt fishing gear under Section 64 (see below, *Final Report* part 14.3).

Section 15.

...
(b) fishing gear which may be used in harvesting aquatic resources in the Commercial Marine Fishery Zone without a fishing gear permit and this may include the size, kind, type, number, parts, size of mesh, dimension, and the place, time and method in which the fishing gear may be used;

In the Inland Fishery Zone and the Coastal Marine Fishery Zone, the presumption is that all fishing gear is allowed to be used unless there is a regulation or notification to contrary. While this is not stated expressly in the Draft Act, it is the intention of the Draft Act. Section 15, paragraph (c), however, provides for the creation of regulations and notifications to list that fishing gear which is prohibited from use in the Inland Fishery Zone and the Coastal Marine Fishery Zone. The content of paragraph (c) is covered by Section 15, paragraph (a), but is listed separately for greater clarity.

Section 15.

...
(c) fishing gear which may not be used in harvesting aquatic resources in the Inland Fishery Zone or the Coastal Marine Fishery Zone and this may include the size, kind, type, number, parts, size of mesh, dimension, and the place, time and method in which approved fishing gear may be used;

Paragraph (e) of Section 15 is based on Section 32, paragraph (4) of the 1947 Fisheries Act.

Section 15.

...
(e) the type and method of harvesting of aquatic resources that may take place;

Paragraph (e) provides authority for the issue of regulations and notifications respecting which methods of harvesting are permitted and which are not permitted. Paragraph (e) is included in the Draft Act for clarity since paragraph (a) covers the same issues.

12.2.4 Time, Place and Resource Restrictions

Section 15, paragraph (d), is based on Section 32, paragraph (6), of the 1947 Fisheries Act.

Section 15.

...

- (d) the kind, species, size and other characteristics and quantity of aquatic resources which may be harvested either by persons, fishing gear, fishing vessels or in total within a specific geographic area, including any restrictions on by-catch;

Paragraph (d) provides the authority to issue regulations and notifications respecting quotas, harvest limits, by-catch restrictions and fish-size limitations for a specific geographic area or for a specific species and such limitations can be imposed on persons, fishing vessels or fishing gear. For example, pursuant to paragraph (d), regulations and notifications can be issued indicating that a person or a fishing vessel cannot harvest more than X fish from a specific area and that such fish shall not be under a particular size.

Paragraphs (f), (g) and (h) of Section 15 are related as they provide for the creation of regulations and notifications respecting prohibitions on harvesting selected fish species, harvesting in certain areas (“habitat of aquatic resources”), and regarding open and closed seasons. Paragraph (h) is based on Section 32 (5) of the 1947 Fisheries Act. The authority in Section 15, paragraphs (f) and (g), is designed to be easier to use and involve short-term measures rather than what is intended to be included within Chapter Twelve of the Draft Act regarding protected species and fisheries protection areas (Sections 89-91, see below, *Final Report* part 12.5).

Section 15.

...

- (f) aquatic resources for which harvesting is prohibited;
- (g) the habitat of aquatic resources in which harvesting of aquatic resources is prohibited;
- (h) times and areas which are open or closed to harvesting of aquatic resources;

12.2.5 Equipment and Markings Requirements

Regulations and notifications can be issued on a number of subjects related to the equipment that a fishing vessel must have, how the equipment must be used and the markings that a fishing vessel must display. Specific equipment and marking can make the monitoring, control and surveillance of fishing activities, and thus the enforcement of the Draft Act and protection of fishing resources, considerably easier. Many of the items noted below, such as logbooks, vessel identification markings, communications equipment and call-in requirements are standard requirements in most States.

Section 15.

...

- (o) the maintenance of logbooks on board fishing vessels in which shall be recorded the nature, time and position of all harvesting operations and the quantity of catch by species, including all aquatic resources caught but not landed or retained on board;
- (p) the size, location and specific identification markings or numbers that a fishing vessel or fishing gear must display;
- (q) the communications and safety equipment, including radios, transponders and similar devices, that a fishing vessel is required to have and the times, places, conditions and manner in which the master of a fishing vessel is to communicate with competent officials and safety equipment is to be checked;

12.2.6 Artificial Reefs and Fish Aggregating Devices

Section 15, paragraph (i), allows for regulations and notifications respecting devices and items used for attracting fish.

Section 15.

...
(i) fish aggregating devices, artificial reefs and similar items for attracting aquatic resources;

12.2.7 Implementing International Obligations

Section 15, paragraph (u), allows for the implementation of conventions, treaties or agreements relating to fishery matters through a regulation or notification.

Section 15.

...
(u) the implementation of the provisions of any convention, treaty or agreement in relation to fishery matters which is binding on Thailand; and

12.3 Prohibitions in the Draft Act Regarding Harvesting in Thai Waters

12.3.1 Prohibited Areas of Harvesting

One of the primary reasons for the creation of the Coastal Marine Fishery Zone is to ensure that this Zone is preserved for small-scale fishermen. Thus, the Coastal Marine Fishery Zone is a prohibited area for harvesting by commercial fishing vessels. The inclusion of such a provision (Section 59) in the Draft Act is consistent with existing notifications and regulations under the 1947 Fisheries Act which seeks to prohibit trawlers from the near-shore area.

Section 59 makes it an offence for anyone, other than a small-scale fishermen, defined in Section 10 (34), or a person with written permission from a competent official or the relevant Local Fishery Committee, to harvest aquatic resources in the Coastal Marine Fishery Zone. Regulations and notifications respecting written permissions can be issued pursuant to Section 25 (see below, *Final Report* 13.3).

Section 59. No person shall harvest aquatic resources within the Coastal Marine Fishery Zone unless

(a) the person engaged in the harvesting is a small-scale fisherman, or
(b) the person has in their possession a written permission for such activity given to that person by the Local Fishery Committee which has the authority to issue local fishing permits for the area or, where no Local Fishery Committee exists, by a competent official.

The definition of small-scale fishermen is set out in Section 10 (34).

Section 10.

...
(34) “Small-scale fisherman” means a person who, in the harvesting of aquatic resources, uses a vessel of less than 5 gross tons and uses fishing gear, such as nets, hook-and-line or traps, in such a manner as to be consistent with the harvest of small amounts of aquatic resources;

The definition is both objective/measurable and functional. It is objective/measurable in that a small-scale fishermen is a person who uses a vessel that is less than 5 gross tons. This limitation was suggested at the August 2000 Workshop by several people. The definition of a small-scale fishermen is functional in that the gear used and the manner of fishing must be

consistent with harvesting small amounts of resource and, thus, not be industrial or commercial in nature. This functional approach would prevent a small-scale fishermen from loading many multiple traps on a small vessel.

A Local Fishery Committee can have its own rules and conditions regarding the issuance of written permissions under Section 59 for the area of Thai waters within its jurisdiction. Section 21, paragraph one, sub-paragraph (b) provides that a Local Fishery Committee can recommend to the Minister or Director-General⁴¹ that a regulation or notification be issued respecting matters dealt with in Section 25, such as the forms, conditions, fees, and time period (see below, *Final Report* part 13.3) for a written permission. Section 21, paragraph two, notes that, where reasonable and feasible, such a regulation or notification is to be issued (see above, *Final Report* part 10.6.3). Thus, by regulation or notification all the matters dealt with in Section 25 regarding written permissions can meet the specific interests of a particular Local Fishery Committee.

Section 21. A Local Fishery Committee may recommend to the Minister, Director-General or provincial governor, as appropriate, that regulations or notifications be issued respecting:

...
(b) the matters referred to in Section 25 relating to a written permission; and
...

The Minister, Director-General or provincial governor, as appropriate, shall review all recommendations from a Local Fishery Committee and, where reasonable and feasible, issue regulations or notifications implementing the recommendations.

The Minister, Director-General, provincial governors and Local Fishery Committees should establish a process for the review of recommendations from a Local Fishery Committee.

The fine and imprisonment provision for a violation of Section 59 is Section 125. While the fine and imprisonment may not be substantial, violation of Section 59 is considered to be a serious offence. A person violating Section 59 is required to be a fisherman not in good standing for a minimum period of time. Also, pursuant to Section 137, vessels, gear and fish used in or acquired from the offence are required to be forfeited to the Court.

Section 125. Whoever violates Sections ... 59 ... shall be punished with a fine not exceeding _____ baht or with imprisonment not exceeding _____ or both and shall be a fisherman not in good standing for a minimum of ___ months and a maximum of ___ years.

Section 137. Fishing vessels, fishing gear, aquatic resources, aquatic resource products, the proceeds from sale of aquatic resources and aquatic resource products undertaken pursuant to Section 109, any bond or security posted pursuant to Section 110, and other things used in or acquired through the commission of an offence of Sections ... 59 ... shall be forfeited by the Court.

A restricted area where harvesting cannot take place within the Inland Fishery Zone is created by Sections 56 and 57. Section 56, which is adapted from Sections 7, 8 and 9 of the 1947 Fisheries Act, allows for the establishment of preservation fishery areas. Section 57 makes it an offence to harvest resources in a preservation fishery area. Section 123 is the principal penalty provision for a violation of Section 57 and Section 139 requires forfeiture to the Court of all resources harvested in violation of Section 57.

Section 56. The Director-General or, with the approval of the Minister, the provincial governor within his jurisdiction, may by notification designate any area of the Inland Fishery Zone as a preservation fishery area.

41. Pursuant to Section 25, the Provincial Governor does not have jurisdiction to deal with the conditions, fees, forms or time period for written permissions.

Preservation fishery areas may be those areas lying within or adjoining to the compound of a monastery or place of worship, a navigational lock, dam, water treatment facility, or any other facility where it is inappropriate or dangerous for harvesting of aquatic resources to occur.

Section 57. No person may harvest aquatic resources within a preservation fishery area unless the person has in their possession a written permission for such harvesting given to that person by a competent official.

Section 123. Whoever violates Sections 42, 57, or 58 shall be punished with a fine not exceeding _____ baht or with imprisonment not exceeding _____ or both and may be a fisherman not in good standing for a maximum of ___ months.

Section 139. Aquatic resources, aquatic resource products, and the proceeds from sale of aquatic resources and aquatic resource products undertaken pursuant to Section 109, acquired through or involved in the commission of an offence of Sections 54, 57, 60, 63, 69, 71, 72, 90, 96 or 98 shall be forfeited by the Court.

While retaining the preservation fishery area from the 1947 Fisheries Act, the Draft Act does not continue the leasable and reserved fishery waters or wording of the 1947 Act (see Sections 6 – 22 of the 1947 Fisheries Act). The leasable and reserved fisheries of the 1947 Act have, according to Department of Fisheries officials, fallen into disuse.

12.3.2 Prohibited Methods of Harvesting

Sections 40 and 41 contain traditional prohibitions on harvesting methods that are harmful to both the fish and fishery habitat. Section 40, which follows Section 31 of the 1947 Fisheries Act, prohibits the use of poisonous substances or any other substance which is harmful to fish. The provision is broadly worded such that wherever a substance harmful to fish is put in Thai waters, either intentionally or unintentionally, it is a violation of Section 40. No offence is committed if the person has, in their possession, a written permission allowing the activity given by a competent official.

Section 40. No person shall, intentionally or unintentionally, release, introduce or cause to be released or introduced into Thai waters any substance that is poisonous or harmful to aquatic resources unless the person has in their possession a written permission for such a release given to that person by a competent official.

Section 41 of the Draft Act parallels Section 20 of the 1947 Fisheries Act respecting the use of electricity and explosives. No offence is committed if the person has, in their possession, a written permission allowing the activity given by a competent official.

Section 41. No person shall, intentionally or unintentionally, use electricity or explosives in a manner that is harmful to aquatic resources in Thai waters unless the person has in their possession a written permission for such a use given to that person by a competent official.

The penalty provisions for the violation of Sections 40 and 41 are Sections 122 and 137. Section 122 provides for the fine or imprisonment and that a violator shall be a fisherman not in good standing for a minimum period. Section 137, which follows Section 69 of the 1947 Fisheries Act, provides that violation of Sections 40 and 41 results in forfeiture of all gear, vessels, resources and other items related to the offence.

Section 122. Whoever violates Sections 40 or 41 shall be punished with a fine not exceeding _____ baht or with imprisonment not exceeding _____ or both and shall be a fisherman not in good standing for a minimum of ___ months and a maximum of ___ years.

Section 137. Fishing vessels, fishing gear, aquatic resources, aquatic resource products, the proceeds from sale of aquatic resources and aquatic resource products undertaken pursuant to Section 109, any bond or security

posted pursuant to Section 110, and other things used in or acquired through the commission of an offence of Sections 40, 41, 43, 58, 59, 79, or 89 shall be forfeited by the Court.

A specific harvesting restriction regarding the Inland Fishery Zone contained in the Draft Act concerns the use of stationary gear. Section 58, which is adapted from Sections 17, 22 and 31 of the 1947 Fisheries Act, prohibits the use of stationary fishing gear in the Inland Fishery Zone. Sections 123 and 137 are the penalty provisions for a breach of Section 58.

Section 58. No person shall erect, peg down, maintain, place or build stationary fishing gear in the Inland Fishery Zone unless the person has in their possession a written permission for such activity given to that person by a competent official.

Section 123. Whoever violates Sections 42, 57, or 58 shall be punished with a fine not exceeding _____ baht or with imprisonment not exceeding _____ or both and may be a fisherman not in good standing for a maximum of ___ months.

Section 137. Fishing vessels, fishing gear, aquatic resources, aquatic resource products, the proceeds from sale of aquatic resources and aquatic resource products undertaken pursuant to Section 109, any bond or security posted pursuant to Section 110, and other things used in or acquired through the commission of an offence of Sections 40, 41, 43, 58, 59, 79, or 89 shall be forfeited by the Court.

12.4 Fishery Habitat Protection

Fishery habitat protection has been identified as a principal building block of the Draft Act (see above, *Final Report* part 9.5). The importance of fishery habitat protection in the Draft Act is clear from Section 6 which adopts habitat protection as a principle for the implementation, interpretation and application of the Draft Act.

Section 6. This Act shall be applied, interpreted and implemented so as to promote and encourage protection of the habitat of aquatic resources and to eliminate destructive and other practices inconsistent with sustainable aquatic resource management.

The ability to protect and enhance fishery habitat, understood as being where fish live, should increase the ability of the Department of Fisheries to manage the fishery resources of Thai waters. Fisheries habitat protection is important to the conservation and management of fishery resources.

Habitat of an aquatic resource is defined broadly in Section 10 (21) as being any Thai waters where fish (aquatic resources) may be located.

Section 10.

...
(21) "Habitat of an aquatic resource" means any area of Thai waters where an aquatic resource may be found;

The main provision respecting protection of fishery habitat in the Draft Act is Section 42 which makes it an offence for any person to destroy or interfere with the habitat of an aquatic resource. Basically the provisions makes it an offence to do anything that alters or interferes with Thai waters where fish may be found. Potentially, this is a very far-reaching and powerful prohibition that can be used to prosecute almost any activity which interferes with Thai waters.

Section 42. No person shall, intentionally or unintentionally, destroy, disturb, interfere with or alter, either directly or indirectly, the habitat of an aquatic resource unless the person has in their possession a written

permission for such destruction, disturbance, interference or alteration given to that person by a competent official.

For greater certainty, paragraph one includes, but is not limited to:

- (a) any use of or activity on privately-owned property which destroys, disturbs, interferes with or alters the habitat of an aquatic resource;
- (b) any alteration of water levels in Thai waters; or
- (c) the erection of any device which has the effect of altering water levels, the flow of water or the quality of water in Thai waters.

Paragraph two of Section 42 provides some examples of the type of activities that are intended to be covered with paragraph one. Paragraph 2, sub-paragraph (a), for example, would cover the situation of person releasing any substance (for example, motor oil) from their private property and that substance enters Thai waters.

Section 42, paragraph one, notes that an offence of the provision can be avoided where the person has in their possession a written permission from a competent official for the activity.

Section 123 provides for the fine or imprisonment and the possibility of the violator becoming a fisherman not in good standing where Section 42 is breached and Section 138 provides that forfeiture of the items used in the breach of Section 42 may be ordered by the Court.

Section 123. Whoever violates Sections 42, 57, or 58 shall be punished with a fine not exceeding _____ baht or with imprisonment not exceeding _____ or both and may be a fisherman not in good standing for a maximum of _____ months.

Section 138. Fishing vessels, fishing gear, aquatic resources, aquatic resource products, the proceeds from sale of aquatic resources and aquatic resource products undertaken pursuant to Section 109, any bond or security posted pursuant to Section 110, and other things used in or acquired through the commission of an offence of Sections 42, 44, 45, 46, 47, 48, 84, or 85 may be forfeited by the Court.

Fishery habitat protection is directly provided for in Section 15, paragraphs (g), (h), and (m) which allows for the issuance of regulations and notifications respecting:

- habitat (areas) in which fishing is not permitted;
- closed and opened seasons; and
- specifically regarding protection of fish habitat..

Section 15. The Minister may issue regulations and the Director-General, and, respecting the Inland Fishery Zone and the Coastal Marine Fishery Zone, with the approval of the Minister, the provincial governor within his jurisdiction, may issue notifications relating to any matter that arises under this Act including:

...

- (g) the habitat of aquatic resources in which harvesting of aquatic resources is prohibited;
- (h) times and areas which are open or closed to harvesting of aquatic resources;

...

- (m) the protection or restoration of the habitat of aquatic resources;

Section 15 (m) also allows for regulations and notifications to be issued respecting the restoration of destroyed or damaged fishery habitat.

Fishery habitat protection can also be accomplished through the designation of an area as a fisheries protection area pursuant to Chapter Twelve (Sections 90-91, see below, *Final Report* part 12.5).

12.5 Protected Species and Protection Areas

Regulations and notifications under the 1947 Fisheries Act deal with certain aquatic species (turtles, dugongs, dolphins) that are not to be harvested or interfered with in Thai waters, moreover, certain protected areas have been created for the purposes of coral reef protection. The 1992 Wild Animal Preservation and Protection Act of Thailand is relevant regarding the preservation and protection of aquatic species and the 1961 National Park Act is relevant regarding marine protected areas (marine parks).

The Director-General is involved in decision-making under the 1992 Wild Animal Act which deals primarily, although not exclusively, with species listed as endangered under the Convention on International Trade in Endangered Species (CITES). As the Kuemlangan Report (1999) notes,⁴² this Act "implicitly" gives the power of implementation to the Department of Fisheries respecting aquatic animals.

There is a complex relationship between the National Parks Act and fisheries. Marine areas can be designated as national parks (marine parks or marine protected areas) under the National Parks Act. The Department of Fisheries is represented on the relevant committees and officials of the Department of Fisheries can be designated as enforcement officers for the purposes of the National Parks Act.⁴³

The Draft Fisheries Act contains a separate Chapter regarding Protected Species and Protection Areas⁴⁴ in order to make it clear that these issues require special attention. The approach of the Draft Act is to provide to the Minister or the Director-General the authority to designate a species as a "protected aquatic resource" or an area of Thai waters as a "fisheries protection area" (Section 91, paragraph one). The decision to make such designations is to take into account and be in cooperation with other departments and the mandates of other legislation (Section 91, paragraph 2). Once a species has been designated as a protected aquatic species, then harvesting or interfering with such a species is prohibited (Section 89). Similarly, once an area has been designated as a fishery protection area, then harvesting in that area is prohibited (Section 90).

Section 10.

...

(15) "Fisheries protection area" means an area of Thai waters that has been designated and listed in a regulation or notification issued under Section 91 as a fisheries protection area;

(33) "Protected aquatic resource" means an aquatic resource that has been designated and listed in a regulation or notification issued under Section 91 as a protected aquatic resource;

Section 91. The Minister by regulation and the Director-General by notification may:

- (a) designate any aquatic resource as a protected aquatic resource;
- (b) designate any area of Thai waters as a fisheries protection area;
- (c) indicate what activities are permissible within a specific fisheries protection area;
- (d) establish criteria for when an aquatic resource should be designated as a protected aquatic resource;
- (e) establish criteria for when an area of Thai waters should be designated as a fisheries protection area; and

42. Kuemlangan, *supra* note 17, at p. 4.

43. Explained in Kuemlangan, *supra* note 17, at pp. 4-5.

44. The Draft Act does not use the term marine protected areas or marine parks since these usually involve regulation of more than just fishery activities. All the Draft Fisheries Act deals with is the fishery aspects of a marine park or marine protected area. A comprehensive and coordinated approach to marine parks and marine protected areas is advisable although, to a certain extent, this is being accomplished through the National Parks Act.

(f) establish one or more processes by which members of the public can initiate and participate in decision-making regarding the establishment of criteria for and the designation of protected aquatic resources and fisheries protection areas.

In addition to the authority to designate a species as a protected aquatic resource and an area of Thai waters as a fisheries protection area, Section 91, paragraph one, sub-paragraph (c), notes that by regulation and notification certain activities can be permitted in a fisheries protection area. Sub-paragraphs (d) and (e) provide that, through regulations and notifications, a process can be created as to when an aquatic resource can reach the status of a protected aquatic resource and when an area can become a fisheries protection area. These processes may involve members of the public with their role to also be determined by regulation and notification (sub-paragraph (f)).

Regarding the designation of a protected aquatic resource and a fisheries protection area, Section 91, paragraph 2, indicates that coordination, cooperation and consultation is necessary with other Ministries and departments.

Section 91. paragraph two.

In the preparation, adoption and issuance of regulations and notifications under paragraph one, the Minister and Director-General shall take into account, consult and coordinate with other relevant Ministries and departments.

Sections 89 and 90 create the prohibition on persons harvesting or interfering with a protected aquatic resource or a fisheries protection area. With the written permission of the Director-General, a person can harvest and interfere with a protected aquatic resource and a fisheries protection area.

Section 89. No person in Thailand, in Thai waters or onboard a Thai flag fishing vessel in non-Thai waters shall harvest, import, export, destroy, disturb, interfere with, or have in their possession a protected aquatic resource, or any parts thereof, unless the person has in their possession a written permission for such activity given to that person by the Director-General.

Section 90. No person shall harvest aquatic resources or take any action that results in the destruction, disturbance, or interference with aquatic resources within a fisheries protection area, unless the person has in their possession a written permission for such activity given to that person by the Director-General or the activity is expressly permitted by a regulation or notification issued pursuant to Section 91.

The primary penalty provision for a violation of Sections 89 or 90 is Section 132. In addition to a fine or imprisonment, a violator of Sections 89 or 90 is to be a fishermen not in good standing for a minimum period. Respecting harvesting or interference with a protected aquatic resource, the vessel, gear and resource involved in the breach of Section 89 is to be forfeited to the Court (Section 137). Section 140 directs that vessels and gear involved in harvesting in a fisheries protection area in breach of Section 90 may be forfeited to the Court. Section 139 provides that resources harvested within a fisheries protection area are to be forfeited to the Court.

Section 132. Whoever violates Sections 89 or 90 shall be punished with a fine not exceeding _____ baht or with imprisonment not exceeding _____ or both and shall be a fisherman not in good standing for a minimum of _____ months and a maximum of _____ years.

Section 137. Fishing vessels, fishing gear, aquatic resources, aquatic resource products, the proceeds from sale of aquatic resources and aquatic resource products undertaken pursuant to Section 109, any bond or security posted pursuant to Section 110, and other things used in or acquired through the commission of an offence of Sections 40, 41, 43, 58, 59, 79, or 89 shall be forfeited by the Court.

Section 139. Aquatic resources, aquatic resource products, and the proceeds from sale of aquatic resources and aquatic resource products undertaken pursuant to Section 109, acquired through or involved in the commission of an offence of Sections 54, 57, 60, 63, 69, 71, 72, 90, 96 or 98 shall be forfeited by the Court.

Section 140. Fishing vessels, fishing gear and other things used in the commission of an offence of Sections 54, 57, 60, 63, 69, 71, 72 or 90 and any bond or security posted pursuant to Section 110 related to these offences may be forfeited by the Court.

12.6 Fishery Statistics and Research

Appropriate fisheries management requires both detailed scientific information and the best available data (fishery statistics) respecting the harvest, the effort, the gear, the vessels and the numbers of fishermen. However, it is important for statistical collection not to be an end in itself. The purpose of statistical collection is to assist in more informed decision-making. Fishery statistics and marine research should be used in the development of fishery management, conservation and development plans provided for in Section 17 (see above, *Final Report* part 12.1).

Section 36 of the Draft Act puts the responsibility on the Department of Fisheries to collect and analyze both fishery statistics and fisheries scientific information.

Section 36. The Department of Fisheries shall collect and analyze statistical, scientific and other information on aquatic resources and related activities including all information and statistics useful for the management of aquatic resources.

Section 38 gives authority to the Minister and Director-General to share fishery data with other States and international organizations.

Section 38. The Minister and Director-General may enter into arrangements or agreements with other States, either directly or through international organizations, providing for the exchange of aquatic resource data and scientific information and for the harmonization of systems for its collection.

Section 37, paragraph one, provides that every person engaged in fish harvesting and related activities (including aquaculture) is obligated to supply whatever information is requested by the Department of Fisheries. Paragraph 2 provides that the Director-General may issue notifications respecting the statistics and information that must be provided, including when and how they are to be reported.

Section 37. It is prohibited for a person engaged in harvesting aquatic resources and related activities, including aquaculture, not to supply such information regarding such activities in such form as the Department of Fisheries may require.

The Director-General may issue notifications stipulating the precise information that must be provided, the manner in which the information must be provided, when the information must be provided, which persons have the responsibility for providing the information and other requirements respecting statistics gathering.

A failure to provide the statistical information required by Section 37 constitutes an offence and Section 121 provides for the fine or imprisonment that arises for the offence.

Section 121. Whoever violates Sections 37 paragraph one or 114 shall be punished with a fine not exceeding _____ baht or with imprisonment not exceeding _____ or both.

Section 39 authorizes the Department of Fisheries to undertake fisheries-related research and to participate and share with other States and international organizations fisheries research information.

Section 39. The Department of Fisheries may conduct research related to aquatic resources in Thai waters and, where appropriate, participate in research activities directly or in cooperation with other States and international organizations.

13.0 LICENCES, PERMITS AND WRITTEN PERMISSIONS

13.1 Required Permits and Written Permissions: An Overview

For almost all harvesting activity (including aquaculture) which takes place either in Thai waters or by Thai flag vessels outside Thai waters, a permit of some kind is required. The Draft Act directs that:

- a *local fishing permit* is required by a person using a motorized vessel in harvesting activities in the Inland Fishery Zone (Section 54, see below, *Final Report* part 15.0);
- a *local fishing permit* is required by a person using a motorized vessel in harvesting activities in the Coastal Marine Fishery Zone (Section 60, see below, *Final Report* part 15.0);
- a *fishing gear permit* is required for all harvesting activities in the Commercial Marine Fishery Zone (Section 63, see below, *Final Report* part 14.0);
- an *overseas fishing permit* is required for Thai flag fishing vessels harvesting resources outside Thai waters (Section 69, see below, *Final Report* part 18.3);
- *written permission* from the Director-General is required for a foreign fishing vessel to harvest fish in Thai waters (Section 79, see below, *Final Report* part 17.0); and
- an *aquaculture permit* is required for aquaculture activities (Section 84, see below, *Final Report* part 19.4).⁴⁵

There is no requirement directly in the Draft Act for any other licences, permits or the registration of fishermen, fishing vessels or fishing gear engaged in activities in Thai waters. The reliance on permits rather than registration has been explained above (see above, *Final Report* part 9.6.1).

Section 15, paragraph (j), provides that a regulation or notification can be issued requiring registration of everyone (including vessels and fishing gear) engaged in harvesting activities in Thai waters.

Section 15. The Minister may issue regulations and the Director-General, and, respecting the Inland Fishery Zone and the Coastal Marine Fishery Zone, with the approval of the Minister, the provincial governor within his jurisdiction, may issue notifications relating to any matter that arises under this Act including:

...
(j) the requirement that a person, fishing vessel and all those on board a fishing vessel engaged in harvesting aquatic resources and related activities must register with the Department of Fisheries in a required manner, time and place;

Section 15, paragraphs (k) and (l), allows for other licences and permits for other activities to be required pursuant to regulations and notifications. This provision would allow for the introduction of a comprehensive licence or permit requirement for all fishing activities (persons, vessels or fishing gear) in the Inland Fishery Zone, the Coastal Marine Fishery Zone, the Commercial Marine Fishery Zone (see below, *Final Report* part 14.5) and respecting foreign fishing vessels in Thai waters.

45. In addition, Section 98 of the Draft Act requires all fish and fish products to have a fisheries export permit, see below, *Final Report* part 21.4.

Section 15.

...
(k) the requirement that a person engaged in harvesting aquatic resources and related activities must have a licence or permit issued by a competent official and the criteria that must be met before such a licence or permit will be issued and the conditions that can be placed on the licence or permit;
(l) the requirement that fishing vessels engaged in harvesting of aquatic resources and related activities must have a licence or permit issued by a competent official and the criteria that must be met before such a licence or permit will be issued and the conditions that can be placed on the licence or permit;

13.2 Licences or Permits

Respecting licences or permits, such as, the local fishing permit, the fishing gear permit, the overseas fishing permit, the aquaculture permit and the fisheries export permit, Section 24 provides that regulations and notifications are to be issued respecting:

- the competent official or, in the case of the local fishing permit the Local Fishery Committee with the authority to issue the requested licence or permit;
- the forms and information required;
- the conditions that must be met before the licence or permit can be granted;
- any fee that is payable;
- the period of time for which the licence or permit is to be valid;
- conditions that must be met during the term of the licence or permit; and
- any financial security that may be requested to ensure the good behaviour of the holder of licence or permit.

Section 24. For any licence or permit required by this Act, and for greater certainty, for a local fishing permit, a fishing gear permit, an overseas fishing permit, an aquaculture permit and a fisheries export permit, the Minister by regulation or the Director-General by notification shall establish:

- (a) the competent officials with the authority to grant a licence or permit or the Local Fishery Committee with the authority to grant a local fishing permit;
- (b) the forms and information that must be provided by a person requesting a licence or permit;
- (c) the conditions, requirements and criteria that must be met before a licence or permit will be issued by a competent official or a Local Fishery Committee;
- (d) any fee that may be payable to obtain a licence or permit;
- (e) the time period for which a licence or permit shall be valid;
- (f) the conditions, requirements and criteria that will apply to the possessor of a licence or permit; and
- (g) the amount and kind of security or surety that a person requesting a licence or permit may be required to provide, the appropriate safeguards for any security or surety held by the Department, the conditions that must be met for the return or release of the security or surety, and the situations which will lead to the forfeiture to the Department of any security or surety.

It is important to note that Section 24 requires regulations or notifications to be issued to deal with the above issues. Without these regulations and notifications no permits can be issued.

13.3 Written Permissions

Written permissions are provided for in numerous sections of the Draft Act usually to allow for exceptions to a prohibition.⁴⁶ The goal of the Draft Act is to regularize exceptions to prohibitions by requiring written permission from the most appropriate level of authority since at present, exceptions can be granted virtually at will by almost anyone. Moreover, the

46. The use of written permissions as an exception to prohibitions has been discussed, see above, *Final Report* parts 10.1 and 10.4, and see footnote 35.

goal of the Draft Act is to place exceptions on a each activity rather than a general exception section which could potentially be abused (or used) regarding the Draft Act as a whole.

The following are the provisions of the Draft Act that explicitly provide for written permissions:

- prohibition on use of poisonous or harmful substances except with a written permission given by a competent official (Section 40);
- prohibition on use of explosives except with a written permission given by a competent official (Section 41);
- prohibition on destroying fish habitat except with a written permission given by a competent official (Section 42);
- prohibition on the importing, sale or possession of aquatic resources which may be harmful to the health of humans, other aquatic resources or the environment except with a written permission given by the Director-General (Section 43);
- prohibition on importing, handling, storing, selling illegally harvested fish except with a written permission given by the Director-General (Section 48);
- prohibition on fishing in a preservation fishery area except with a written permission given by a competent official (Section 57);
- prohibition on use stationary gear except with a written permission given by a competent official (Section 58);
- prohibition on fishing in the Coastal Marine Fishery Zone unless a small-scale fishermen except with a written permission given by a competent official or a Local Fishery Committee (Section 59);
- all foreign fishing vessels harvesting in Thai waters require the written permission of the Director-General (Section 79);
- prohibition on aquaculture activities which interferes with fish habitat except with a written permission given by a competent official (Section 85);
- prohibition on harvesting or having in possession a protected aquatic resource except with a written permission given by the Director-General (Section 89); and
- prohibition on fishing in a fisheries protection area except a written permission given by the Director-General (Section 90).

The written permissions contemplated in the Draft Act can be given either by a competent official or by the Director-General except in the case of allowing non-small-scale fishermen to fish in the Coastal Marine Fishery Zone when the written permission may come from either a competent official or the Local Fishery Committee.

Unlike with licences or permits, the Draft Act does not require that there be regulations or notifications establishing the forms, fees and conditions for the issuance of written permissions. Thus, written permissions (except respecting written permission for foreign fishing in Thai waters, see below, *Final Report* part 17.0) can be issued on an ad hoc basis. However, Section 25 provides that by regulation or notification the issuance of written permissions can and should be formalized just like the issuance of licences and permits.

Section 25. For any written permission provided for in this Act, the Minister by regulation or the Director-General by notification may establish:

- where the Act directs that the written permission is to be from a competent official, the competent officials with the authority to issue the written permission;
- where the Act directs that the written permission is to be from the Director-General, to which competent official, if any, the Director-General delegates his authority to issue a written permission;
- the forms and information that must be provided by a person requesting a written permission;
- the conditions, requirements and criteria that must be met before a written permission will be issued;
- any fee that may be payable to obtain a written permission;

- (f) the time period for which a written permission shall be valid; and
- (g) the conditions, requirements and criteria that will apply to the possessor of a written permission;

13.4 Licences, Permits or Written Permissions Deemed Invalid

It is a requirement in the Draft Act that, where a permit is needed, it must be a valid permit. For example, Section 63, paragraph one:

Section 63. No person shall harvest aquatic resources in the Commercial Marine Fishery Zone unless that person has in their possession a valid fishing gear permit specific to the fishing gear in use, about to be used, or used in the act of harvesting.

Section 26, paragraph one, provides when it is that a licence, permit or written permission that has been granted is deemed to be forfeited and no longer valid. Sub-paragraphs (a), (b), and (c) all refer to activities undertaken by the licence, permit or written permission holder which results in the licence, permit or written permission becoming invalid. The most important is paragraph (c) - where a condition of a licence, permit or written permission is breached, the licence, permit or written permission is deemed to be forfeited and invalid. Sub-paragraph (d) provides for the invalidity of a licence, permit or written permission when the time period of its validity expires. Section 24, paragraph (e) and Section 25, paragraph (f) indicate that licences, permits and written permissions are only to be valid for set time periods. Finally, Section 26, sub-paragraph (e), provides that “in exceptional circumstances”, the Director-General can decide that a licence, permit or written permission is no longer valid and is to be forfeited. It does not matter who issued the licence, permit or written permission, under sub-paragraph (e), only the Director-General can revoke it. The wording of sub-paragraph (e) is an attempt to balance the need to revoke licences, permits and written permissions with the interests of the holder of a licence, permit or written permission not to be arbitrarily and unfairly deprived of its benefit.

Section 26. A licence, permit or written permission is deemed to be forfeited and no longer valid if:

- (a) the possessor of a licence, permit or written permission is not the person named on the licence, permit or written permission;
- (b) the person who requested the licence, permit or written permission provided false information in order to obtain the licence, permit or written permission;
- (c) the possessor of a licence, permit or written permission has contravened, failed to comply with or breached a condition of the licence, permit or written permission or a provision of this Act;
- (d) the time period for which a licence, permit or written permission was granted has expired; or
- (e) in exceptional circumstances, the Director-General in writing directs that such is the case.

A licence, permit or written permission deemed forfeited and invalid under paragraph one may be reinstated at such time and on such conditions as the Director-General in writing directs.

Section 26, paragraph 2, provides that a licence, permit or written permission can be deemed forfeited and invalid for a temporary period (temporary suspension).

13.5 Fisherman Not in Good Standing

13.5.1 When a Person Becomes a Fisherman Not in Good Standing

The assumption in the Draft Act is that all persons are fishermen in good standing (Section 10 (16) and Section 28) unless, by their own action, they become a fisherman not in good standing.

Section 10.

...

(16) "Fisherman in good standing" means all persons except a person who is a fisherman not in good standing pursuant to Sections 29-31;

Section 28. All persons are fisherman in good standing unless the fisherman has become a fisherman not in good standing.

Section 29 provides when a person will become a fisherman not in good standing. Because the consequences of being a fisherman not in good standing are significant, the threshold for acquiring that designation has to be high. The first situation is where a person has breached a provision of the Draft Act which provides, as a penalty, that a person shall be a fisherman not in good standing for a defined period (Section 29, paragraph (a) and see below, *Final Report* part 25.2.1). Thus, the fisherman not in good standing designation provides an additional penalty that can be imposed for the breach of a section of the Draft Act.

Section 29. A person is a fisherman not in good standing where:

- (a) as a consequence of a violation of a provision of this Act that person becomes a fisherman not in good standing; or

The second situation is where a licence, permit or written permission has been deemed invalid under Section 26 as a result of:

- the possessor not being the person named on the licence, permit or written permission;
- false information having been used to obtain the licence, permit or written permission; or
- a condition of the licence, permit or written permission or any provision of the Draft Act has been breached.

Section 29, paragraph (b), makes it clear that the above are the only situations where a licence, permit or written permission which becomes invalid also results in a person becoming a fisherman not in good standing. The other provisions of Section 26 which allow for invalidity - expiration of time and the direction of the Director-General do not result in a person becoming a fisherman not in good standing.

Section 29. A person is a fisherman not in good standing where:

- ...
 - (b) any licence, permit or written permission given to that person has been deemed to be forfeited or no longer valid pursuant to Section 26, except where the licence, permit or written permission became invalid because of
 - (i) the time period for which the licence, permit or written permission was granted expired; or
 - (ii) the Director-General had directed that the licence, permit or written permission was no longer valid.

There is no direct role for the Minister, Director-General, Provincial Governors, Local Fishery Committees or others respecting whether a person is or is not a fisherman not in good standing. The fisherman through his actions of either violating the Draft Act or taking action that leads to invalidity of the issued licence, permit or written permission makes the election.

13.5.2 How Long a Person Remains a Fisherman Not in Good Standing

Once a person is a fisherman not in good standing, Sections 30 and 31 determine how long the person is to remain as a fisherman not in good standing. Section 31 makes it clear that where the person has become a fisherman not in good standing as a result of a violation

of a provision of the Draft Act, the person is to remain as a fisherman not in good standing until the period of time designated as part of the penalty has expired.

Section 31. Where this Act stipulates that, as a consequence of a violation of a provision of this Act, a person shall be a fisherman not in good standing for a defined period of time, the person shall remain a fisherman not in good standing until the expiration of that time period.

Where a person has become of fishermen not in good standing as a result of a licence, permit or written permission becoming invalid (in the manner set out in Section 29, paragraph (b)), Section 30 provides that a person is to remain as a fisherman not in good standing for one year from the time of the event or, in exceptional circumstances, until the Director-General by notification directs that a person is no longer a fisherman not in good standing. It is worth noting that Section 30 cannot override Section 31.

Section 30. Subject to Section 31, a person shall remain as a fisherman not in good standing until:

- (a) one year has elapsed from the event which led to the person becoming a fisherman not in good standing; or
- (b) in exceptional circumstances, the Director-General issues a notification directing that a person is a fisherman in good standing.

Sections 29, 30 and 31 are designed to work as follows:

(i) if a person has a local fishing permit and harvests resources in a manner inconsistent with the conditions of the local fishing permit, then Section 26, paragraph (c) applies and the local fishing permit is deemed to be invalid. Pursuant to Section 30, paragraph (a), the person becomes a fisherman not in good standing for a year from the time of the offence;

(ii) if a person uses explosives in the harvesting of fish in violation of Section 41, the penalty for this prohibition includes (pursuant to Section 122) that the person shall be a fisherman not in good standing for a minimum period and up to a maximum period as set in the Draft Act. Also, pursuant to Section 26, paragraph (c), any licence, permit or written permission the person has becomes invalid.

13.5.3 Consequences of Being a Fisherman Not in Good Standing

The consequences of being a fisherman not in good standing is that a fisherman not in good standing may not be issued or granted a licence, permit or written permission provided for by the Draft Act. This is set out in Section 27.

Section 27. A licence, permit or written permission required or provided for in this Act shall be issued or granted only to a person who is a fisherman in good standing.

For greater clarity, the Draft Act expressly provides that local fishing permits, fishing gear permits, overseas fishing permits, aquaculture permits and fisheries export permits will only be issued if the person requesting the permit is a fisherman in good standing:

- local fishing permits (Sections 55 and 61, paragraph (d), see below, *Final Report* part 15.4);
- fishing gear permits (Section 65, paragraph (e), see below, *Final Report* part 14.4);
- overseas fishing permit (Section 75, paragraph (e), see below, *Final Report* part 18.3);
- aquaculture permits (Section 87, paragraph (g), see below, *Final Report* part 19.4); and

- fisheries export permits (Section 100, paragraph (f), see below, *Final Report* part 21.4).

13.5.4 The “Black List” of Fisherman Not in Good Standing

Section 32 provides that it is the responsibility of the Department of Fisheries to establish and maintain a list of those persons who are fisherman not in good standing (the “Black List”). The Director-General, Provincial Governors, Local Fishery Committees, competent officials and others are to work together to ensure that the list is accurate, current and available to all those who have the authority to issue licence, permits and written permissions.

Section 32. The Department of Fisheries shall establish and maintain a list of fisherman not in good standing.

The list of fisherman not in good standing shall include the name of the person, the date when the person was put on the list, and the reason the person was put on the list.

The name of a person shall be entered on the list of fisherman not in good standing every time it is required by Section 29 even if the name of that person is already on the list.

It is the responsibility of the Director-General, provincial governors, Local Fishery Committees, authorized enforcement officers, competent officials and members of the Department of Fisheries to work together in providing the necessary information for the maintenance, updating, and reviewing of the list of fisherman not in good standing.

13.6 Prohibitions Regarding Licences, Permits and Written Permissions

Although located in Chapter Four, sub-chapter VI, entitled General Prohibitions, Sections 45, 46 and 47 are related to licences, permits and written permissions. Section 45 prohibits the possessor of a licence, permit or written permission to transfer the licence, permit or written permission to another person or to duplicate or copy the licence, permit or written permission. Section 46 prohibits a person from taking, receiving or obtaining a licence, permit or written permission from anyone other than a competent official. Section 47 prohibits a person from being in possession of a copied or fraudulent licence, permit or written permission. In short, it is prohibited for the possessor of a licence, permit or written permission to give it to another person or to copy it and it is prohibited for that other person to be in possession of the licence, permit or written permission that is either copied or to which the recipient is not entitled. The penalty provision for these offences are Sections 125 and 138 which provides for a fine or imprisonment, designation of the offender as a fisherman not in good standing and for possible forfeiture of vessels, gear and resources involved in the offence.

Section 45. It is prohibited for the possessor of a local fishing permit, fishing gear permit, an overseas fishing permit, an aquaculture permit, a fisheries export permit, or any licence, permit or written permission provided for under this Act, to transfer to another person, to duplicate or make a copy of a local fishing permit, a fishing gear permit, an overseas fishing permit, an aquaculture permit, a fisheries export permit, or any licence, permit or written permission for under this Act.

Section 46. It is prohibited for a person to be the recipient of or be in possession of a local fishing permit, a fishing gear permit, an overseas fishing permit, an aquaculture permit, a fisheries export permit, or any licence, permit or written permission provided for under this Act, which they have not received from a competent official.

Section 47. It is prohibited for a person to be the recipient of or be in possession of a copied or fraudulent local fishing permit, fishing gear permit, overseas fishing permit, aquaculture permit, a fisheries export permit, or any licence, permit or written permission provided for under this Act.

Section 125. Whoever violates Sections 45, 46, 47, 48, 49, 50, 59, 63, 69, 71, 72, or 84 shall be punished with a fine not exceeding _____ baht or with imprisonment not exceeding _____ or both and shall be a fisherman not in good standing for a minimum of _____ months and a maximum of _____ years.

Section 138. Fishing vessels, fishing gear, aquatic resources, aquatic resource products, the proceeds from sale of aquatic resources and aquatic resource products undertaken pursuant to Section 109, any bond or security posted pursuant to Section 110, and other things used in or acquired through the commission of an offence of Sections 42, 44, 45, 46, 47, 48, 84, or 85 may be forfeited by the Court.

14.0 THE COMMERCIAL MARINE FISHERY ZONE: THE FISHING GEAR PERMIT

14.1 Background

The Moore Report (1978) strongly recommended that Thailand adopt a fishing vessel licensing system in order to restrict entry to the fishery. The Kuemlangan Report (1999) and the Flewwelling Report (1999) also strongly recommended the adoption of a fishing vessel licensing system which would have as its purpose control of the number of vessels legally able to fish in Thai waters. The advantage of controlled-access to fishery resources, when applied rigorously, is the possibility of appropriate management and conservation of scarce, renewable resources and stable economic returns to those with fishing vessel licences.

The 1996 Draft Fisheries Law (see above, *Final Report* part 4.4) did not include a system of restricting the entry of fishermen or vessels. The previously noted ambiguities regarding registration of vessels by the Harbours Department (see above, *Final Report* part 4.3.5) is explained in the Kuemlangan Report (1999)⁴⁷ as stalling any attempt to licence fishing vessels directly.

The approach that has been attempted in Thailand is the use of limited controls on gear (mesh size, etc.) and closed seasons and areas (see above, *Final Report* part 4.3.3).

Despite the above-noted recommendations that Thailand adopt a controlled or limited entry system for fishing vessels in the Commercial Marine Fishery Zone, it must be acknowledged that such a dramatic shift in the understanding of both Thai fishermen, vessel-owners and the Department of Fisheries itself regarding "traditional" open-access would be a difficult one. This orientation towards open access has been discussed above (see above, *Final Report* part 9.4).

What is included in the Draft Law is a two-tiered approach. First, there is a continuation of the emphasis of the 1947 Fisheries Act on regulating fishing gear (fishing implements as the term was used in the 1947 Fisheries Act). However, what is recommended is a different approach to fishing gear. Second, the possibility is created for the adoption of a fishing vessel licence system that would replace the provisions of the Draft Act related to gear restrictions (Section 62, see below, *Final Report* part 14.5).

Included in the Draft Act are greater controls on the fishing gear that can be used in the Commercial Marine Fishery Zone. In general terms, what the Draft Act requires is that everyone using fishing gear in the Commercial Marine Fishery Zone must have a fishing gear permit specific to the gear being used (Sections 63 and 64) and a fishing gear permit will only be issued for fishing gear that is listed in regulations and notifications (Section 65, paragraph (d)). The goal is to reverse the existing situation where it is only for listed gear that permission from the Department of Fisheries must be sought and for new or re-engineered gear no permission is required (see above, *Final Report* part 4.3.3). The Draft Act seeks to

47. Kuemlangan, *supra* note 17, at pp. 10-11

prevent new or re-engineered gear from being used unless it is listed in a regulation or notification as being an approved gear for which a fishing gear permit can be issued.

14.2 Prohibition and Penalty

Putting the goal into action involves a series of steps. Step one is the prohibition of fishing in the Commercial Marine Fishery Zone without a fishing gear permit. This is accomplished in Section 63, paragraph one.

Section 63. No person shall harvest aquatic resources in the Commercial Marine Fishery Zone unless that person has in their possession a valid fishing gear permit specific to the fishing gear in use, about to be used, or used in the act of harvesting.

For greater certainty, where the physical characteristics of fishing gear or the manner in which fishing gear has been used in harvesting an aquatic resource does not comply fully with the detail and conditions of a valid fishing gear permit, there has been a breach of paragraph one.

It is a breach of Section 63, paragraph one, if a person does not have on their possession a valid fishing gear permit which relates to (is specific to) the fishing gear in use. Paragraph two provides more information to better understand the way in which paragraph one is intended to operate. Paragraph two directs that the gear being used must correspond identically to the gear for which the fishing gear permit has been issued. Moreover, the fishing gear permit must be valid, which means that none of the situations listed in Section 26 (see above, *Final Report* part 13.4) have occurred.

The penalty for a breach of Section 63 is set out in Sections 125, 139 and 140. Section 125 provides for a fine or imprisonment and for designation of the offender as a fisherman not in good standing. Section 139 directs that fish harvested without a valid fishing gear permit will be forfeited. Section 140 provides that a violation of Section 63 gives the Court the option of ordering the forfeiture of vessels and gear used in the violation of Section 63.

Section 125. Whoever violates Sections 45, 46, 47, 48, 49, 50, 59, 63, 69, 71, 72, or 84 shall be punished with a fine not exceeding _____ baht or with imprisonment not exceeding _____ or both and shall be a fisherman not in good standing for a minimum of _____ months and a maximum of _____ years.

Section 139. Aquatic resources, aquatic resource products, and the proceeds from sale of aquatic resources and aquatic resource products undertaken pursuant to Section 109, acquired through or involved in the commission of an offence of Sections 54, 57, 60, 63, 69, 71, 72, 90, 96 or 98 shall be forfeited by the Court.

Section 140. Fishing vessels, fishing gear and other things used in the commission of an offence of Sections 54, 57, 60, 63, 69, 71, 72 or 90 and any bond or security posted pursuant to Section 110 related to these offences may be forfeited by the Court.

14.3 When a Fishing Gear Permit is Required

Step two is identifying for which fishing gear (defined in Section 10 (17)) a fishing gear permit is required. This is done in Section 64 where it states that all fishing gear must have a fishing gear permit unless there is a regulation or notification stating to the contrary (which can be issued pursuant to Section 15, paragraph (b)).

Section 10.

...

(17) "Fishing gear" means any equipment or other thing that can be used in the act of harvesting of aquatic resources including, but not limited to, nets, hooks, traps, ropes, line, floats, winches, trawls, seines, and lights;

Section 64. All fishing gear that is used or are capable of being used in the act of harvesting an aquatic resource in the Commercial Marine Fishery Zone requires a fishing gear permit unless there is a regulation or notification to the contrary.

Section 15.

...
(b) fishing gear which may be used in harvesting aquatic resources in the Commercial Marine Fishery Zone without a fishing gear permit and this may include the size, kind, type, number, parts, size of mesh, dimension, and the place, time and method in which the fishing gear may be used;

14.4 When a Fishing Gear Permit Will be Issued

Step three is determining the meaning of a fishing gear permit (Section 10 (18)) and when one will be issued.

Section 10.

...
(18) “Fishing gear permit” means a fishing gear permit issued under Section 65;

While Section 65 provides when a fishing gear permit will be issued, Section 24 (see above, *Final Report* part 13.2) requires regulations and notifications to be issued to determine who the competent authority is with authority to issue a fishing gear permit, the form that must be filled in, the conditions that must be met, the fee that must be paid, the time period for which the permit is valid, and other matters. Using the information found in the regulation or notification issued under Section 24 related to a fishing gear permit, the appropriate competent official is not to issue a fishing gear permit under Section 65 unless certain conditions are met by the person requesting the fishing gear permit. The wording is in the negative -“a competent official ... shall not issue a fishing gear permit to a person unless” – in order to emphasize that the person seek the permit is under the obligation to meet the requirements.

The conditions required by Section 65 are:

- the person must be the owner of the vessel on which the gear is to be used or the fishing gear;
- the forms must be filled in and the required information given (as provided in Section 24);
- the conditions set in the regulations and notifications must have been met (as provided in Section 24);
- the person requesting the form must be a fisherman in good standing (as provided in Sections 27-31);
- any fee payable has been paid;
- the competent official must believe the person understands the rules and conditions; and
- the fishing gear in question must be one for which a fishing gear permit is allowed to be granted.

Section 65. The competent official with the authority to grant a fishing gear permit shall not issue a fishing gear permit to a person unless:

- (a) the person requesting the permit is the owner or the master of the vessel which is going to use the fishing gear for which the permit is intended;
- (b) the person requesting the fishing gear permit has filled in the forms and provided the information as required by this Act;
- (c) the person requesting the fishing gear permit has satisfied and met all the conditions, requirements and criteria established under this Act for the issuance of a fishing gear permit;

- (d) the fishing gear for which the fishing gear permit is intended is of a type or kind that the Minister or Director-General has listed in a regulation or notification as one for which a fishing gear permit may be issued;
- (e) the person requesting the fishing gear permit is a fisherman in good standing;
- (f) any fee payable has been paid; and
- (g) the person requesting the fishing gear permit has demonstrated an understanding of the conditions of the fishing gear permit.

Section 65, paragraph (d), is worthy of special note since it requires the competent official to ensure that the gear for which the permit is intended is a gear type that is listed in a regulation or notification as one for which a fishing gear permit is allowed to be granted. Section 15, paragraph (a), provides the authority for the issuance of regulations and notifications respecting which fishing gear may be used in the Commercial Marine Fishery Zone.

Section 15.

- ...
 - (a) fishing gear which is approved for use in harvesting aquatic resources and this may include the size, kind, type, number, parts, size of mesh, dimension, and the place, time and method in which approved fishing gear may be used;

It is recognized that a vessel may require multiple fishing gear permits to utilize different gear at different times. This is provided for in Section 66.

Section 66. A person who is an owner or master of a Thai flag fishing vessel may require and have multiple fishing gear permits.

14.5 The Future: A Fishing Vessel Licence System

The possible future adoption of a licensing system for fishing vessels (rather than focused upon fishing gear) is provided for through Section 15, paragraph (l), which explicitly directs that regulations and notifications can be issued to establish the requirement that all fishing vessels engaged in harvesting resources must have a vessel licence.

Section 15.

- ...
 - (l) the requirement that fishing vessels engaged in harvesting of aquatic resources and related activities must have a licence or permit issued by a competent official and the criteria that must be met before such a licence or permit will be issued and the conditions that can be placed on the licence or permit;

Moreover, in an admittedly unusual provision, Section 62 provides that when such a vessel licensing system is adopted, the licensing requirements will supersede (override and take precedence) over the requirements for the fishing gear permits contained in the Draft Act.

Section 62. Pursuant to Section 15, paragraph 1, the Minister by regulation or the Director-General by notification may require all fishing vessels engaged in harvesting aquatic resources and related activities in the Commercial Marine Fishery Zone to have a valid fishing vessel licence or permit.

When a fishing vessel licence or permit system is adopted, the regulations and notifications creating the fishing vessel licence or permit system shall take precedence and override the provisions of Chapter Eight relating to the fishing gear permit.

Having the enabling legislation in place and referenced in Section 62 of the Draft Act will make it easier at some future time to implement a limited entry system and will acquaint

the various stakeholders that the possibility is being considered and eventually may be both necessary and appropriate.

15.0 THE INLAND FISHERY ZONE AND THE COASTAL MARINE FISHERY ZONE: THE LOCAL FISHING PERMIT

15.1 When a Local Fishing Permit is Required

The Draft Act, Sections 54 and 60, requires that all persons who utilize a motorized vessel in harvesting fish in the Inland Fishery Zone or the Coastal Marine Fishery Zone are to have a local fishing permit. Thus, for the Inland Fishery Zone and the Coastal Marine Fishery Zone, it is the vessel that is to be permitted and not the gear *per se*.

The distinction between motorized and non-motorized is based on the view that fishermen who fish from shore, use paddle boats or engage in a fishing method not involving a powered vessel are recreational or subsistence fishermen and ought to be exempt from the requirement of having to have a local fishing permit. By regulation and notification under Section 15, paragraphs (j) and (k), this exemption can be lifted (see above, *Final Report* part 13.1).

15.2 Prohibition and Penalty

The prohibition on fishing in the Inland Fishery Zone or the Coastal Marine Fishery Zone without a valid local fishing permit is found in Sections 54 and 60.

Section 54. Unless a regulation or notification exists to the contrary, it is prohibited for a person to use a motorized vessel in the harvesting of aquatic resources in the Inland Fishery Zone unless that person has in their possession a valid local fishing permit.

Section 60. Unless a regulation or notification exists to the contrary, it is prohibited for a person to use a motorized vessel in the harvesting of aquatic resources in the Coastal Marine Fishery Zone unless that person has in their possession a valid local fishing permit.

The local fishing permit must be valid which means that none of the situations listed in Section 26 (see above, *Final Report* part 13.4) have occurred.

The primary penalty provisions for the breach of Sections 54 and 60 are set out in Section 124. Section 139 provides that the fish harvested without a valid permit are to be forfeited to the Court. Section 140 provides that the vessel and gear used in the offence may be forfeited to the Court.

Section 124. Whoever violates Sections 54 or 60 shall be punished with a fine not exceeding _____ baht or with imprisonment not exceeding _____ or both and may be a fisherman not in good standing for a maximum of _____ months.

Section 139. Aquatic resources, aquatic resource products, and the proceeds from sale of aquatic resources and aquatic resource products undertaken pursuant to Section 109, acquired through or involved in the commission of an offence of Sections 54, ...60 ... shall be forfeited by the Court.

Section 140. Fishing vessels, fishing gear and other things used in the commission of an offence of Sections 54, ... 60 ... and any bond or security posted pursuant to Section 110 related to these offences may be forfeited by the Court.

15.3 Who Can Issue a Local Fishing Permit

A local fishing permit is defined in Section 10 (26) as being a permit issued pursuant to Sections 55 or 61.

Section 10.

...

(26) “Local fishing permit” means a local fishing permit issued pursuant to either Section 55 or Section 61;

The authority to issue a local fishing permit rests with the competent official provided with the authority by a regulation or notification pursuant to Section 24, paragraph (a). However, if a Local Fishery Committee has been established by regulation or notification with jurisdiction over a specified area of Thai waters pursuant to Section 19 and the Local Fishery Committee has been delegated the authority to issue local fishing permits (also by regulation and notification issued pursuant to Section 19, paragraph (d)), then only the Local Fishery Committee can grant a local fishing permit for the Thai waters within its jurisdiction (see above, *Final Report* part 10.6.3).

Section 24. For any licence or permit required by this Act, and for greater certainty, for a local fishing permit, a fishing gear permit, ... the Minister by regulation or the Director-General by notification shall establish:

- (a) the competent officials with the authority to grant a licence or permit or the Local Fishery Committee with the authority to grant a local fishing permit;

Section 19. The Minister by regulation or the Director-General by notification may:

- (a) establish a Local Fishery Committee and designate an area of Thai waters within the Inland Fishery Zone or the Coastal Marine Fishery Zone which is under the jurisdiction of a Local Fishery Committee;
- ...
- (d) provide to the Local Fishery Committee the exclusive authority to issue local fishing permits for the area of Thai waters under the jurisdiction of the Local Fishery Committee; and

It is worth noting, that a Local Fishery Committee or a competent official can only give a local fishing permit for the area within its or his jurisdiction, thus if a person is fishing outside the area specified by the local fishing permit, the permit is invalid for that fishing activity and the person has breached either Section 54 or 60.

15.4 When a Local Fishing Permit Can be Issued

Sections 55 and 61 indicate that a local fishing permit is not to be issued unless certain conditions have been met by the person requesting the local fishing permit.

Section 55. The competent official or the Local Fishery Committee with the authority to grant a local fishing permit shall not issue a local fishing permit to a person unless:

Section 61. The competent official or the Local Fishery Committee with the authority to grant a local fishing permit shall not issue a local fishing permit to a person unless:

The wording is in the negative - “a competent official or the Local Fishery Committee ... shall not issue a local fishing permit unless ...” - in order to emphasize that the person seeking the permit is under the obligation to meet the requirements.

The conditions that must be met for the issuance of a local fishing permit are in Sections 55 and 61, although reference is necessary back both to Section 24 (see above, *Final Report* part 13.2), which provides the authority to create the necessary forms, conditions, fees

and other matters referred to in Sections 55 and 61, and to Sections 27-31 (see above, *Final Report* parts 13.5.1 and 13.5.2) respecting when a person is a fisherman in good standing.

Section 55. The competent official or the Local Fishery Committee with the authority to grant a local fishing permit shall not issue a local fishing permit to a person unless:

- (a) the person requesting the local fishing permit is the owner or the master of the vessel for which the local fishing permit is intended;
- (b) the person requesting the local fishing permit has filled in the forms and provided the information as required by this Act;
- (c) the person requesting the local fishing permit and met all the conditions, requirements and criteria established under this Act for the issuance of a local fishing permit;
- (d) the person requesting the local fishing permit is a fisherman in good standing;
- (e) any fee payable has been paid; and
- (f) the person requesting the local fishing permit has demonstrated an understanding of the conditions of the local fishing permit.

Section 61. The competent official or the Local Fishery Committee with the authority to grant a local fishing permit shall not issue a local fishing permit to a person unless:

- (a) the person requesting the local fishing permit is the owner or the master of the vessel for which the local fishing permit is intended;
- (b) the person requesting the local fishing permit has filled in the forms and provided the information as required by this Act;
- (c) the person requesting the local fishing permit has met all the conditions, requirements and criteria established under this Act for the issuance of a local fishing permit;
- (d) the person requesting the local fishing permit is a fisherman in good standing;
- (e) any fee payable has been paid; and
- (f) the person requesting the local fishing permit has demonstrated an understanding of the conditions of the local fishing permit.

The conditions that must be met before a local fishing permit will be issued under Sections 55 or 61 can be summarized:

- the person must be the owner or master of the vessel for which the permit is intended;
- the forms must be filled in and information provided (as required by regulation and notification under Section 24);
- the person requesting the permit has meet the conditions and requirements for the issuance of the permit (as required by regulation and notification under Section 24);
- the person must a fisherman in good standing (as determined pursuant to Sections 27-31);
- any fee payable has been paid; and
- the person requesting the permit understands the obligations in the permit.

A Local Fishery Committee can have its own rules and conditions regarding the issuance of local fishing permits for the areas within its jurisdiction. Section 21, paragraph one, provides that a Local Fishery Committee can recommend to the Minister or Director-General⁴⁸ that a regulation or notification be issued respecting matters dealt with in Section 24, such as the forms, conditions, fees, and time period (see above, *Final Report* part 13.2) for a local fishing permit. Section 21, paragraph two, notes that, where reasonable and feasible, such a regulation or notification is to be issued (see above, *Final Report* part 10.6.3). Thus, by regulation or notification all the matters dealt with in Section 24 can meet the specific interests of a particular Local Fishery Committee.

48. Pursuant to Section 24, the Provincial Governor does not have jurisdiction to deal with the conditions, fees, forms or time period for permits.

Section 21. A Local Fishery Committee may recommend to the Minister, Director-General or provincial governor, as appropriate, that regulations or notifications be issued respecting:

(a) the matters referred to in Section 24 relating to a local fishing permit;

...
The Minister, Director-General or provincial governor, as appropriate, shall review all recommendations from a Local Fishery Committee and, where reasonable and feasible, issue regulations or notifications implementing the recommendations.

The Minister, Director-General, provincial governors and Local Fishery Committees should establish a process for the review of recommendations from a Local Fishery Committee.

16.0 COMMUNITY-BASED MANAGEMENT

Unlike the situation with a Local Fishery Committee, where community-based management comes into existence the “designated community” (defined in Section 10 (10)) can have independent authority regarding all harvesting activities in the area subject to community-based management (the “designated community fishery area”, defined in Section 10(11)). Community-based management is treated as a separate topic in Chapter Five of the Draft Act. It should be pointed out that the provisions of Chapter Five can be utilized to create community-based management regimes for aquaculture activities, as well as, more traditional fishing operations.

The general approach adopted in the Draft Act to community-based management is based on several points.

First, an area for which community-based management is to apply (a designated community fishery area) can be established by a regulation or notification (Section 51). The Draft Act, Section 51, paragraph one, sub-paragraph (a), restricts the possibility of a designated community fishery area to the Inland Fishery Zone or the Coastal Marine Fishery Zone.

Second, for a designated community fishery area, regulations and notifications can be issued regarding who is within the designated community for the purposes of decision-making and harvesting.

The approach to this issue of who is within a designated community is two-fold – either, a regulation or notification can name those who are within a designated community for the purposes of community-based management of a designated community fishery area (Section 53, paragraph one, sub-paragraph (a)); or a regulation or notification can indicate the process by which the members of a designated community are to be determined and thus leave it to the community itself to determine who is in the community and who is not (Section 53, paragraph one, sub-paragraph (b)).

Third, for a designated community fishery area, regulations and notifications can determine the process for decision-making within the community and the provisions of the Draft Act which shall and shall not apply within the designated community fishery areas. It is presumed, through Section 52, that all the provisions of the Draft Act apply to activities within a designated community fishery area unless there is a regulation or notification to the contrary. Thus, there will be no legal vacuum – if the community has not decided on a rule that has been put into a regulation or notification, then the wording in the Draft Fisheries Act will prevail.

Fourth, unless there is a specific regulation or notification to the contrary, it is prohibited for a person not part of designated community to harvest resources within a designated community fishery area (Section 52, paragraph (c)).

Fifth, no regulations or notifications respecting any of the above issues regarding community-based management are to be issued without close consultation with the

communities involved and all other persons, Ministries and departments which may be affected (Section 51, paragraph 2 and Section 53, paragraph 2).

Turning to a more detailed treatment, the principal terms, designated community and designated community fishery area, are defined in Section 10.

Section 10.

...

(10) “Designated community” means the persons who, pursuant to this Act, have either the right to harvest aquatic resources within a designated community fishery area or have been given the authority to manage and implement measures related to aquatic resources within a designated community fishery area;

(11) “Designated community fishery area” means a specific geographic area set out by the Minister by regulation or the Director-General by notification pursuant to Section 51, in which only the designated community has rights to harvest specified aquatic resources and in which the designated community has been delegated rights and responsibilities regarding the management and implementation of measures respecting aquatic resources and the habitat of aquatic resources;

The *starting point* for the creation of community-based management is Section 51, paragraph one.

Section 51. The Minister by regulation or the Director-General by notification may:

- (a) designate any area of the Inland Fishery Zone or the Coastal Marine Fishery Zone as a designated community fishery area;
- (b) alter or revoke the designation of a designated community fishery area;
- (c) establish criteria for when an area of the Inland Fishery Zone or the Coastal Marine Fishery Zone can become a designated community fishery area; and
- (d) establish one or more processes by which members of the public can initiate and participate in decision-making regarding the establishment of criteria for and the creation of a designated community fishery area.

By regulation or notification an area of the Inland Fishery Zone or the Coastal Marine Fishery Zone can be established as a designated community fishery area. Sub-paragraphs (c) and (d) provide that rather than a case-by-case basis, regulation or notification can establish: (i) criteria for when an area is appropriate for community-based management; and (ii) a process for by which the public can initiate and participate in for determining when an area should become subject to community-based management.

Section 51, paragraph 2, requires consultation with the relevant communities and other persons, Ministries and departments before any regulation or notifications are issued under Section 51, paragraph one.

Section 51. paragraph two.

The Minister or Director-General shall, to the extent that is reasonable and feasible, consult with all persons, communities and other Ministries and departments that may be affected by the creation, alteration or revocation of a designated community fishery area.

Section 53 provides that regulations and notifications are to be issued regarding the operation and working of community-based management in a designated community fishery area.

Section 53. For a designated community fishery area, the Minister may issue regulations and the Director-General and, with the approval of the Minister, the provincial governor within his jurisdiction, may issue notifications relating to:

- (a) which persons shall be part of the designated community for the purposes of decision-making and harvesting;
- (b) the creation of procedures for determining which persons shall be part of designated community for the purposes of decision-making and harvesting;

Section 53, paragraph one, sub-paragraphs (a) and (b), deal with the issue of who is in a community for the purposes of decision-making and harvesting within a designated community fishery area. The options are, either, a regulation or notification can name those who are within a designated community for the purposes of community-based management of a designated community fishery area (sub-paragraph (a)); or a regulation or notification can indicate the process by which the members of a designated community are to be determined, and thus leave it to the community itself to determine who is in the community and who is not (sub-paragraph (b)).

Section 53, paragraph one, sub-paragraph (d) provides that the manner in which decision-making is to be made respecting matters related to harvesting is to be established by regulation or notification. The wording of sub-paragraph (d) ensures that the community itself can make the necessary harvesting-related decisions provided the process followed is the one agreed upon and in the regulation or notification.

Section 53.

...

- (d) the manner in which decisions respecting the management and harvesting of the aquatic resources and the management and protection of the habitat of aquatic resources within a designated community fishery area shall be made, including but not limited to: the uses, types and specifications of fishing gear, open and closed seasons, habitat protection, who can harvest an aquatic resource and the amount of resource that can be harvested;

Section 52 of the Draft Act and the authority to issue regulations and notifications under Section 53, paragraph one, sub-paragraphs (c), (e), (f) and (g) work together. Section 52 creates a presumption that, unless a regulation or notification exists to the contrary;

- all the provisions of the Draft Act apply within a designated community fishery area;
- all the fishery resources in the community fishery area are subject to community management; and
- that a person not part of a designated community is prohibited from harvesting resources in a community area.

Section 53, paragraph one, sub-paragraphs (c), (e), (f) and (g) create the authority to issue regulations and notifications to reverse or rebut the presumptions created in Section 52.

Section 52, paragraph (a) creates the presumption that all the provisions of the Draft Act will apply within a designated community fishery area and to those involved in the designated community fishery area. However, pursuant to Section 53, paragraph one, sub-paragraph (g), regulations and notifications can determine which provisions of the Draft Act would not have application to a designated community fishery area.

Section 52. Unless there is a regulation or notification to the contrary,

...

- (a) all the provisions of this Act apply within a designated community fishery area;

Section 53.

...

- (g) which specific provisions of this Act, if any, will not have application within a designated community fishery area.

Section 52, paragraph (b) creates the presumption that all fishery resources with a designated community fishery area are subject to community-based management. However, pursuant to Section 53, paragraph one, sub-paragraph (c), a regulation or notification can determine which fishery resources are to be included within a designated community fishery

area. This allows for the possibility, for example, of a clam or oyster bed being subject to community-based management but not other resources in the same geographic area.

Section 52. Unless there is a regulation or notification to the contrary,

...
(b) all aquatic resources within a designated community fishery area are subject to the rules of the designated community fishery area; and

Section 53.

...
(c) whether all or only some of the aquatic resources and the habitat of aquatic resources within a designated community fishery area will be subject to the rules adopted for the designated community fishery area;

Section 52, paragraph (c) creates the presumption that it is an offence for any person not a member of a designated community to harvest resources in a designated community fishery area.

Section 52. Unless there is a regulation or notification to the contrary,

...
(c) a person not a member of a designated community is prohibited from harvesting aquatic resources in that designated community fishery area.

Section 135 establishes the fine/imprisonment, the possibility of the offender being a fisherman not in good standing, and the forfeiture possibilities that can result from a breach of Section 52, paragraph (c) (see below, *Final Report* parts 25.2.1 and 25.3.1).

Section 135. Unless there is a regulation or notification to the contrary issued pursuant to Section 53 (f), whoever violates Section 52 (c):

(a) shall be punishable with a fine not exceeding _____ baht or with imprisonment not exceeding _____ or both;
(b) may be a fisherman not in good standing for a maximum of _____; and
(c) shall be subject to Sections 139 and 140.

Section 139 directs that resources acquired as a result of a breach of Section 52 (c) are to be forfeited to the Court. Section 140 provides that if there is breach of Section 52 (c), the vessels and gear involved in the breach may be forfeited to the Court.

However, the presumption in Section 52, paragraph (c) can be erased by regulations and notifications issued under Section 53, paragraph one, sub-paragraphs (e) and (f) which deal with the power that a designated community may be given regarding enforcement of the harvesting rules it adopts against both community and non-community members and the penalties that can be imposed for breaches of those rules. Regulations and notifications issued pursuant to Section 53 could allow for the designated community to have enforcement and penalty provisions that override the provisions of the Draft Act.

Section 53.

...
(e) the manner in which enforcement may take place, including the authority to seize, arrest, detain and penalize both members and non-members of the designated community for the breach of rules established for a designated community fishery area;
(f) the penalties that are to exist for the breach of rules established for a designated community area; and

Section 103 of the Draft Act specifically requires the authority of the designated community to undertake enforcement action as provided for in Section 53, paragraph one,

sub-paragraph (e), to be taken into account by authorized fisheries officers acting pursuant to Section 102 (see below, *Final Report* part 23.3.5).

Section 103. The exercise of any authority granted to an authorized fisheries officer under Section 102 respecting a designated community fishery area shall take into account any regulation and notification issued pursuant to Section 53 (e).

The interaction of regulations and notifications issued under Section 53, paragraph one, sub-paragraph (e) and Sections 102 and 103 would be that the designated community could have exclusive authority regarding enforcement and compliance matters.

Section 53, paragraph 2, requires consultation with the relevant communities and other persons, Ministries and Departments before any regulation or notifications are to be issued under Section 53, paragraph one.

Section 53. paragraph 2.

Regulations and notifications under paragraph one shall only be issued following, to the extent that is reasonable and feasible, consultation among the appropriate divisions of the Department of Fisheries and with all individuals, communities, and other Ministries and departments that may be affected by them.

Given the unique nature of community-based management to give to a community exclusionary rights over a resource, where a designated community fishery area has been established, the Department of Fisheries has a special obligation to publicize the creation of the community-based management area in order to facilitate respect for the area. This special obligation is contained in Section 51, paragraph 3, and Section 53, paragraph 3, which have identical wording.

Sections 51 and 53. paragraph three.

Where regulations and notifications have been issued pursuant to paragraph one, special attention shall be given to publicizing the regulations and notifications and making their contents known to all persons and communities who may be affected by them.

17.0 FOREIGN FISHING IN THAI WATERS

There is currently no foreign (non-Thai) fishing activity in Thai waters. While the likelihood of significant non-Thai fishing taking place in Thai waters is remote, there is the possibility of Thai-owned vessels being registered under the flag of another state and seeking to fish in Thai waters. There is also the possibility of research fisheries being done by non-Thai vessels as part of international fisheries research agreements. The currently legislation which deals with foreign fishing activity in Thai waters is the 1939 Right to Fish in Within Thai Waters Act which has fallen into disuse and is out-of-date.

The approach taken in the Draft Act is to treat foreign fishing activity on a case-by-case basis rather than establishing detailed provisions regarding foreign fishing. Pursuant to Section 15, paragraphs (k) and (l) (see above, *Final Report* part 13.1), a permit and licensing system can be created by regulation and notification for foreign fishing activity in Thai waters, if the need arises. Other regulations and notifications issued pursuant to Section 15 can be made applicable to foreign fishing activity in Thai waters.

Section 79 makes all harvesting of marine resources in Thai waters by a foreign fishing vessel illegal unless the vessel has written permission from the Director-General.

Section 79. It is prohibited for a foreign fishing vessel to engage in the harvesting of aquatic resources in Thai waters without the written permission of the Director-General.

A foreign fishing vessel is defined in Section 10 (20) as any fishing vessel (defined in Section 10 (19)), that is not a Thai flag fishing vessel (defined in Section 10 (35)). Simply put, a foreign fishing vessel is any vessel not registered in Thailand or, if unregistered in any State, is not owned by Thai nationals. Thus, if a fishing vessel is owned by Thai nationals but is registered in another State (flies a non-Thai flag), the fishing vessel is a foreign fishing vessel.

Section 10.

...
(19) "Fishing vessel" means any vessel which is used for, equipped to be used for or is of a type normally used for harvesting aquatic resources or related activities which includes being a carrier, support or mother vessel for fishing vessels and also includes both a foreign fishing vessel and a Thai flag fishing vessel;

(20) "Foreign fishing vessel" means any fishing vessel that is not a Thai flag fishing vessel;

(35) "Thai flag fishing vessel" means a vessel registered under the Thai Vessels Act of B.E. 2481 or a vessel not registered in any State but under the control of Thai nationals:

The penalty for the breach of Section 79 is set out in Sections 128 and Section 137. Breach of Section 79 results in the forfeiture to the Court of the vessel, gear and resources involved in the offence.

Section 128. Whoever violates Section 79 shall be punished with a fine not exceeding _____ baht or with imprisonment not exceeding _____ or both.

Section 137. Fishing vessels, fishing gear, aquatic resources, aquatic resource products, the proceeds from sale of aquatic resources and aquatic resource products undertaken pursuant to Section 109, any bond or security posted pursuant to Section 110, and other things used in or acquired through the commission of an offence of Sections 40, 41, 43, 58, 59, 79, or 89 shall be forfeited by the Court.

In addition to conditions and criteria that can be created for the issuance of a written permission pursuant to Section 25, Section 80 provides for specific conditions that can be included in written permissions involving foreign fishing activities in Thai waters. Section 80, paragraph (a), directs that the Director-General, on a case-by-case basis, is to determine whether to give a written permission to allow a foreign fishing vessel to harvest resources in Thai waters and the conditions that must be met by the person seeking the written permission. Section 80, paragraph (b), provides that the Director-General can impose conditions on the holder of a written permission and paragraph (c) provides that non-compliance with either the conditions of the written permission or any provisions of the Draft Act requires the written permission to be withdrawn. Section 81 completes the provisions by indicating that the Director-General can withdraw a written permission given under Section 80 at any time and for any reason.

Section 80. In addition to requirements and conditions that may be established for a written permission for foreign vessels to harvest in Thai waters pursuant to regulations and notifications issued under Section 25, the Director-General shall:

- (a) on a case-by-case basis, determine the conditions, criteria, fees and other requirements that a foreign fishing vessel must meet before the Director-General will issue a written permission for a foreign fishing vessel to engage in harvesting aquatic resources in Thai waters;
- (b) indicate the conditions and the provisions of this Act with which the foreign fishing vessel must comply; and
- (c) withdraw the written permission if a foreign fishing vessel breaches a condition of the written permission or any provision of this Act.

Section 81. At any time and for any reason, the Director-General may withdraw a written permission that has been given to a foreign fishing vessel.

Section 82 deals, not with foreign vessel fishing in Thai waters, but with foreign flag vessels which bring fishery resources into Thailand which have been caught illegally in non-Thai waters. This provision is consistent with the expectations on Thailand arising from international fishery practices which are attempting to eliminate the market for illegally caught fish. Section 82 is linked to Section 48 which prohibits a person from handling and being in possession of fish caught illegally under the Draft Act (see below, *Final Report* part 20.0) and Sections 70 and 71 which obligate Thai flag fishing vessels not to violate applicable non-Thai fishing laws (see below, *Final Report* parts 18.1 and 18.4). Section 82 also closes a possible loophole where Thai flag fishing vessels could harvest illegally outside Thai waters, tranship the resource to a non-Thai vessel, and the non-Thai vessel could import the fish into Thailand.

Section 82. No person may use a foreign flag vessel or otherwise import aquatic resources or aquatic resource products into Thailand where the aquatic resource has been harvested:

- (a) in contravention of the laws of a foreign state recognized by the government of Thailand as having jurisdiction over the waters where the harvesting occurred; or
- (b) in contravention of obligations that exist on Thailand or the State of the foreign flag vessel through international arrangements respecting the aquatic resource.

Paragraph (b) provides that importation shall not take place where the resource was harvested in contravention of an international arrangement binding either on Thailand or the state of foreign flag vessel. This is broad and, if applied, would assist in eliminating the market for all illegally harvested fish.

18.0 OVERSEAS MARINE FISHERY ACTIVITY

18.1 Background

The government of Thailand is hopeful of finding new fishing areas outside Thai waters and entering into agreements for its fishermen with foreign States (see above, *Final Report* part 3.0).⁴⁹ The Draft Act recognizes this governmental policy in Section 67 where it encourages the Minister and Director-General to seek opportunities for Thai fishermen in non-Thai waters.

Section 67. The Minister and Director-General, in consultation and cooperation with organizations which represent those persons with an interest in having Thai flag fishing vessels harvest or acquire aquatic resources in non-Thai waters, and in consultation and cooperation with other Ministries and departments, are to seek opportunities for Thai flag fishing vessels to harvest, purchase or tranship aquatic resources in non-Thai waters and may enter into agreements to accomplish these purposes.

Respecting fishing activities by Thais in non-Thai waters, the Government of Thailand (the Department of Fisheries) has responsibility for Thai flag fishing vessels (defined in Section 10 (35)) that operate in non-Thai waters. Moreover, Thai fishermen and the masters and owners of Thai flag fishing vessels have a duty and responsibility to Thailand when they

49. The Eighth National Development Plan set as a goal the attainment of arrangements with neighbouring and other states fishing for 3,500 vessels and harvest goals of 1.8 million m.t. Menasveta, *supra* note 1, at 121.

operate in non-Thai waters. Thai law and responsibilities do not cease to exist once a Thai flag fishing vessel leaves Thai waters. Section 70 has been included in the Draft Act to reinforce the fact that Thai overseas fishing vessels are obligated to follow the Draft Act, foreign law and the rules of existing international arrangements.

Section 70. A Thai flag fishing vessel, its owner, master and crew, when operating outside Thai waters, are to follow:

- (a) the applicable laws of Thailand, including this Act;
- (b) the laws of the state recognized by the government of Thailand as having jurisdiction over the waters where the Thai flag fishing vessel is located or operating; and
- (c) the obligations that exist on Thailand through international arrangements which have established conservation and management measures respecting either the waters where the Thai flag fishing vessel is located or operating or the activity of the Thai flag fishing vessel.

It is worth noting that open access does not exist in the waters of neighbouring States and it is expected that Thailand will exercise control over and be responsible for those Thai-flag vessels which stray beyond Thai waters. Given the significant difficulties in international relations that have resulted from illicit Thai fishing practices in non-Thai waters, it is appropriate to point to Section 74 of the 1997 Constitution which directs the government of Thailand is to promote friendly relations with other countries and one way of accomplishing this would be through effective control over Thai fishing vessel activity in foreign waters.

18.2 Overview

By way of overview, the Overseas Marine Fishery Chapter of the Draft Act provides that all Thai fishing vessels harvesting resources outside Thai waters must have an overseas fishing permit (Section 69) which will only be issued when the vessel in question is a participant in an approved overseas fishing plan (Section 75, paragraph (c)). It is a condition of all overseas fishing permits that the Thai vessel is to comply with the applicable law of the foreign State (Section 74, paragraph (a)). It is a breach of the Draft Act for a Thai flag fishing vessel to harvest marine resource outside Thai waters:

- without an overseas fishing permit (Section 69);
- in violation of an approved overseas fishing plan (Section 72);
- in violation of the law of a foreign State (Section 71, paragraph (a)); and
- in violation of the rules of an international fishery arrangements adhered to by Thailand (Section 71, paragraph (b)).

In addition, vessel owners, masters and representatives are required to pay any fines imposed by foreign governments and to secure the release of arrested fishermen (Sections 77 and 78).

During the August 2000 Legislation Workshop, there was considerable discussion about the role that could and should be played by organizations which represent and have as members fishermen and vessel owners who engage in overseas fishing activity. It was suggested that a committee or board structure should be established in the Draft Act to allow such organizations to share or participate in decision-making about overseas fishing matters. This idea has been included in the Draft Fisheries Act through Section 76 which allows for the creation of such a committee (the Overseas Fisheries Committee) and provides that such a committee can provide advice to the decision-makers (see below, *Final Report* part 18.5).

18.3 The Overseas Fishing Permit

It is the approach of the Draft Fisheries Act to require that all Thai flag fishing vessels operating outside Thai waters have a valid overseas fishing permit (defined in Section 10 (29) and issued under Section 75) and that harvesting resources outside Thai waters without such a permit is a violation of the Draft Act (Section 69). This requirement for a government-issued permit requiring all Thai fishing activity outside Thai waters, even if those waters are the high seas, is consistent with the Code of Conduct for Responsible Fisheries and other internationally accepted fishery practices.

Section 10.

...
(29) “Overseas fishing permit” means an overseas fishing permit issued under Section 75;

Section 69. It is prohibited for a Thai flag fishing vessel, its owner, master and crew, to harvest, purchase or tranship aquatic resources in non-Thai waters unless the Thai flag fishing vessel is in possession of a valid overseas fishing permit.

Section 75 provides when an overseas fishing permit will be issued. Reference must be made the Section 24 (see above, *Final Report* part 13.2) which requires regulations and notifications to be issued to determine who is the competent authority with authority to issue an overseas fishing permit, the form that must be filled in, the conditions that must be met, the fee that must be paid, the time period for which the permit is valid, and other matters. Using the information found in the regulations or notifications issued under Section 24 related to an overseas fishing permit, the appropriate competent official is not to issue an overseas fishing permit under Section 75 unless certain conditions are met by the person requesting the overseas fishing permit. The wording is in the negative -“a competent official ... shall not issue an overseas fishing permit to a person unless” – in order to emphasize that the person seeking the permit is under the obligation to meet the requirements.

The conditions required by Section 75 are:

- the person must be the owner of the vessel;
- the forms must be filled in and the requested information provided (as required by regulation or notification under Section 24);
- the person requesting the permit must be entitled to participate in an approved overseas fishing plan (Section 75, paragraph (c));
- the conditions set in the regulations and notifications (under either Sections 24 or 15) must have been met;
- the person requesting the permit must be a fisherman in good standing (as determined by Sections 27 to 31);
- any fee payable (under Section 24) has been paid;
- the competent official must believe the person understands the rules and conditions; and
- the person has met any financial security requirements that may be imposed (under Section 24).

Section 75. The competent official with the authority to grant an overseas fishing permit shall not issue an overseas fishing permit to a person unless:

- (a) the person requesting an overseas fishing permit is the owner or the master of the vessel for which the overseas fishing permit is intended;
- (b) the person requesting the overseas fishing permit has filled in the forms and provided the information as required by regulation or notification;

- (c) the person requesting the overseas fishing permit is entitled to be a participant in an approved overseas fishing plan;
- (d) the person requesting the overseas fishing permit has met all the conditions, requirements and criteria established under this Act for the issuance of an overseas fishing permit;
- (e) the person requesting the overseas fishing permit is a fisherman in good standing;
- (f) the person requesting the overseas fishing permit has provided any security or surety required by regulations and notifications;
- (g) any fee payable has been paid; and
- (h) the person requesting the overseas fishing permit has demonstrated an understanding of the conditions of the overseas fishing permit including the condition that the person, and all those engaged in the activity covered by the overseas fishing permit, must comply with all foreign laws applicable to the overseas fishing permit.

Section 75, paragraph (c), is worthy of special note since it requires the competent official to ensure that the vessel for which the overseas fishing permit is intended is a vessel which is entitled to be a participant in an approved overseas fishing plan.

An approved overseas fishing plan is defined in Section 10 (2) which refers to Section 68. Under Section 68, an approved overseas fishing plan exists where:

- the government of Thailand has entered into an fishing agreement allowing for harvesting in the waters of a foreign State (Section 68, paragraph one);
- an agreement entered into by Thai fishing interests allowing for harvesting in the waters of a foreign state is accepted by the Minister or Director-General as an approved overseas fishing plan (Section 68, paragraph 2); or
- where what is involved is fishing on the “high seas” (defined in Section 10 (23)), Thai fishing interests have proposed a plan which the Minister or Director-General, taking into account the obligations on Thailand that arise through “international arrangements” (defined in Section 10 (24)), approves.

Section 10.

...
(2) “Approved overseas fishing plan” means an agreement, arrangement or plan which provides for Thai flag fishing vessels to harvest, purchase or tranship aquatic resources outside Thai waters that has been approved by the Minister or Director-General under Section 68;

Section 68. An agreement entered into by the Minister, Director-General or other authorized representative of the government of Thailand with a foreign State, a department within a foreign State or a foreign fishing company or enterprise is an approved overseas fishing plan.

The Minister or Director-General may determine that an agreement entered into by a person who is an owner or master of a Thai flag fishing vessel, a fisheries organization, a company or other enterprise which operates in Thailand, with a foreign State, a department within a foreign State or a foreign fishing company or enterprise is an approved overseas fishing plan.

The Minister or Director-General may determine that a plan presented by an owner or master of a Thai flag fishing vessel, a fisheries organization, a company or other enterprise which operates in Thailand to harvest aquatic resources in the high seas is an approved overseas fishing plan provided:

- (a) the proposed harvesting activity will not contravene obligations that exist on Thailand through international arrangements; and
- (b) the proposed harvesting activity will not undermine the effectiveness of any international arrangements that may exist respecting either the area where it is proposed that the Thai flag fishing vessels are to operate or the species that are proposed to be harvested by the Thai flag fishing vessels.

Section 10.

...
(23) “High seas” means marine waters which are not within the national jurisdiction of any State;

(24) “International arrangements” as used in Chapters Nine and Ten means both international agreements which are binding on Thailand and international agreements respecting fishery matters which create rules, procedures and structures which Thailand observes and follows;

International arrangements are defined more broadly than an international treaty or agreement binding on Thailand since it is clear that what is occurring at the international level are fishery arrangements for high seas and highly migratory fish stocks that are to be respected even if a State is not a party to the treaty. Section 68, paragraph three, subparagraph (b), acknowledges that Thailand will not approve harvesting activity which might undermine the effectiveness of such international fishery arrangements.

The activities of Thai flag fishing vessels operating outside Thai waters can be regulated by:

- the regulations and notifications issued pursuant to Section 15 which are explicitly made applicable, under Section 16, to overseas activities (see above, *Final Report* part 12.2.2);
- the conditions that exist within an overseas fishing permit which can be included pursuant to Section 24, paragraph (f) (see above, *Final Report* part 13.2);
- the conditions, contents, rules and procedures of approved overseas fishing plans which are deemed to be conditions of the overseas fishing permit (Section 74, paragraph (b)); and
- the laws of a foreign State or rules of an international arrangement which are also deemed to be conditions of the overseas fishing permit (Section 74, paragraph (a)).

Section 74 of the Draft Act is important since it makes as a condition of every overseas fishing permit: (i) the laws of a foreign state; (ii) the management measures of international arrangements; and (iii) the contents of the approved overseas fishing plan.

Section 74. In addition to other conditions that may exist in an overseas fishing permit, it is a condition of all overseas fishing permits that the holder must comply with:

- (a) all the laws of a foreign state and the conservation and management measures of international arrangements that are applicable to the activities covered by the overseas fishing permit; and
- (b) all the conditions, contents, rules and procedures of the approved overseas fishing plan.

The requirement in Section 69 is that there must be a valid overseas fishing permit, which means that none of the situations listed in Section 26 (see above, *Final Report* part 13.4) have occurred. The penalty for violating Section 69 is contained in Sections 125, (the fine, imprisonment, status as a fisherman in good standing), Section 140 (fishing vessel and gear may be forfeited) and Section 139 (resources harvested in violation of Section 69 are to be forfeited).

Section 125. Whoever violates Sections 45, 46, 47, 48, 49, 50, 59, 63, 69, 71, 72, or 84 shall be punished with a fine not exceeding _____ baht or with imprisonment not exceeding _____ or both and shall be a fisherman not in good standing for a minimum of _____ months and a maximum of _____ years.

Section 139. Aquatic resources, aquatic resource products, and the proceeds from sale of aquatic resources and aquatic resource products undertaken pursuant to Section 109, acquired through or involved in the commission of an offence of Sections 54, 57, 60, 63, 69, 71, 72, 90, 96 or 98 shall be forfeited by the Court.

Section 140. Fishing vessels, fishing gear and other things used in the commission of an offence of Sections 54, 57, 60, 63, 69, 71, 72 or 90 and any bond or security posted pursuant to Section 110 related to these offences may be forfeited by the Court.

Currently, limited customs benefits are available to Thai fishing interests who operate beyond Thai waters in a responsible manner. Section 73 of the Draft Act recognizes this practice and suggests that, provided there is cooperation with the relevant Ministries and departments, incentives to encourage compliance should be considered.

Section 73. The Minister by regulation and the Director-General by notification may, in cooperation with other ministries and departments, establish tax, customs or other benefits that may be given to holders of valid overseas fishing permits.

18.4 Other Measures

In order to impress upon Thai flag fishing vessels which harvest resource overseas that they must operate responsibly, the Draft Fisheries Act contains a number of additional prohibitions in addition to the prohibition of operating outside Thai waters without an overseas fishing permit.

Section 72 makes it an offence for a Thai vessel, its master, owner and crew, to harvest resources in a manner which violates an approved overseas fishing plan.

Section 71 of the Draft Act makes it an offence under Thai law where a Thai flag fishing vessel violates the laws of a foreign State or the conservation and management measures of an international fishery arrangement to which Thailand adheres. Thus, a Thai flag fishing vessel when operating illegally outside Thai waters is violating both Thai law and the local law of the foreign State or the conservation and management measures of an international fishery arrangement. The last point is covered in Section 71, paragraph (b), where it is an offence under Thai law for a Thai flag fishing vessel to contravene obligations that exist on Thailand pursuant to international fishery arrangements.

For both Sections 71 and 72, it is Section 125 which contains the fine, imprisonment and fisherman not in good standing provisions. Section 140 directs that the vessel, gear or items involved in a breach of Sections 71 or 72 may be forfeited to the Court and Section 139 directs that resources harvested in violation of Sections 71 and 72 are to be forfeited to the Court.

Section 71. It is prohibited for a Thai flag fishing vessel, its owner, master or crew, to harvest aquatic resources in non-Thai waters:

- (a) in contravention of the law of the foreign state recognized by the government of Thailand as having jurisdiction over the waters where the contravention occurred; or
- (b) in contravention of obligations that exist on Thailand through international arrangements which have established conservation and management measures respecting either the waters where the Thai flag fishing vessel is located or operating or the activity of the Thai flag fishing vessel.

Section 72. It is prohibited for a Thai flag fishing vessel, its owner, master and crew, to harvest aquatic resources in non-Thai waters in contravention of an approved overseas fishing plan.

Section 125. Whoever violates Sections 45, 46, 47, 48, 49, 50, 59, 63, 69, 71, 72, or 84 shall be punished with a fine not exceeding _____ baht or with imprisonment not exceeding _____ or both and shall be a fisherman not in good standing for a minimum of _____ months and a maximum of _____ years.

Section 139. Aquatic resources, aquatic resource products, and the proceeds from sale of aquatic resources and aquatic resource products undertaken pursuant to Section 109, acquired through or involved in the commission of an offence of Sections 54, 57, 60, 63, 69, 71, 72, 90, 96 or 98 shall be forfeited by the Court.

Section 140. Fishing vessels, fishing gear and other things used in the commission of an offence of Sections 54, 57, 60, 63, 69, 71, 72 or 90 and any bond or security posted pursuant to Section 110 related to these offences may be forfeited by the Court.

Sections 77 and 78 of the Draft Act are designed to deal with the problem of Thai fishermen being left in jail following the seizure of a Thai flag fishing vessel in the waters of a foreign State. Section 77 makes it an offence for “an owner, owner’s representative and master” (it can be all three simultaneously) of a Thai flag fishing vessel arrested in non-Thai waters not to secure the release of the master and crew and return them to Thailand. The fine

and imprisonment provision for a violation of Section 77 is Section 127. Section 78 provides that in addition to the penalty that may be imposed under Section 127, the offending party is required to compensate the government of Thailand for any costs incurred in obtaining the release and return to Thailand of the master and crew.

Section 77. It is prohibited for an owner, owner's representative or master of a Thai flag fishing vessel that has been apprehended, seized or arrested in non-Thai waters not to secure the release of the master and crew.

Section 78. In addition to any penalty that may be imposed pursuant to Section 127, the owner, owner's representative or master who breaches Section 77 is required to compensate the government of Thailand for all costs incurred by the government of Thailand in securing the release of the master and crew and returning the master and crew to Thailand.

Section 127. Whoever violates Section 77 shall be punished with a fine not exceeding _____ baht or with imprisonment not exceeding _____ or both.

In the Kuemlangan Report (1999), it was suggested that Thai fishing vessels engaged in activities in non-Thai waters either without an overseas fishing permit (Section 69) or that were otherwise operating inconsistent with the Draft Act, which would include harvesting in violation of the laws of the relevant foreign countries and international arrangements (Section 71), should not be able to bring their catch back to Thailand for sale, transshipment or export. This recommendation is met in part through Section 48 which prohibits any person from importing, handling, transporting, selling or having in their possession any fish that has been harvested inconsistent with the Draft Act (see below, *Final Report* part 20.0). If fish landed in Thailand has been harvested inconsistent with a foreign law, the harvester has violated Thai law (Section 71), and, according to Section 48, whomever receives that fish is under a strict obligation to determine whether the fish has been caught legally – in this example, it was caught inconsistent with Section 71, thus whomever handles, receives or posses the fish is violating Section 48.

18.5 The Overseas Fisheries Committee

The principal decisions regarding overseas fishery activities by Thai flag fishing vessels involve the approval of overseas fishing plans and the issuing of overseas fishing permits. Section 76 provides that an Overseas Fisheries Committee can be established, composed of an equal number of government and industry representatives, to provide advice to the Minister, Director-General or competent officials regarding these principal decisions. Requiring the establishment of a permanent overseas committee, fixing the committee's membership and giving the committee the authority to make the principal decisions is seen as creating a system that is too rigid. It is seen as better to have a flexible structure with the understanding that an appropriately functioning Overseas Fisheries Committee can reduce some of the problems that Thailand has faced in recent years in its overseas fishing activities.

Section 76. An Overseas Fisheries Committee composed of equal numbers of representatives from either the Department of Fisheries or other Ministries and from organizations which represent those persons with an interest in overseas marine fishery activities may be established to provide advice to:

- (a) the Minister and Director-General respecting the approval of overseas fishing plans under Section 68;
- (b) competent officials with the authority to grant overseas fishing permits respecting the issuance of and conditions that may be attached to overseas fishing permits under Section 75; and
- (c) the Minister, Director-General and the Department of Fisheries on other matters and issues regarding overseas marine fishery activities.

19.0 AQUACULTURE

19.1 Definition

Aquaculture involves different issues and considerations from much of rest of the Draft Fisheries Act and, therefore, has its own chapter within the Draft Act (Chapter Eleven). Aquaculture deserves separate legislation since it involves many subject areas, other pieces of legislation and governmental responsibilities outside the jurisdiction of fisheries. This interaction of aquaculture with the responsibilities of other departments (for example, land management) is an important element of Chapter Eleven. However, the activity of engaging in aquaculture is clearly within the authority of the Department of Fisheries.

In the Draft Act, aquaculture is defined broadly in Section 10 (3). This definition is based upon the definition of aquaculture used in the Fisheries Act of Papua New Guinea.

Section 10.

...

(3) “Aquaculture” means the cultivation, propagation or farming of aquatic resources, whether from eggs, spawn, spat or seed, including rearing aquatic resources from the wild, or lawfully imported into the country, or by other similar process whether done using fresh, brackish or salt water;

19.2 Management Measures

19.2.1 General Authority

Because aquaculture is a topic separate from much of the rest of the Draft Fisheries Act, a separate section providing for the issuance of regulations and notifications exists in Chapter Eleven. Thus, Section 83 allows for the Minister to make regulations and the Director-General and Provincial Governors to issue notifications relating to “aquaculture, aquaculture facilities and the activity of aquaculture”.

Section 83. The Minister may issue regulations and the Director-General and, with the approval of the Minister, the provincial governor within his jurisdiction, may issue notifications respecting any matter that arises relating to aquaculture, aquaculture facilities, and the activity of aquaculture, including:

The intent is to allow for regulations and notifications respecting “any matter” that arises respecting aquaculture. While Section 83 goes on to indicate the type of subjects and the matters for which regulations and notifications can be issued, paragraph (m) indicates that regulations and notifications are not restricted to the listed subjects or matters.

Section 83. The Minister may issue regulations and the Director-General and, with the approval of the Minister, the provincial governor within his jurisdiction, may issue notifications respecting any matter that arises relating to aquaculture, aquaculture facilities, and the activity of aquaculture, including:

...

(m) any other matter regarding the activity of aquaculture or an aquaculture facility.

An “aquaculture facility” is referred to in Section 83 and throughout Chapter Eleven. It is defined in Section 10 (4). It is used to ensure that where aquaculture takes place is also subject to regulation and control.

Section 10.

...

(4) “Aquaculture facility” means any location, site or place where aquaculture takes place;

The Draft Act has not included any role for Local Fishery Committees or similar local community bodies respecting the control and management of aquaculture. The Local Fishery Committees provided for in Sections 18 to 21 *prima facie* have no role respecting aquaculture decision-making since they are to deal primarily with local fishing permits. The reason for this decision was that aquaculture is an activity which involves more than just fishery interests. New, aquaculture-specific legislation involving multiple departments and requiring amendment of numerous other laws would be the best way to achieve direct local involvement in aquaculture decision-making.

The Draft Act does not preclude subsequent legislation creating local committees with the authority to direct competent officials within the Department of Fisheries to issue (or not issue) aquaculture permits or to direct that regulations and notifications be issued on any of the matters covered by Section 83. Moreover, community-based management (Chapter Five, see above, *Final Report* part 16.0) envisions the possibility of community-based management arising for aquaculture activities.

Section 83, paragraph two, expressly directs that regulations and notifications are not to be issued regarding aquaculture without consultation with all individuals, communities and other Ministries and departments that may be affected by them.

Section 83, paragraph two.

Regulations and notifications under paragraph one shall only be issued following, the extent that is reasonable and feasible, consultation with persons, communities and other Ministries and departments that may be affected by them.

19.2.2 Restrictions on Facilities and Operations

Regulations and notifications can be issued pursuant to Section 83, paragraphs (a), (b), (c), and (d), regarding the size of an aquaculture facility, its location, how the aquaculture activity must be conducted, the equipment and nature of the facilities that must exist, the necessary processes that must be used in the aquaculture activity and the monitoring that must take place. Paragraph (e) specifically allows for regulations and notifications respecting the quality and type of feed that may be used. In short, everything to do with the location of an aquaculture activity, how the facility is to be equipped and managed, and the operations of both the facility and the aquaculture activity can be dealt with through regulations and notifications.

Section 83. The Minister may issue regulations and the Director-General and, with the approval of the Minister, the provincial governor within his jurisdiction, may issue notifications respecting any matter that arises relating to aquaculture, aquaculture facilities, and the activity of aquaculture, including:

- (a) the size and location of aquaculture activities and facilities;
- (b) the manner in which aquaculture activities must take place and the operation of aquaculture facilities;
- (c) the type, operation and location of equipment required including the training that operators of such equipment must have;
- (d) the required processes and monitoring of aquaculture activities and facilities;
- (e) the quality and type of feed used for aquaculture;

19.2.3 Restrictions Related to the Aquatic Resources

Regulations and notifications can also be issued under Section 83 respecting the aquatic resources that are subject to aquaculture. Paragraph (g) expressly allows for regulations and notifications regarding ornamental live fish. Paragraph (f) allows for the prohibition of aquaculture of certain aquatic resources. Regulations and notifications can be

issued regarding all sources of aquatic resources used in aquaculture, including hatcheries, and respecting the importation of aquatic resources intended for use in aquaculture.

Section 83. The Minister may issue regulations and the Director-General and, with the approval of the Minister, the provincial governor within his jurisdiction, may issue notifications respecting any matter that arises relating to aquaculture, aquaculture facilities, and the activity of aquaculture, including:

...

- (f) the prohibition of aquaculture activities respecting certain aquatic resources;
- (g) ornamental live fish;
- (h) hatcheries and other sources of aquatic resources for aquaculture purposes including the importation of aquatic resources for aquaculture purposes

Section 83, paragraphs (i) and (j), provide for regulations and notifications to deal with two major aquaculture concerns. First is the prevention, control and elimination of diseases that affect aquatic resources. Related to this is Section 85 which is discussed below (see below, *Final Report* part 19.3). Second is the use of chemicals, antibiotics, biotechnology and genetically modified organisms in aquaculture activities.

Section 83. The Minister may issue regulations and the Director-General and, with the approval of the Minister, the provincial governor within his jurisdiction, may issue notifications respecting any matter that arises relating to aquaculture, aquaculture facilities, and the activity of aquaculture, including:

...

- (i) measures to prevent, eliminate or control diseases that may affect aquatic resources;
- (j) the use, monitoring and testing of chemicals, antibiotics, biotechnology and genetically modified organisms;

19.3 Abusive and Dangerous Aquaculture Practices

Aquaculture activities can result in damage to the environment and the habitat of aquatic resources. The virtually unrestrained expansion of coastal aquaculture of tiger prawns has resulted in mangrove destruction, salination of fresh water and environmental degradation of areas surrounding these coastal aquaculture facilities. Section 83 provides that regulations and notifications can be issued regarding the control and avoidance of environmental degradation.

Section 83. The Minister may issue regulations and the Director-General and, with the approval of the Minister, the provincial governor within his jurisdiction, may issue notifications respecting any matter that arises relating to aquaculture, aquaculture facilities, and the activity of aquaculture, including:

...

- (k) all matters relating to the control and avoidance of environmental degradation and interference with users of adjacent lands and waters;

While these issues involve matters that cross-departmental and legislative responsibilities, the Draft Act in Section 85 creates an offence for anyone who engages in aquaculture activities which “destroys, disturbs, interferes with” the habitat of an aquatic resource. Section 85 provides an important prohibition that may assist in curbing abusive aquacultural practices.

Section 85. No person shall, intentionally or unintentionally, engage in aquaculture which destroys, disturbs, interferes with or alters, either directly or indirectly, the habitat of an aquatic resource unless the person has in their possession a written permission for such aquaculture activity given to that person by a competent official.

The fine or imprisonment provision for a violation of Section 85 is Section 130. Section 130 also provides that a person who violates Section 85 may be a fisherman not in good standing for up to a maximum period. Moreover, Section 138 provides that things used in or acquired as result of the offence may be forfeited to the Court.

Section 130. Whoever violates Sections 85 shall be punished with a fine not exceeding _____ baht or with imprisonment not exceeding _____ or both and may be a fisherman not in good standing for a maximum of ___ months.

Section 138. Fishing vessels, fishing gear, aquatic resources, aquatic resource products, the proceeds from sale of aquatic resources and aquatic resource products undertaken pursuant to Section 109, any bond or security posted pursuant to Section 110, and other things used in or acquired through the commission of an offence of Sections 42, 44, 45, 46, 47, 48, 84, or 85 may be forfeited by the Court.

Regarding environmentally harmful aquaculture activities, reference should also be made the Section 42 (see above, *Final Report* part 12.4) which makes it an offence for any person to disturb fisheries habitat.

Section 42. No person shall, intentionally or unintentionally, destroy, disturb, interfere with or alter, either directly or indirectly, the habitat of an aquatic resource unless the person has in their possession a written permission for such destruction, disturbance, interference or alteration given to that person by a competent official.

For greater certainty, paragraph one includes, but is not limited to:

- (a) any use of or activity on privately-owned property which destroys, disturbs, interferes with or alters the habitat of an aquatic resource;
- (b) any alteration of water levels in Thai waters; or
- (c) the erection of any device which has the effect of altering water levels, the flow of water or the quality of water in Thai waters.

Paragraph two specifically notes that it is an offence when an activity on privately-owned land results in destruction or a disturbance of fisheries habitat. This is designed to include aquacultural activities.

In addition to concerns about the environmental consequences of abusive aquacultural activities, there are concerns about certain aquacultural practices and activities posing a health risk to humans and to other aquatic resources. In this regard, reference is necessary to Section 43 which specifically prohibits a person from engaging in aquaculture involving a species which because of “disease, genetic structure or not being native to Thai waters” creates a health hazard to humans or other aquatic resources.

Section 43. It is prohibited for a person to import, sell, own, control, possess, or engage in aquaculture respecting an aquatic resource which, because of disease, genetic structure or its not being native to Thai waters, does or may create a hazard to the health of humans or other aquatic resources or to the environment unless the person has in their possession a written permission for such activity given to that person by the Director-General.

Given the special nature of the activity being prohibited in Section 43 and the risks involved, Section 102, paragraph (g) provides for special powers for an authorized fisheries officer.

Section 102. An authorized fisheries officer may:

- ...
 - (g) seize and destroy aquatic resources which he has reason to believe have been, are or may be involved in an offence of Section 43;

Related to Section 102, paragraph (h) is the special power given an authorized fisheries officer in Section 102, paragraph (h).

Section 102. An authorized fisheries officer may:

...

- (h) order and take appropriate action to ensure the immediate cessation of aquaculture activities where he has reason to believe an offence under this Act is, has or may be committed and he believes the cessation of aquaculture activities is necessary to protect the health of humans, aquatic resources or the environment;

Section 102, paragraph (h) is not tied directly to Section 43, thus respecting aquaculture an authorized fisheries officer can close down an aquaculture facility or aquaculture activities whenever the Draft Act is being breached and closing down the aquaculture activity is “necessary” to protect the health of humans, fish or the environment. This power is deemed necessary to ensure the immediate closure of aquaculture activities and facilities that are both abusive and dangerous.

Because of the special nature of the power given to an authorized fisheries officer under Section 102, paragraph (h), the action of the officer is to be reviewed by the Director-General within ten days. The Director-General can continue the order or action of the authorized fisheries officer or order that the action be rescinded.

Section 111. Where an authorized fisheries officer has ordered or taken action to cease aquaculture activities pursuant to Section 102, the order or action shall be reviewed within 10 days by the Director-General who may:

- (a) continue the order or the action ceasing the aquaculture activity; or
- (b) order that the aquaculture activity can recommence.

19.4 Aquaculture Permits

The goal of the Draft Act regarding aquaculture is to use aquaculture permits as the means of managing and controlling most aquaculture activities. Putting this into action in the Draft Act involves a series of steps.

Step one is that a person is prohibited from engaging in aquaculture activities where an aquaculture permit is necessary without a valid aquaculture permit. This is accomplished in Section 84.

Section 84. It is prohibited for a person to engage in aquaculture for which an aquaculture permit is necessary unless the person has a valid aquaculture permit.

The aquaculture permit must be valid, which means that none of the situations listed in Section 26 (see above, *Final Report* part 13.4) have occurred.

Where there is a violation of Section 84, Section 125 directs what is the fine, imprisonment and the minimum and maximum period of being a fisherman not in good standing and, pursuant to Section 138, the things used in the offence including the resources themselves may be ordered forfeited to the Court.

Section 125. Whoever violates Sections 45, 46, 47, 48, 49, 50, 59, 63, 69, 71, 72, or 84 shall be punished with a fine not exceeding _____ baht or with imprisonment not exceeding _____ or both and shall be a fisherman not in good standing for a minimum of _____ months and a maximum of _____ years.

Section 138. Fishing vessels, fishing gear, aquatic resources, aquatic resource products, the proceeds from sale of aquatic resources and aquatic resource products undertaken pursuant to Section 109, any bond or security posted pursuant to Section 110, and other things used in or acquired through the commission of an offence of Sections 42, 44, 45, 46, 47, 48, 84, or 85 may be forfeited by the Court.

Step two is the identification of which aquaculture activities require an aquaculture permit. Prima facie all aquaculture activities require an aquaculture permit. However, by notification and regulation certain types, sizes or locations of aquaculture activities may be exempted from the requirement to have an aquaculture permit. Section 86, paragraph (a) provides this authority.

Section 86. In addition to regulations and notifications that may be made respecting an aquaculture permit under Section 24, the Minister by regulation and the Director-General, and, with the approval of the Minister, the provincial governor within his jurisdiction, by notification may establish:

- (a) the type, size, activities, and location of aquaculture activities and facilities which do not require an aquaculture permit;

Step three is determining the meaning of an aquaculture permit (Section 10 (5)) and determining when one will be issued (Section 87).

Section 10.

...

- (5) “Aquaculture permit” means an aquaculture permit issued under Section 87;

The appropriate competent official is not to issue an aquaculture permit under Section 87 unless certain conditions are met by the person requesting the aquaculture permit. The wording is in the negative -“a competent official ... shall not issue an aquaculture permit to a person unless” – in order to emphasize that the person seek the permit is under the obligation to meet the requirements.

Section 87. A competent official with the authority to grant an aquaculture permit shall not issue an aquaculture permit to a person unless:

While Section 87 provides when an aquaculture permit will be issued, Section 24 (see above, *Final Report* part 13.2) requires regulations and notifications to be issued to determine the competent official with the authority to issue an aquaculture permit, the form that must be filled in, the conditions that must be met, the fee that must be paid, the time period for which the permit is valid, and other matters.

In addition to these requirements, Section 86 allows for regulations and notifications respecting specific matters relating to the issuance of an aquaculture permit.

Section 86. In addition to regulations and notifications that may be made respecting an aquaculture permit under Section 24, the Minister by regulation and the Director-General, and, with the approval of the Minister, the provincial governor within his jurisdiction, by notification may establish:

- ...
- (b) the conditions that must exist and the criteria that must be met by an aquaculture activity and facility relating to the control and avoidance of environmental degradation and interference with users of adjacent lands and waters before an aquaculture permit will be issued;
- (c) the conditions that must exist and the criteria that must be met by an aquaculture activity and facility including limits on type, size, location, equipment and other matters before an aquaculture permit will be issued; and
- (d) the conditions that will attach to an aquaculture permit relating to the above subject matters including the time, place, aquatic specie, and equipment that may be used and the processes and monitoring that must be undertaken.

Section 86, paragraph (c) provides for the making of regulations and notifications to establish the conditions that must be met before an aquaculture permit will be issued regarding control and avoidance of environmental damage including interference with users of adjacent lands and waters. Paragraph (d) allows for the regulations and notifications to

establish the type, size, activities, location, equipment and related matters that must be met in order to obtain an aquaculture permit.

Summarizing the conditions that must be met before an aquaculture permit will be issued under Section 87:

- the person must be the owner or operator of the aquaculture activity and facility;
- the forms must be filled in and the information provided (as required by regulation and notification under Section 24);
- the aquaculture activity must be one for which a permit may be issued (as determined pursuant to regulations and notifications issued under Section 86 (a));
- the aquaculture activity and facility must meet the conditions relating the control and avoidance of environmental degradation (as established pursuant to Section 86);
- the aquaculture activity and facility meets all the conditions established by this Act pursuant to Sections 24 and 86;
- the granting of an aquaculture permit is not inconsistent with acts, regulations, notifications or policies of other Ministries or departments;
- the person requesting the aquaculture permit is a fisherman in good standing;
- any fee payable has been paid; and
- the competent official must believe the person knows the rules and conditions regarding the aquaculture permit.

Section 87. A competent official with the authority to grant an aquaculture permit shall not issue an aquaculture permit to a person unless:

- (a) the person requesting the aquaculture permit is the owner or the intended operator of the aquaculture activity and facility for which the aquaculture permit is intended;
- (b) the person requesting the aquaculture permit has filled in the forms and provided the information as required by regulations and notifications under this Act;
- (c) the aquaculture activity or facility for which the aquaculture permit is requested is of a kind or type for which an aquaculture permit may be issued;
- (d) the person requesting the aquaculture permit has demonstrated that the proposed activity and facility meets the conditions and criteria relating to the control and avoidance of environmental degradation and interference with users of adjacent lands and waters set out by regulations and notifications under this Act;
- (e) the person requesting the aquaculture permit has met all the conditions, requirements and criteria established under this Act for the issuance of an aquaculture permit;
- (f) the competent official is of the view that the issuing of the aquaculture permit is not inconsistent with any Act, regulation and notification or any policy of another Ministry or department;
- (g) the person requesting the aquaculture permit is a fisherman in good standing;
- (h) any fee payable has been paid; and
- (i) the person requesting the aquaculture permit has demonstrated an understanding of the conditions of the aquaculture permit.

Note should be made of Section 87, paragraph (g), which requires a person requesting an aquaculture permit to be a fisherman in good standing. This refers back to Sections 27 to 31 (sub-chapter IV of Chapter Four, see above, *Final Report* part 13.5). While the term fisherman in good standing appears to apply only to those who directly harvest fish, for the purposes herein, it also includes a person who wishes to undertake aquaculture. A person who breaches a condition of an aquaculture permit or violates a provision of this Act dealing with aquaculture (for example, Section 84, engaging in aquaculture without an aquaculture permit) can be fisherman not in good standing and thus a person to whom an aquaculture permit cannot be issued.

Section 87, paragraph (f), also deserves special attention.

Section 87. A competent official with the authority to grant an aquaculture permit shall not issue an aquaculture permit to a person unless:

...
(f) the competent official is of the view that the issuing of the aquaculture permit is not inconsistent with any Act, regulation and notification or any policy of another Ministry or department;

The intention of this condition on the issuance of an aquaculture permit is to ensure that the competent official takes into account other laws, regulations, notifications and policies that may exist regarding aquaculture activities. Such a condition is deemed to be necessary since aquaculture is a subject matter which numerous Ministries and departments within the Thai government have an interest in and responsibility for.

19.5 Additional Monitoring Authority

Although Chapter Fourteen, Monitoring, Control and Surveillance, applies to aquaculture activities, and there are special provisions for authorized enforcement officers under Section 102 (see above, *Final Report* 23.3), the nature of aquaculture requires that certain additional powers exist for competent officials. These powers are noted in Section 88. These additional authorities relate to the monitoring and inspecting of all aquaculture facilities, irrespective of whether a permit is necessary or has been issued for the facility or activity, and the gathering of information and samples from aquaculture activities and facilities.

Section 88. Notwithstanding the authority granted to an authorized fisheries officer under Section 102, a competent official may:

- (a) monitor, inspect and visit all aquaculture facilities, regardless of whether the aquaculture activity in question requires an aquaculture permit;
- (b) request, require the production of, require regular reporting of, inspect, and copy any information and documents from the owner of or a person in authority at an aquaculture facility; and
- (c) request and take samples of the water, feed, soil, and species found at an aquaculture facility.

20.0 A CONTROVERSIAL PROHIBITION- SECTION 48

Section 48 is both a controversial prohibition and potentially a very power prohibition for dealing with resources harvested without proper permits or otherwise harvested in violation of the Draft Act. In simple terms, Section 48 prohibits any person from having in their possession, selling, importing, attempting to export, etc. a fish which has not been harvested legally. The idea is to take away the market for illegal caught fish by making it an offence for any person to buy, sell or have in their possession illegally caught fish.

Section 48 provides that the offence is created when a person knows, "ought to have know" (in other words, should have known that fish was illegally harvested), or the person "did not inquire" whether the fish was harvested legally. Thus, a person handling fish is under a responsibility to inquire whether the fish was caught legally. Section 48 attempts to put the burden or onus on the person receiving or handling fish to show that he (she) took positive action to determine whether the fish was caught legally. If the person did not ask whether the fish was caught legally or it is clear that the fish was not caught legally (a reasonable person would have concluded that the fish was harvested illegally), then the person in possession of the illegally caught fish has breached Section 48. A person can avoid a violation of Section 48 where written permission has been given by the Director-General.

Section 48. No person shall import, export, attempt to export, handle, transport, tranship, process, sell, store or have in his possession an aquatic resource or aquatic resource product, or enter into a contract to do any of the above, where the person knew, ought to have known, or did not inquire respecting whether the aquatic

resource had been harvested in a manner inconsistent with this Act unless the person has in their possession a written permission for such activity given to that person by the Director-General.

Section 125 provides for the fine or imprisonment for the breach of Section 48 and Section 138 provides that the Court may order the forfeiture of the resources and other items involved in the offence.

Section 125. Whoever violates Sections 45, 46, 47, 48, 49, 50, 59, 63, 69, 71, 72, or 84 shall be punished with a fine not exceeding _____ baht or with imprisonment not exceeding _____ or both and shall be a fisherman not in good standing for a minimum of _____ months and a maximum of _____ years.

Section 138. Fishing vessels, fishing gear, aquatic resources, aquatic resource products, the proceeds from sale of aquatic resources and aquatic resource products undertaken pursuant to Section 109, any bond or security posted pursuant to Section 110, and other things used in or acquired through the commission of an offence of Sections 42, 44, 45, 46, 47, 48, 84, or 85 may be forfeited by the Court.

21.0 FISH INSPECTION, SEAFOOD SAFETY AND EXPORT CERTIFICATION

21.1 Overview

The primary focus of the 1947 Fisheries Act and the Department of Fisheries is the harvesting of marine resources. Post-harvest activities (handling, sales, processing, exporting) are almost totally ignored within the 1947 Fisheries Act and receive minimal attention within the Department of Fisheries. However, the Department of Fisheries does have the Division of Fishery Inspection and Quality Control which deals with inspection and quality standards for fish and fish products. At present, however, there are no requirements that seafood or seafood products be inspected or be of a certain quality before being marketed or consumed Thailand. As a result, almost all the fish and fish products sold or available for sale in Thailand are unmonitored for health or quality concerns.

Where this is changing is regarding the export market. International markets are increasingly demanding that the country-of-origin take greater efforts to ensure that fish and fish products meet international health and quality standards. In response to this, the Department of Fisheries, Division of Fishery Inspection and Quality Control, is increasingly involved in inspection and certification of fish, fish products, processing plants, handling, and storage facilities where the products are destined for the export market. These activities of the Division of Fishery Inspection and Quality Control are conducted pursuant to a Ministerial Notification issued under the 1979 Import and Export Controls Act. As has been noted, it can be expected that international demands for enhanced controls over the quality and safety of exported fish and fish products will increase in the future (see above, *Final Report* part 6.0).

Assessing and assuring that fish and fish products are both safe and of a particular quality for consumption involve essentially three activities:

- inspection and testing of the fish at the time of harvest;
- inspecting and monitoring of fish processing plants, storage facilities, handling practices, places of sale and every place and person who deals with a fish from the time of harvest until it reaches the consumer; and
- inspecting and testing of the final product made available to the consumer.

A recitation of these activities indicates that they involve matters which are beyond the traditional responsibilities of a fisheries department and engage the responsibilities of health officials responsible for food and places where food is produced, handled and stored; industry

officials responsible for businesses and business practices; local officials responsible for approving, inspecting and monitoring buildings and plants; etc. If the product is destined for the export market, then the customs and export officials also have a role.

It should be noted that like the aquaculture Chapter of the Draft Fisheries Act, Chapter Thirteen “Health, Quality and Export” is significantly different that the rest of the Draft Fisheries Act. The approach within Chapter Thirteen of the Draft Fisheries Act is not to resolve the cross-Ministerial and cross-departmental issues noted above but to recognize their existence and provide three things:

- (i) an increase in awareness of the responsibility on all those who deal with fish and fish products that the product should be of high quality, safe for consumption, and labelled and packaged properly;
- (ii) the authority to issue regulations and notifications respecting health and quality standards for fish and fish products, as well as, for inspection to assure those standards are met; and
- (iii) the requirement for a fisheries export permit for fish and fish products being exported from Thailand.

21.2 Awareness of Consumer Health and Safety

Section 92 of the Draft Fisheries Act provides that all those who handle or deal with fish and fish products are to make efforts to ensure that the fish and fish products comply with all consumer protection legislation and requirements. Section 92 does not create a direct obligation, rather it is designed to raise awareness of the responsibility on fisherman, fish processors and all those involved in handling and selling fish and fish products that consumer health and safety should be of paramount concern. The phrase in Section 92, “consumer health and food safety laws, regulations and notifications”, is defined in Section 93 to include all laws, regulations and notifications respecting quality and standards for food, packaging, labelling and consumer health protection. Special reference is made to the 1979 Food Act, since it provides both specific requirements regarding food and for the regulation of food,⁵⁰ which is defined in Section 94 of the Draft Act as including any Act which subsequently replaces the 1979 Food Act.

Section 92. All persons who import, harvest, sell, handle, store, transport, export, or process aquatic resources or aquatic resource products should ensure that the aquatic resources and aquatic resource products comply with all consumer health and food safety laws, regulations and notifications.

Section 93. For the purposes of this Chapter, “consumer health and food safety laws, regulations and notifications” means all acts, including this Act and the Food Act, and all regulations and notifications issued under this Act, the Food Act, or other acts which deal with or establish requirements for quality and standards for food, packaging, labeling and consumer health protection.

Section 94. For the purposes of this Chapter, “Food Act” means the Food Act, B.E. 2522 or any act which replaces or repeals the Food Act, B.E. 2522.

50. The Food Act has prohibitions on the production and import of impure food, adulterated food and substandard food (Sections 25-29), licence requirements for those producing or importing food (Sections 14 and 15), and product licences for controlled food (Section 31). Generally, the Food Act classifies food as specifically-controlled food (as of 1995, 39 types of food fit this category), standardized food (as of 1995, 9 types of food fit this category) and general food, each having its own requirements regarding hygiene, safety, quality and labelling. See generally: Government of Thailand, Food and Drug Administration of Thailand (1995).

21.3 Regulations and Notifications on Standards for Fish and Fish Products

As has been noted above, the 1979 Food Act directly provides for the creation of quality and standards for all food, packaging, labelling and other matters related to consumer protection. However, fish and fisheries products have received little attention thus far under the Food Act.

Section 95, paragraph one, of the Draft Act allows for regulations and notifications to be issued respecting all issues that relate to quality and health standards regarding fish, fish products, processing, storing, handling, etc and the inspection of fish and facilities to monitor and test that the standards are being met. What is critical respecting possible regulations and notifications under Section 95 arises in Section 95, paragraph two. Pursuant to paragraph two, regulations and notifications can only be issued under Section 95 following consultation with “the Minister, departments and agencies with responsibilities under the Food Act” and other relevant Ministries. Thus, cooperation is necessary between the Department of Fisheries, the Health Ministry and the Food and Drug Administration in order for regulations and notifications to be issued under Section 95.

Section 95. paragraph two.

Regulations and notifications under paragraph one shall only be issued following consultation between the Department of Fisheries and the Minister, departments and agencies with responsibilities under the Food Act and other Ministries and departments that have an interest.

The regulations and notifications that can be issued under Section 95, paragraph one, can deal with:

- standards that must be met by the fish or the fish product (product standards);
- processes for verification and monitoring (QMPs, HAACP, ISO);
- standards for the manner in which fish and fish products must be handled, stored, processed, etc (handling and processing standards);
- standards for the premises, vehicles and vessels where fish and fish products are kept, processed, or transported (premise or place standards);
- the appointment and authority for officials to carry out the goals of this Chapter including inspecting, testing and seizing fish and fish products (power of fisheries inspection officers); and
- any matter relating to the health, safety and quality of fish and fish products (general clause).

Section 95. The Minister may issue regulations and the Director-General may issue notifications relating to:

- (a) quality and health standards for aquatic resources and aquatic resource products;
- (b) quality management programmes (QMPs), hazard analysis and critical control point (HACCP), ISO and processes intended to accomplish and verify quality and health standards for aquatic resources and aquatic resource products;
- (c) conditions, criteria, processes and standards applicable to the importing, sale, handling, storing, transporting, exporting or processing of aquatic resources and aquatic resource products;
- (d) conditions, criteria, processes and standards applicable to premises, vehicles, or vessels where aquatic resources or aquatic resource products are sold, stored, transported, or processed;
- (e) the appointment, authority and power of competent officials to carrying out the goals of this Chapter including the authority and power to inspect, obtain samples, seize and take action respecting aquatic resources, aquatic resource products and premises; and
- (f) any matter respecting the health, safety and quality of aquatic resources and aquatic resource products.

Where regulations and notifications are issued under Section 95, paragraph one, Sections 96 and 97 provide for specific prohibitions respecting the breach of standards set in the regulations and notifications. Section 95 deals with a person who imports, sells, stores, exports or processes fish or fish products (the product itself) which do not comply with the health and quality standards set in regulations and notifications issued under Section 95, paragraph one. Section 97 deals with a person who owns, operates or controls a building, vehicle or vessel (premise) which does not comply with the health and quality standards set in the regulations and notifications issued under Section 95, paragraph one.

Section 96. A person is prohibited from importing, harvesting, selling, making available for sale, handling, storing, transporting, exporting or processing aquatic resources or aquatic resource products which do not comply with regulations and notifications issued pursuant to Section 95.

Section 97. A person is prohibited from controlling, operating, facilitating, or supervising a premise, vehicle, or vessel which does not comply with regulations and notifications issued pursuant to Section 95.

Section 96 follows Section 25 of the Food Act where it deals with adulterated and substandard food. There is no provision in the Food Act equivalent to Section 97 which creates a prohibition on a person owning, operating or having a premise which causes or contributes to a health and quality issue. Such a provision, however, is deemed to be important.

The penalty provision for Sections 96 and 97 is Section 133.

Section 133. Whoever violates Sections 96, 97 or 98 shall be punished with a fine not exceeding _____ baht or with imprisonment not exceeding _____ or both.

Where a breach of Section 96 has occurred, the fish and fish product in question are to be forfeited pursuant to Section 139. Where a breach of Section 97 has occurred, the premises involved in the commission of the offence may be forfeited by the Court pursuant to Section 141.

Section 139. Aquatic resources, aquatic resource products, and the proceeds from sale of aquatic resources and aquatic resource products undertaken pursuant to Section 109, acquired through or involved in the commission of an offence of Sections 54, 57, 60, 63, 69, 71, 72, 90, 96 or 98 shall be forfeited by the Court.

Section 141. A premise, vehicle or vessel involved in the commission of an offence of Section 97 and any bond or security posted pursuant to Section 110 may be forfeited by the Court.

21.4 The Fisheries Export Permit

As has already been noted, the Department of Fisheries, Division of Fishery Inspection and Quality Control, is already involved in issuing certificates respecting the quality and safety of fish and fish products exported from Thailand where the receiving nation requires the exporting state to issue such a certificate. The Draft Act seeks to put this practice on a firmer legislative foundation by creating the fisheries export permit that can be issued for fish and fish products exported from Thailand.

Once it was decided to include a fisheries export permit in the Draft Act, the choice that had to be made was whether all exported product required a fisheries export permit, except where regulations and notifications indicated to the contrary, or whether only that product identified in notifications and regulations needed a fisheries export permit. The fisheries export permit would be more effective if it applied to all exports unless exceptions existed. Such a requirement would increase the international credibility of Thailand's fish and fish products. However, the Draft Act follows the current practice of only specifically

identified exports requiring a fisheries export permit, thus keeping costs and restraint on trade to a minimum, although creating a risk to the reputation and external marketing of Thai fish and fish products.

Section 98 creates the prohibition for exporting or, more importantly, for attempting to export without a valid fisheries export permit.

Section 98. It is prohibited for a person to export or attempt to export aquatic resources or aquatic resource products for which a fisheries export permit is necessary unless that person has a valid fisheries export permit.

The requirement is for a valid fisheries export permit, which means that none of the situations listed in Section 26 (see above, *Final Report* part 13.4) have occurred. Moreover, the requirement for a fisheries export permit attaches to the item being exported - either aquatic resources (defined in Section 10 (6)) or aquatic resource products (defined in Section 10 (7)).

Section 10.

...
(6) "Aquatic resource" means animals that inhabit or during part of their life-cycle inhabit marine or fresh waters including fish, shrimps, crabs, mollusks, tortoises, turtles, snapping turtles, crocodiles, marine mammals, sea cucumbers, sponges, coral, marine algae and water plants, seaweed and, where relevant, the eggs of the listed aquatic resource;

(7) "Aquatic resource product" means both an aquatic resource and any good, item or substance made from or with an aquatic resource that is intended for human or animal consumption;

The penalty provision is Section 133 and, where there has been a violation of Section 98, the resources and products in question are to be forfeited pursuant to Section 139.

Section 133. Whoever violates Sections 96, 97 or 98 shall be punished with a fine not exceeding _____ baht or with imprisonment not exceeding _____ or both.

Section 139. Aquatic resources, aquatic resource products, and the proceeds from sale of aquatic resources and aquatic resource products undertaken pursuant to Section 109, acquired through or involved in the commission of an offence of Sections 54, 57, 60, 63, 69, 71, 72, 90, 96 or 98 shall be forfeited by the Court.

The issue of importance is not that a fisheries export permit is to be required by the Draft Act, rather it is when is a fisheries export permit necessary and what conditions must be met before a fisheries export permit will be issued.

Section 99, paragraphs (a) and (b), provide that by regulation and notification either specific fish and fish products being exported can be identified as requiring a fisheries export permit or fish and fish products exported to specific destinations can be identified as requiring a fisheries export permit.

Section 99. In addition to regulations and notifications that may be made respecting a fisheries export permit under Section 24, the Minister by regulation and the Director-General by notification may establish:

- (a) for which aquatic resources and aquatic resource products a fisheries export permit is necessary;
- (b) for which export destinations a fisheries export permit is necessary;

When a fish export permit is necessary, then it is necessary to look to Section 100 to determine when a fisheries export permit will be issued.

Section 10.

...
(14) "Fisheries export permit" means a fisheries export permit issued under Section 100;

Section 100. A competent official with the authority to grant a fisheries export permit shall not issue a fisheries export permit unless:

Again, the appropriate competent official is not to issue a fisheries export permit under Section 100 unless certain conditions are met by the person requesting the fisheries export permit and by the fish and fisheries product for which the fisheries export permit is intended. The wording is in the negative - “a competent official ... shall not issue a fisheries export permit unless” - in order to emphasize that the person seeking the permit is under the obligation to meet the requirements.

While Section 100 provides when a fisheries export permit will be issued, Section 24 (see above, *Final Report* part 13.2) requires regulations and notifications to be issued to determine who is the competent official with the authority to issue a fisheries export permit, the form that must be filled in, the conditions that must be met, the fee that must be paid, the time period for which the permit is valid, and other matters.

In addition to these requirements, Section 99 allows for regulations and notifications respecting specific matters relating to the issuance of a fisheries export permit.

Section 99. In addition to regulations and notifications that may be made respecting a fisheries export permit under Section 24, the Minister by regulation and the Director-General by notification may establish:

...

- (c) the conditions that must exist and the criteria that must be met by an aquatic resource and aquatic resource product respecting the quality, health, safety, labelling, packaging, and product standards before a fisheries export permit will be issued; and

Paragraph (c) provides that regulations and notifications may be issued establishing the quality, health, safety and other standards that the fish or fish products must meet in order to obtain a fisheries export permit. The types of issues to be covered by these regulations and notifications would be the same ones detailed in Section 95. The regulations and notifications could be crafted to meet the specific needs of particular export destinations.

Section 99, paragraph (d), is a potentially controversial provision. By regulation or notification it could be established that as a condition of obtaining a fisheries export permit, the fish in question must be shown to have been “harvested in a manner consistent with sustainable practices and with this Act”. It can be expected that in the future export markets are going to require that the exporting state must show that the fish and fish products being exported were caught in an environmentally-safe manner. While Thailand was successful at the WTO in having a U.S. measure along these lines declared to be inconsistent with the rules of the WTO (the Turtle/Shrimp decisions), the future is one of increasingly seeing such measures (see above, *Final Report* part 6.0). Section 99, paragraph (d), merely recognizes this future possibility.

Section 99. In addition to regulations and notifications that may be made respecting a fisheries export permit under Section 24, the Minister by regulation and the Director-General by notification may establish:

...

- (d) the conditions that must exist and the criteria that must be met by the person requesting the fisheries export permit respecting whether the aquatic resource to be exported was harvested in a manner consistent with sustainable practices and with this Act before a fisheries export permit will be issued.

More controversial still is the wording in Section 99, paragraph (d), that the person requesting the fisheries export permit must show the fish in question were harvested in a manner consistent “with this Act”. The burden on showing that fish were caught legally is on the person with the access to the information. If a regulation or notification implemented this wording, it would reduce the possibility of illegally harvested fish (fish harvested in contravention of the Draft Act) being exported. In short, *the requirement would help to*

remove the market for illegally caught fish and improve the potential of compliance with the Draft Act. While it is frequently questioned how can a person show that a fish was caught legally, it must be noted that for many species (for example, tuna), it is already required that it be shown where the tuna was caught (certificate-of-origin). A similar requirement exists for shellfish where the safety of the product depends on knowing that the shellfish came from an uncontaminated site.

Section 100 requires the competent official with the authority to grant a fisheries export permit to look at all the above where they are set out in regulations and notifications. Summarizing the conditions that must be met before a fisheries export permit will be issued under Section 100:

- the person must be the owner or the named exporter of the product;
- the forms must be filled in and the information provided (as required by regulation and notification under Section 24);
- the fish or fisheries product for which the permit is intended must meet the relevant quality, health, safety, labelling, packaging, and product standards (where established by regulation and notification under Section 99, paragraph (c))
- the fish in question must have been harvested consistent with sustainable practices and legally under this Act (where established by regulation and notification under Section 99, paragraph (c));
- the person requesting the fisheries export permit and the fish and fish products to which the permit applies meets all the conditions established by this Act pursuant to Sections 24 and 99;
- the person requesting the fisheries export permit must be a fisherman in good standing and the fish for which the fisheries export permit is required must have been harvested by a fisherman in good standing (as determined by Sections 27-31);
- any fee payable has been paid; and
- the competent official must believe the person understands the rules and conditions regarding the fisheries export permit.

Section 100. A competent official with the authority to grant a fisheries export permit shall not issue a fisheries export permit unless:

- (a) the person requesting the fisheries export permit is the owner or the named exporter of the aquatic resource or aquatic resource product for which the fisheries export permit is intended;
- (b) the person requesting the fisheries export permit has filled in the forms and provided the information as required by this Act;
- (c) the competent official believes that the aquatic resource or aquatic resource product for which the fisheries export permit is requested has met all the conditions and criteria respecting quality, health, safety, labelling, packaging, and product standards as required by this Act;
- (d) the competent official believes that the aquatic resource and aquatic resource product for which the fisheries export permit is requested has met all the conditions and criteria respecting whether the aquatic resource was harvested consistent with sustainable practices and with this Act as required by this Act;
- (e) the person requesting the fisheries export permit has satisfied and met all the conditions, requirements and criteria established under this Act for the issuance of a fisheries export permit;
- (f) the person requesting the fisheries export permit and the person who harvested the fish for which the fisheries export permit is requested are fisherman in good standing;
- (g) any fee payable has been paid; and
- (h) the person requesting the fisheries export permit has demonstrated an understanding of the conditions of the fisheries export permit.

Note should be made of Section 100, paragraph (f), which requires a person requesting a fisheries export permit to be a fisherman in good standing and that the person who harvested the fish was also a fisherman in good standing. This refers back to Sections 27 to 31 (sub-

chapter IV of Chapter Four, see above, *Final Report* part 13.5). The inclusion of this requirement should have the effect of removing the export market from those who have violated the Draft Act. It is a controversial provision. Section 100, paragraph (f), will require the exporter to have knowledge of who caught the fish and be able to document that the fish was harvested by a fisherman in good standing. This would be an important assist in obtaining compliance with the Draft Act.

21.5 Licences and Permits for Post-Harvest Activities

The 1947 Fisheries Act in Section 25 provided that notifications could be issued requiring those involved “in trading in aquatic animals, fishery products” to be registered and seek permission to engage in such an occupation. In some national fisheries laws, fish processors, handlers, sellers, brokers, transporters and others handling or dealing with fish and fish products are required to be either registered or have a licence for such activities. Particularly as regards premises where processing of fish takes place, licences or permits for that activity can be helpful in ensuring that the premises and the fish within them meet health and quality standards. While the Draft Act does not directly require registration, licences or permits for such activities, Section 15, paragraph (n), provides that regulations and notifications may be issued to require registration, licences or permits for these types of activities.

Section 15. The Minister may issue regulations and the Director-General, and, respecting the Inland Fishery Zone and the Coastal Marine Fishery Zone, with the approval of the Minister, the provincial governor within his jurisdiction, may issue notifications relating to any matter that arises under this Act including:

...
(n) the requirement that persons engaged in and premises where aquatic resources are processed, transported, stored, handled, sold or transhipped must be registered with the Department of Fisheries in a required manner, time and place and must have a licence or permit issued by a competent official and the criteria that must be met before such a licence or permit will be issued and the conditions that can be placed on the licence or permit;

22.0 FISH DISEASE, EXOTIC SPECIES, BIOTECHNOLOGY AND GENETICALLY MODIFIED ORGANISMS

Fish disease, exotic species (which means fish species not native to Thai waters), biotechnology and genetically modified organisms (GMOs) all raise concerns about the health and safety of fish for consumers and other fish species. The issues that arise or may arise regarding GMOs and biotechnology are not yet fully understood. The Draft Act contains several provisions which allow for the issuance of regulations and notifications respecting these matters so that they can be controlled and regulated in the future. Moreover, pursuant to Section 43 (which has been discussed in the context of aquaculture, see above, *Final Report* part 19.3), there is a prohibition on persons importing or possessing diseased or exotic fish which does or may create a health hazard.

22.1 Prohibition on Importing or Possessing Diseased or Exotic Fish Which Pose a Risk to Health

Section 43 specifically prohibits a person from importing, possessing, or engaging in aquaculture involving a species which because of “disease, genetic structure or not being native to Thai waters” creates a health hazard to humans or other aquatic resources.

Section 43. It is prohibited for a person to import, sell, own, control, possess, or engage in aquaculture respecting an aquatic resource which, because of disease, genetic structure or its not being native to Thai waters, does or may create a hazard to the health of humans or other aquatic resources or to the environment unless the person has in their possession a written permission for such activity given to that person by the Director-General.

Given the special nature of the activity being prohibited in Section 43 and the risks involved, Section 102, paragraph (g) provides for special powers for an authorized fisheries officer.

Section 102. An authorized fisheries officer may:

...
(g) seize and destroy aquatic resources which he has reason to believe have been, are or may be involved in an offence of Section 43;

Related to Section 102, paragraph (g) is the special power given an authorized fisheries officer in Section 102, paragraph (h).

Section 102. An authorized fisheries officer may:

...
(h) order and take appropriate action to ensure the immediate cessation of aquaculture activities where he has reason to believe an offence under this Act is, has or may be committed and he believes the cessation of aquaculture activities is necessary to protect the health of humans, aquatic resources or the environment;

Section 102, paragraph (h) is not tied directly to Section 43, thus respecting aquaculture an authorized fisheries officer can close down an aquaculture facility or aquaculture activities whenever the Draft Act is being breached and closing down the aquaculture activity is “necessary” to protect the health of humans, fish or the environment. This power is deemed necessary to ensure the immediate closure of aquaculture activities and facilities that are both abusive and dangerous (see above, *Final Report* part 19.3 and see below, *Final Report* part 23.3.2).

The penalty provision for Section 43 is Section 126 and it includes the requirement that the offender become a fisherman not in good standing for a minimum period. In addition, Section 137 requires the forfeiture of everything involved in the offence.

Section 126. Whoever violates Section 43 shall be punished by a fine not exceeding ____ baht or with imprisonment not exceeding ____ or both and may be a fisherman not in good standing for a maximum of ____ months.

Section 137. Fishing vessels, fishing gear, aquatic resources, aquatic resource products, the proceeds from sale of aquatic resources and aquatic resource products undertaken pursuant to Section 109, any bond or security posted pursuant to Section 110, and other things used in or acquired through the commission of an offence of Sections 40, 41, 43, 58, 59, 79, or 89 shall be forfeited by the Court.

22.2 Authority to Issue Regulations Relating to Fish Diseases, Biotechnology and GMOs

Both Sections 15 and 83 allow for the issuance of regulations and notifications respecting fish diseases, biotechnology and GMOs.

Section 15, paragraph (t), deals with fish disease and it is broadly worded to allow for regulations and notifications respecting the control and prevention of fish diseases and diseases that travel through fish and effect humans, plants or animals.

Section 15. The Minister may issue regulations and the Director-General, and, respecting the Inland Fishery Zone and the Coastal Marine Fishery Zone, with the approval of the Minister, the provincial governor within his jurisdiction, may issue notifications relating to any matter that arises under this Act including:

...
(t) research, identification, control and prevention of diseases that effect aquatic resources, or that through aquatic resources, effect humans, plants or animals;

Respecting aquaculture, Section 83, paragraph (i), provides for regulations and notifications for the prevention, elimination and control of diseases that affect fish involved in aquaculture.

Section 83. The Minister may issue regulations and the Director-General and, with the approval of the Minister, the provincial governor within his jurisdiction, may issue notifications respecting any matter that arises relating to aquaculture, aquaculture facilities, and the activity of aquaculture, including:

...
(i) measures to prevent, eliminate or control diseases that may affect aquatic resources;

Respecting biotechnology and GMOs, both Sections 15 and 83 provide for the issuance of regulations and notifications.

Section 15. The Minister may issue regulations and the Director-General, and, respecting the Inland Fishery Zone and the Coastal Marine Fishery Zone, with the approval of the Minister, the provincial governor within his jurisdiction, may issue notifications relating to any matter that arises under this Act including:

...
(s) biotechnology and genetically modified organisms as they relate to aquatic resources and aquatic resource products;

Section 83. The Minister may issue regulations and the Director-General and, with the approval of the Minister, the provincial governor within his jurisdiction, may issue notifications respecting any matter that arises relating to aquaculture, aquaculture facilities, and the activity of aquaculture, including:

...
(j) the use, monitoring and testing of chemicals, antibiotics, biotechnology and genetically modified organisms;

23.0 MONITORING, CONTROL AND SURVEILLANCE

23.1 The Role of Enforcement

The primary role of enforcement is to achieve compliance with legislation or, put another way, enforcement is designed to deter non-compliance. While the relationship between enforcement and compliance is complex, there are at least three elements of enforcement that play a role in decision-making by fishermen respecting compliance. These three elements are:

- (i) the probability of detection, in other words, how likely is it that a non-complier will be detected;
- (ii) once detected, the probability of being penalized for non-compliance, in other words, how likely is it that a non-complier will be penalized; and
- (iii) the amount and type of the penalty that will be assessed a non-complier, in other words, even if detected and a penalty is assessed, does the penalty (fine, non-renewal of a permit, etc.) create a sufficient incentive to modify behaviour.

The probability of detection of non-compliers can be enhanced by legislation which provides to those responsible for enforcement broad powers to visit and search vessels, places of business, and persons suspected of having breached the relevant legislation. Moreover,

those responsible for enforcement should have broad powers of seizure and arrest where, following inspection, it appears that relevant legislative provisions have been breached.

Chapter Fourteen, Monitoring, Control and Surveillance, deals with the authority of those responsible for enforcement and the manner in which they carry out their tasks. Penalties are dealt with in Chapter Fifteen (see below, *Final Report* part 25.0).

23.2 Authorized Fisheries Officers

Under Thai law and practice numerous officials (for example, the Police and the Navy) have the responsibility to enforce all the laws of Thailand. However, respecting fisheries matters, under the 1947 Fisheries Act as it has been applied by the Department of Fisheries, enforcement activities have been undertaken primarily by the fishery patrol divisions (see above, *Final Report* part 5.2.2).

The Draft Fisheries Act directs that the monitoring, control and enforcement authority which arises directly from the Draft Act is to be exercised by authorized fisheries officers (defined in Section 10 (8)).

Section 10.

...
(8) “Authorized fisheries officer” means a competent official who is appointed by the Minister pursuant to Section 101 to carry out the responsibilities as set out in Chapter Fourteen of this Act;

Authorized fisheries officers, as separate from competent officials, would be an important, though small change from the existing enforcement practices. It is worth noting that the nature of enforcement activities is the interference by officials with the operations and activities of private individuals. Individuals who are properly trained, have been given a clear mandate by law to undertake such interference with private persons (this is accomplished in the Draft Act primarily through Section 102), and have recognized limits on their authority should be better able to both better carry out enforcement activities and gain the respect of those with whom they must deal.

The Draft Act seek to meet these factors in several ways. First, Section 101 of the Draft Act provides that the appointment of authorized fisheries officers is to be done only by the Minister and that only those persons who are trained as authorized fisheries officers or have appropriate expertise can be appointed as authorized fisheries officers.

Section 101. The Minister by regulation or notification shall appoint persons as authorized fisheries officers for the purposes of carrying out the responsibilities assigned in this Chapter.

Only those persons who have received training or have a demonstrated expertise respecting fisheries monitoring, control and surveillance procedures and practices and the contents of this Act may be appointed as an authorized fisheries officer.

At the time of appointment, an authorized fisheries officer shall be issued with appropriate identification documents, badges or insignia which clearly indicate that the person is an authorized fisheries officer.

Second, the Draft Act in Section 107 sets out a code of conduct for authorized fisheries officers in the carrying out of their duties and responsibilities.

Section 107. In the exercise of any authority granted under Section 102, an authorized fisheries officer shall:

- (a) clearly identify himself as an authorized fisheries officer;
- (b) take only those actions which are justified by the situation and which are consistent with the authority granted by Section 102;
- (c) act respectfully and with courtesy;
- (d) use only the amount of force called for by the situation;
- (e) take note of and, where possible, record all facts, evidence and conditions;

- (f) comply with any policies, practices or guidelines that have been adopted respecting the exercise of authority under Section 102;
- (g) cooperate with other law enforcement agencies; and
- (h) not abuse the authority granted under Section 102.

Third, Section 106 envisions that there will be policies, practices and guidelines for authorized fisheries officers in the carrying out of their authority under Section 102. Paragraph one, indicates that any such policies, practices or guidelines are to be developed in consultation with those who may be affected. Paragraph three notes that policies, practices or guidelines that deal with enforcement activities against fishing vessels should be consistent with internationally-accepted practices. Finally, paragraph two, provides that any policies, practices or guidelines, to the extent that it is feasible, should be communicated to all persons and communities.

Section 106. Any policies, practices or guidelines respecting the exercise of the authority granted to an authorized fisheries officer under Section 102 shall only be adopted and implemented following consultation, to the extent that is reasonable and feasible, with all persons and communities that may be affected by them.

Any policies, practices or guidelines adopted and implemented pursuant to paragraph one shall, to the extent that is reasonable and feasible, be communicated to all persons and communities that may be affected by them.

Policies, practices or guidelines adopted pursuant to paragraph one regarding fishing vessels in the Coastal Marine Fishery Zone and the Commercial Marine Fishery Zone shall, to the extent that it is reasonable and feasible, be consistent with internationally-accepted practices regarding the boarding, inspecting, seizing and arresting of fishing vessels at sea.

Regulations and notifications can be issued to implement procedures and processes for the exercise of authority by authorized fisheries officers.

Section 116. In addition to regulations and notifications that may be made under Sections 15 and 83 respecting matters arising under this Chapter, the Minister may issue regulations and the Director-General and, with the approval of the Minister, the provincial governor within his jurisdiction, may issue notifications relating to:

- ...
(b) the procedures and processes that authorized fisheries officers are to follow respecting the exercise of authority granted under Section 102.

23.3 Authority of Authorized Fisheries Officers: Section 102

As noted above, a clear mandate for the exercise of authority by an authorized fisheries officer is an important part of establishing the proper balance between the need to assure compliance with and the enforcement of the Draft Act and the right of a person to be free from government interference.

23.3.1 Authority to Monitor and Investigate

Section 102, paragraphs (a) to (e), provide the authority for an authorized fisheries officer to monitor and investigate activities regulated by the Draft Act.

Section 102. An authorized fisheries officer may:

- (a) request and require the production of any information and documents related to any matter that arises under this Act from any person, including the owner, master or crew of a fishing vessel, and the owner or person in authority of an aquaculture facility, fishing gear, premise, or vehicle;

Paragraph (a) provides a broad authority for an authorized fisheries officer to request and require information and documents from anyone who may be involved with an activity

regulated by the Draft Act. Documents have been defined in Section 10 (13) to include electronically stored records and information.

Section 10.

...
(13) "Documents" includes any electronically stored record or information;

Section 102, paragraph (b), provides a broad authority to an authorized fisheries officer to stop, board, enter, search and inspect any fishing vessel in Thai waters and any Thai flag fishing vessel.

Section 102. An authorized fisheries officer may:

...
(b) stop, board, enter, search, inspect and stay on board any fishing vessel in Thai waters and any Thai flag fishing vessel outside those waters;

Respecting the stopping, inspecting and searching of persons, the authority of an authorized fisheries officer is more restricted. An authorized fisheries officer can only interfere with a person if he "has reason to believe" that the person is, has or is about to engage in harvesting, an activity related to harvesting or an activity which interferes with fisheries habitat. The "reason to believe" qualification is consistent with the balance between enforcement and the liberty of the individual.

Section 102. An authorized fisheries officer may:

...
(c) stop, search, and inspect any person which he has reason to believe is, has been or is intending to:
(i) harvest aquatic resources,
(ii) engage in an activity related to the harvesting of aquatic resources, or
(iii) destroy, disturb, interfere with or alter the habitat of an aquatic resource;

However, an authorized fisheries officer can question any person who may provide information which may be required.

Section 102. An authorized fisheries officer may:

...
(d) question any person who may be capable of providing any information that may be required for an inspection or investigation;

Finally, an authorized fisheries officer may search, enter and inspect any aquaculture facility, premise (defined in Section 10 (31)) or vehicle where he has reason to believe (a qualification consistent with non-interference with privately-owned facilities) an offence is, has or may be committed or evidence of an offence exists.

Section 102. An authorized fisheries officer may:

...
(e) search, enter, and inspect any aquaculture facility, premise, dwelling house, or vehicle where he has reason to believe an offence against this Act is, has or may be committed or where he has reason to believe that evidence of an offence against this Act may be found;

Premise is broadly defined to include both buildings and other places where business, storage, packaging or processing of fish takes place.

Section 10.

...

(31) “Premise” means any building or place where business, storage, packaging or processing related to or involving aquatic resources takes place;

23.3.2 Authority to Seize

Section 102, paragraph (f), deals with the authority of an authorized fisheries officer to seize fishing vessels, gear, aquatic resources and other items involved in an offence.

Section 102. An authorized fisheries officer may:

...
(f) seize, take, detain, remove and secure any aquatic resources, aquatic resource products, fishing gear, fishing vessels, vehicles, explosives, substances potentially dangerous to aquatic resources, documents, or equipment that he has reason to believe have been taken, used, is being used or is intended to be used in or in relation to the commission of an offence against this Act or he has reason to believe provides evidence of an offence against this Act;

While the authority provided in paragraph (f) is quite broad, it is qualified in that an authorized fisheries officer must have “reason to believe” that the item is, was or may be involved in the commission of an offence under the Draft Act or which he has reason to believe provides evidence of an offence. Again, this qualification is consistent with the balance that needs to be achieved respecting non-interference with private property.

Section 102, paragraph (g), provides to an authorized fisheries officer an extraordinary power of seizure and the authority to destroy aquatic resources where they resources are involved in an offence under Section 43.

Section 102. An authorized fisheries officer may:

...
(g) seize and destroy aquatic resources which he has reason to believe have been, are or may be involved in an offence of Section 43;

Section 43 deals with aquatic resources which, because of disease, genetic structure or exotic nature, may create a health hazard to humans, other aquatic resource or the environment (see above, *Final Report* part 22.1). In such a case, it is justified for an authorized fisheries officer to have special powers.

Section 43. It is prohibited for a person to import, sell, own, control, possess, or engage in aquaculture respecting an aquatic resource which, because of disease, genetic structure or its not being native to Thai waters, does or may create a hazard to the health of humans or other aquatic resources or to the environment unless the person has in their possession a written permission for such activity given to that person by the Director-General.

Section 102, paragraph (h), deals with aquaculture and the special authority of an authorized fisheries officer to order and take action to close an aquaculture facility where it is necessary to protect the health of humans, aquatic resource or the environment. This provision has been discussed in the aquaculture part of the Final Report (see above, *Final Report* part 19.3).

Section 102. An authorized fisheries officer may:

...
(h) order and take appropriate action to ensure the immediate cessation of aquaculture activities where he has reason to believe an offence under this Act is, has or may be committed and he believes the cessation of aquaculture activities is necessary to protect the health of humans, aquatic resources or the environment;

Because of the special nature of this authority respecting aquaculture, a safeguard on its use has been included in Section 111. The effect of Section 111 is that the order or cessation of aquacultural activities is to be reviewed by the Director-General within ten days.

Section 111. Where an authorized fisheries officer has ordered or taken action to cease aquaculture activities pursuant to Section 102, the order or action shall be reviewed within 10 days by the Director-General who may:

- (a) continue the order or the action ceasing the aquaculture activity; or
- (b) order that the aquaculture activity can recommence.

23.3.3 Authority to Arrest and Detain

Section 102, paragraph (j), provides the authority for an authorized fisheries officer to detain and arrest persons.

Section 102. An authorized fisheries officer may:

- ...
 - (j) detain or arrest a person whom he has reason to believe has committed, is committing or is about to commit an offence against this Act;

The authority provided in paragraph (j) is qualified in that an authorized fisheries officer must have “reason to believe” that the person is, was or may be involved in the commission of an offence under the Draft Act. This qualification is consistent with the balance that needs to be achieved respecting non-interference with individuals.

Note should also be made of Section 102, paragraph (i), which deals with the capacity of an authorized fisheries officer to order vessels either to port or to points where inspection can take place.

Section 102. An authorized fisheries officer may:

- ...
 - (i) order the master of any fishing vessel to bring the vessel to a specified port or to a point at sea for inspection;

23.3.4 Authority to Record and Create Reports

It has already been noted in Section 107, paragraph (e), that an authorized fisheries officer is to take note of all facts, evidence and conditions. Section 102, paragraph (k) provides that an authorized fisheries officer may record the carrying out of any action permitted by Section 102.

Section 102. An authorized fisheries officer may:

- ...
 - (k) utilize audio or visual means to record and document the carrying out of any action permitted by this Section; and

An authorized fisheries officer also has the authority and the responsibility to prepare a dossier, file or written record relating to any action taken pursuant to Section 102. As will be noted below (see below, *Final Report* part 23.4), the dossier, file or written record created by an authorized fisheries officer becomes important when goods have been seized or a person arrested and prosecution is pursued.

Section 102. An authorized fisheries officer may:

...

- (l) prepare or create a file, dossier, and written record, which may include audio and visual information, related to any action allowed by this Section.

23.3.5 Application of Authority under Section 93 – Special Cases

Sections 103, 104 and 105 have been included in the Draft Act in order to deal with several special cases respecting the authority of an authorized fisheries officer under Section 102.

Section 103 directs that the authority of an authorized fisheries officer in respect of a designated community fishery area established under Section 51 can be modified or eliminated by a regulation or notification issued pursuant to Section 53 (e) (see above, *Final Report* part 16.0).

Section 103. The exercise of any authority granted to an authorized fisheries officer under Section 102 respecting a designated community fishery area shall take into account any regulation and notification issued pursuant to Section 53 (e).

Section 104 makes it clear that Thai flag fishing vessels cannot avoid the authority of an authorized fisheries officer because they are outside Thai waters or they had been operating outside Thai fishing waters but were not fishing or undertaking any other activity in Thai waters.

Section 104. An authorized fisheries officer may exercise the authority granted by Section 102 in respect to a Thai flag fishing vessel operating, or which has been operating, outside Thai waters.

Section 105 provides that an authorized fisheries officer can exercise the authority given under Section 102 in respect of all vessels, not only fishing vessels, located within a port or landing area in Thailand. Section 105 is the application of port state enforcement recognized in both international practice and international law. All vessels, whether they are Thai flag vessels or foreign flag vessels, are subject to Thai legal authority when they enter a port or landing area of Thailand. Section 105 ensures that authorized fisheries officers have the authority given them under Section 102 to deal with foreign vessels in port.

Section 105. An authorized fisheries officer may exercise the authority granted by Section 102 in respect of any vessel and all persons on board any vessel located within a port or landing area in Thailand.

23.4 Procedure Following Seizure and Arrest or Detention

Where an authorized fisheries officer has exercised his authority under Section 102 to arrest or detain a person, Section 108 directs that the person is to be delivered to the Police as soon as possible.

Section 108. A person arrested or detained by an authorized fisheries officer pursuant to Section 102 shall be delivered into the custody of the appropriate authority for receipt of complaints and evidence under the Criminal Procedure Code as soon as is reasonably possible.

Goods or items seized by an authorized fisheries officer are, according to Section 109, paragraph one, of the Draft Act, to be delivered to a competent official. A problem that has arisen under the 1947 Fisheries Act has been that fishing vessels and other seized items were delivered to the local police who frequently did not have the proper facilities for such items. Section 109 provides that items seized are to be under the control of competent officials of the Department of Fisheries. Thus, the Department of Fisheries will have to establish facilities and procedures for dealing with seized fishing vessels, gear and other items.

Section 109, paragraph two, provides that seized fish and fish products seized may be sold by the Director-General or, where the offender is a small-scale fisherman, by the Provincial Governor where the offence occurred, and the proceeds delivered into a secure bank account until the case is resolved.

Section 109. Subject to paragraph two, any item seized by an authorized fisheries officer pursuant to Section 102 shall be delivered into the custody of a competent official.

Aquatic resources or aquatic resource products seized pursuant to Section 102 may be sold by the Director-General or, where the person alleged to have violated this Act is a small-scale fisherman, by the Provincial Governor with jurisdiction where the alleged offence took place offence and the proceeds held in a secure Bank account until the final disposal of the case.

Section 110 provides that the Director-General or, in some cases the Provincial Governor, may order the release of any good or item seized by an authorized fisheries officer provided a bond or security has been posted. The amount of bond or security that is to be posted is to be an amount equivalent to the higher of the value of items seized or the maximum fine payable for the alleged offence.

Section 110. The Director-General or, where the person alleged to have violated this Act is a small-scale fisherman, the Provincial Governor with jurisdiction where the alleged offence took place may order the release of any item seized on receipt of a bond or other security of an amount equivalent to the greater of the value of the item seized or the maximum fine payable for the offence, and such bond or security shall be held in a secure Bank account until the final disposal of the case.

Under current practices, where an arrest or seizure takes respecting a fisheries law violation the determination of whether to proceed to prosecution rests primarily with the Police. Where the Police decide to prosecution, the documents and other information relevant to the incident are given to the Department of Public Prosecution who also have to decide whether to undertake the prosecution (see above, *Final Report* part 4.3.5). Section 112 of the Draft Act provides for a slight variation in this process.

As was noted above, an authorized fisheries officer is to create a record respecting any activity undertaken pursuant to Section 102 (see above, *Final Report* part 23.3.4). Where a seizure or arrest takes place, the records and documents relating to the seizure and arrest are, pursuant to Section 112, to be forward to “the appropriate prosecution authorities”. The appropriate prosecution authorities are defined in the Draft Act (Section 10 (1)) as being both the Police and the Department of Public Prosecution.

Section 10.

...

(1) “Appropriate prosecution authorities” means the Department of Public Prosecution and the appropriate authority for receipt of complaints and evidence under the Criminal Procedure Code;

Thus, pursuant to Section 112, both the Police and the Department of Public Prosecution are to receive the reports, records and relevant documents prepared by the authorized fisheries officer. The goal is to include the Department of Public Prosecution in the decision-making regarding whether to prosecute a person for an alleged violation of the Draft Act at an earlier stage.

Section 112. Where, pursuant to this Act, there has been a seizure of an item or an arrest of a person, a competent official or an authorized fisheries officer shall forward to the appropriate prosecution authorities any file, dossier or written record which relates to the seizure or arrest.

23.5 Equipment, Documents and Marking Requirements in Order to Facilitate Monitoring, Control and Surveillance

The task of an authorized fisheries officer in achieving effective monitoring, control and surveillance can be made easier where vessels (or persons) are required to have certain equipment (like transponders and radios), uniform markings, documents, and the like. Section 15, paragraphs (o), (p) and (q), allow for notifications and regulations to be issued regarding such items (see above, *Final Report* part 12.2.5). Many of the items noted in these paragraphs, such as logbooks, vessel identification markings, communications equipment and call-in requirements are standard requirements in most States.

Section 15.

...

- (o) the maintenance of logbooks on board fishing vessels in which shall be recorded the nature, time and position of all harvesting operations and the quantity of catch by species, including all aquatic resources caught but not landed or retained on board;
- (p) the size, location and specific identification markings or numbers that a fishing vessel or fishing gear must display;
- (q) the communications and safety equipment, including radios, transponders and similar devices, that a fishing vessel is required to have and the times, places, conditions and manner in which the master of a fishing vessel is to communicate with competent officials and safety equipment is to be checked;

Section 116, paragraph (a), provides for the issuance of regulations and notifications requiring persons (and vessels) subject to Draft Act to have other information, documents and communications equipment or to follow protocols or practices in order to facilitate compliance and enforcement.

Section 116. In addition to regulations and notifications that may be made under Sections 15 and 83 respecting matters arising under this Chapter, the Minister may issue regulations and the Director-General and, with the approval of the Minister, the provincial governor within his jurisdiction, may issue notifications relating to:

- (a) information, documents, protocols, communications equipment, observers, and related items that all persons engaged in activities subject to this Act must possess and follow in order to facilitate appropriate compliance with and enforcement of this Act; and

23.6 Observers

The use of observers - persons placed on board fishing vessels with the authority to watch the activities on board that fishing vessel - is a common approach to encourage fishermen to comply with national and international fisheries regulations.⁵¹ International agreements which establish management regimes for highly migratory, straddling or high seas fishing stocks, such as the Indian Ocean Tuna Treaty, increasingly involve the use of observers as part of a comprehensive approach to regulatory enforcement and compliance.

Observers have not been utilized on board Thai or foreign vessels harvesting marine resources in Thai waters. Thai flag fishing vessels operating outside Thai waters are increasingly being faced with the requirement to take observers on board.

Sections 117 and 118, borrowed and adapted from the fisheries law of Namibia, provide for the appointment of observers and the function of observers, as well as, allowing for the creation of an obligation for all holders of permits issued under the Draft Act to carry

51. One of the compromises which lead to a calming of the 1994 Canada-Spain confrontation over turbot in the Northeast Atlantic was that all Spanish fishing vessels operating in the area immediately outside Canada's 200 nautical mile fishing zone would allow observers on board.

observers on board and to give to them full access to all the activities taking place on the vessel.

Section 117. The Minister or Director General by notification may appoint a person to be a fishery observer and to perform the following functions:

- (a) to observe the harvesting, handling, processing and related activities of aquatic resources and to record data concerning such operations;
- (b) to collect and record biological information and all other information related to activities governed by this Act;
- (c) to collect samples of the aquatic resources harvested; and
- (d) to report the observations and information obtained pursuant to this Section.

Section 118. The Minister or Director-General may require a possessor of a fishing gear permit, an overseas fishing permit, or any licence, permit or written permission that may be provided for under this Act related to harvesting of aquatic of resources, to carry a fishery observer on board a fishing vessel and to allow the fishery observer full access to all parts of the vessel, to all harvested aquatic resources and to all documents necessary for the fishery observer to carry out the tasks assigned under Section 117.

23.7 Prohibitions on Interference with Competent Officials and Authorized Fisheries Officers

Sections 113, 114 and 115 create offences where:

- a person interferes with a competent official or authorized fisheries officer carrying out their assigned duties under the Draft Act (Section 113);
- a person refuses a request to supply information which may be requested by a competent official or authorized fisheries officer in the exercise of their duties (Section 114); or
- a person destroys or alters documents, gear or other items that may be evidence of an offence (Section 115).

Section 113. No person shall refuse, prohibit, prevent, or interfere with a competent official or an authorized fisheries officer exercising authority pursuant to this Act.

Section 114. No person shall refuse, deny, or prevent a request or requirement to produce information and documents made by a competent official or an authorized fisheries officer exercising authority pursuant to this Act.

Section 115. No person shall destroy, disfigure, hide or alter documents, fishing gear, aquatic resources or other items that may be evidence of a violation of a provision of this Act.

Interference with a competent official or an authorized fisheries officer carrying out their assigned duty is a serious offence. Thus, the penalty for this offence should be severe.

Section 134. Whoever violates Section 113 shall be punished with a fine not exceeding _____ baht or with imprisonment not exceeding _____ or both and shall be a fisherman not in good standing for a minimum of _____ months and a maximum of _____ years.

The penalty provisions for Sections 114 and 115 are in Sections 121 and 129.

Section 121. Whoever violates Sections 37 paragraph one or 114 shall be punished with a fine not exceeding _____ baht or with imprisonment not exceeding _____ or both.

Section 129. Whoever violates Section 115 shall be punished with a fine not exceeding _____ baht or with imprisonment not exceeding _____ or both and may be a fisherman not in good standing for a maximum of _____ months.

24.0 COURTS: JURISDICTION AND EVIDENCE

The appropriate Court in Thailand with jurisdiction over fishery matters is the Provincial Court of the Province where the alleged offence took place. The only uncertainty that arises is where a fisheries offence allegedly takes place in waters that are outside the jurisdiction of a Provincial Court.⁵² To resolve this uncertainty, Section 119 has been included in the Draft Act. It provides that any Provincial Court has jurisdiction respecting an alleged offence of the Draft Act that takes place in Thai waters or outside Thai waters that is outside the jurisdiction of a specific Provincial Court. Inelegantly worded, the idea is that, if an offence does not take place within the specific jurisdiction of a Provincial Court, then any Provincial Court can be seized with jurisdiction.

Section 119. Any Provincial Court in Thailand shall have jurisdiction regarding an offence under this Act where the offence takes place in Thai waters or beyond Thai waters outside the jurisdiction of specific Provincial Courts.

Increasingly, national fisheries laws give directions to the courts regarding evidentiary matters. Put simply, it is unrealistic to expect that a fishing vessel which has been seized can be brought into a courtroom as evidence. Fishing gear poses a similar problem. In the straight-forward case of a fishing vessel allegedly harvesting resources in a restricted area, there can be evidentiary issues respecting the accuracy of charts, satellite imagery (where used), radar readings, and, more generally, proving that a fishing vessel was sighted in a restricted in a restricted area.

The Draft Act has included only a single provision respecting evidence before a Court preferring to leave the many issues of evidence to the Court itself and the evidentiary rules currently in place regarding criminal and quasi-criminal matters. The single provision is Section 120 which provides that where it is not easy to bring physical evidence before a Court, such as a vessel, gear or the resources allegedly illegally harvested, then a written report, photographs and other documents can be submitted and are to be accepted by the Court as evidence.

Section 120. Any aquatic resources, fishing gear, fishing vessels and other articles which are not easy to produce or bring before a Court are not required to be produced or brought before the Court as exhibits; instead, a written report, photographs or other supporting documents relating to these articles and how the articles have been administered may be submitted to and accepted by the Court.

It is also not uncommon in many national fisheries laws to use “reverse onus” provisions. For example, where it is alleged that a fisherman has been found in a restricted area (supported by photos, radar readings, or satellite imagery), then it is up to the fisherman to disprove the allegation. Thai flag fishing vessels have confronted national laws in other States that direct that if a fishing vessel is in the 200 nautical mile zone of the foreign State, the fishing vessel is presumed to be fishing unless the vessel, its owner or master can show that it is not fishing.⁵³ Respecting offences, there are no provisions of the Draft Act that

52. This uncertainty arises because it is unclear what is the seaward limit of a Province. See above, *Final Report* part 10.2, footnote 36.

53. The usual manner for meeting this burden is to inform the officials of the foreign State of entry and departure including details about the fish on board, gear, destination and route to be taken. Also, it is common that all gear must be stowed in such a way as to not be available for use while a fishing vessel is passing through national waters. If not so stowed, the fishing vessel is presumed to have been harvesting, unless the vessel can show to the contrary. The Final Report passes no judgement on the international legality of such national measures.

directly utilize “reverse onus”, although Section 48 (see above, *Final Report* part 20.0) is a provision where the prohibition is very much like a reverse onus provision. Section 33 of the 1997 Thai Constitution states that a person in a criminal case, which would include an offence under the Draft Fisheries Act, “shall be presumed innocent”. While no such right is absolute and a case can be made for the use of “reverse onus” offences as an effective means to protect the environment, another key Constitutional principle, respecting the Draft Fisheries Act it was decided not to include offence provisions which run counter to the Constitutional principle set out in Section 33.

25.0 PENALTIES

25.1 Introduction

With few exceptions, the amount of fines and the penalty provisions of the 1947 Fisheries Act provide virtually no deterrence to non-compliers in 2000. Unrealistically high fines or penalties, while having a certain deterrence value, tend not to be applied by Courts or officials and thus the deterrence effect is lost. Fines and penalties that “fit the crime” are necessary. Beyond fines and penalties, incentives for compliance should also be considered. This is particularly important regarding permits. It appears to be a commonly held attitude that, if a permit is required, then the government department issuing the permit should provide an incentive for obtaining the permit - the threat of a penalty is not considered a sufficient incentive. To overcome this attitude, some creative thinking on incentives would be helpful.⁵⁴

The Draft Act utilizes four types of penalties. Fines, imprisonment, and forfeiture are all used in the 1947 Fisheries Act and are continued in the Draft Act. The new penalty in the Draft Act is that a violator can become a fisherman not in good standing and thus be deprived of the ability to be issued a licence, permit or written permission (see above, *Final Report* part 13.5.3). The Draft Act combines fine, imprisonment and designation as a fisherman not in good standing in one set of provisions and deals with the forfeiture of items involved in an offence in a different set of provisions.

25.2 Fines, Imprisonment and Designation as a Fisherman Not in Good Standing

25.2.1 Fifteen Different Categories

Sections 121 to 135 (15 different sections) provide for the fines and imprisonment available for the prohibitions created in the Draft Act. Sections 122 to 126, 129 to 132, 134 and 135 contain either the requirement or the possibility of a violator becoming a fisherman not in good standing. Throughout this Final Report, these provisions have been set out when a specific prohibition was discussed.

In some sections, for example, Section 125, the fine and/or imprisonment and possibility of becoming a fisherman not in good standing applies to a violation of any one of a number of prohibitions created in the Draft Act. Generally, in such a section, the view taken is that breach of the differing prohibitions should result in a penalty of equal severity. Using this approach, the Draft Act creates 15 different penalty “categories”.

54. Respecting overseas fishing permits, Section 73 provides that tax or customs incentives may be useful. See above, *Final Report* part 18.3. Other types of incentives could be: training, access to information, rebates of fees, and marketing assistance.

The maximum amount of the fines and the length of time of the imprisonment has been left blank. Such an issue is one that must be decided after careful consideration. Similarly, respecting the minimum and/or maximum period during which a person is to be a fisherman not in good standing and thus prohibited from being issued a licence, permit or written permission.

Category one - Section 121: failure to provide required statistics (Section 37, paragraph one, see above, *Final Report* part 12.6) and failure to provide information and documents when requested (Section 114, see above, *Final Report* part 23.7).

Section 121. Whoever violates Sections 37 paragraph one or 114 shall be punished with a fine not exceeding _____ baht or with imprisonment not exceeding _____ or both.

Category two - Section 122: using poison or harmful substances (Section 40, see above, *Final Report* part 12.3.2) and using electricity or explosives (Section 41, see above, *Final Report* part 12.3.2). These provisions are considered of such seriousness that a violator must become a fisherman not in good standing for a minimum period.

Section 122. Whoever violates Sections 40 or 41 shall be punished with a fine not exceeding _____ baht or with imprisonment not exceeding _____ or both and shall be a fisherman not in good standing for a minimum of ___ months and a maximum of ___ years.

Category three - Section 123: interference with fishery habitat (Section 42, see above, *Final Report* part 12.4); fishing in a preservation fishery area (section 57, see above, *Final Report* part 12.3.1); and using stationary gear (Section 58, see above, *Final Report* part 12.3.2). The severity of the offence, the number of times the person has been involved in similar offences, and other like-criteria may result in the offender becoming a fisherman not in good standing for up to a maximum period.

Section 123. Whoever violates Sections 42, 57, or 58 shall be punished with a fine not exceeding _____ baht or with imprisonment not exceeding _____ or both and may be a fisherman not in good standing for a maximum of ___ months.

Category four - Section 124: fishing without a local fishing permit (Sections 54 and 60, see above, *Final Report* part 15.2). The severity of the offence, the number of times the person has been involved in similar offences, and other like-criteria may result in the offender becoming a fisherman not in good standing for up to a maximum period.

Section 124. Whoever violates Sections 54 or 60 shall be punished with a fine not exceeding _____ baht or with imprisonment not exceeding _____ or both and may be a fisherman not in good standing for a maximum of ___ months.

Category five - Section 125: giving a permit to another person or copying a permit (Section 45, see above, *Final Report* part 13.6); receiving a permit from another person (Section 46, see above, *Final Report* part 13.6); being in possession of a copied permit (Section 47, see above, *Final Report* part 13.6); being in possession of illegally caught fish (Section 48, see above, *Final Report* part 20.0); offering to an official or an official receiving a bribe (Sections 49 and 50, see above, *Final Report* part 10.10); not being a small-scale fishermen and harvesting in the Coastal Marine Fishery Zone (Section 59, see above, *Final Report* part 12.3.1); fishing in the Commercial Marine Fishery Zone without a fishing gear permit (Section 63, see above, *Final Report* part 14.2); fishing outside Thai waters without an overseas fishing permit (Section 69, see above, *Final Report* part 18.3); fishing outside Thai waters in contravention of foreign law (Section 71, see above, *Final Report* part 18.4);

fishing outside Thai waters in violation of an approved overseas fishing plan (Section 72, see above, *Final Report* part 18.4); and engaging in aquaculture without an aquaculture permit (Section 84, see above, *Final Report* part 19.4). These provisions are considered of such seriousness that a violator must become a fisherman not in good standing for a minimum period.

Section 125. Whoever violates Sections 45, 46, 47, 48, 49, 50, 59, 63, 69, 71, 72, or 84 shall be punished with a fine not exceeding _____ baht or with imprisonment not exceeding _____ or both and shall be a fisherman not in good standing for a minimum of ___ months and a maximum of ___ years.

Category six - Section 126: possession of an aquatic resource which creates a health hazard for humans or other fish (Section 43, see above, *Final Report* part 22.1). The severity of the offence, the number of times the person has been involved in similar offences, and other like-criteria may result in the offender becoming a fisherman not in good standing for up to a maximum period.

Section 126. Whoever violates Section 43 shall be punished by a fine not exceeding _____ baht or with imprisonment not exceeding _____ or both and may be a fisherman not in good standing for a maximum of ___ months.

Category seven - Section 127: not securing the release of crew arrest outside Thai waters (Section 77, see above, *Final Report* part 18.4).

Section 127. Whoever violates Section 77 shall be punished with a fine not exceeding _____ baht or with imprisonment not exceeding _____ or both.

Category eight - Section 128: foreign vessels fishing in Thai waters without written permission (Section 79, see above, *Final Report* part 17.0).

Section 128. Whoever violates Section 79 shall be punished with a fine not exceeding _____ baht or with imprisonment not exceeding _____ or both.

Category nine - Section 129: destruction of evidence (Section 115, see above, *Final Report* part 23.7). The severity of the offence, the number of times the person has been involved in similar offences, and other like-criteria may result in the offender becoming a fisherman not in good standing for up to a maximum period.

Section 129. Whoever violates Section 115 shall be punished with a fine not exceeding _____ baht or with imprisonment not exceeding _____ or both and may be a fisherman not in good standing for a maximum of ___ months.

Category ten - Section 130: engaging in aquaculture which interferes with fish habitat (Section 85, see above, *Final Report* part 19.3). The severity of the offence, the number of times the person has been involved in similar offences, and other like-criteria may result in the offender becoming a fisherman not in good standing for up to a maximum period.

Section 130. Whoever violates Sections 85 shall be punished with a fine not exceeding _____ baht or with imprisonment not exceeding _____ or both and may be a fisherman not in good standing for a maximum of ___ months.

Category eleven - Section 131: breaching a regulation or notifications (Section 44, see above, *Final Report* part 11.4). The severity of the offence, the number of times the person has been involved in similar offences, and other like-criteria may result in the offender becoming a fisherman not in good standing for up to a maximum period.

Section 131. Whoever violates Section 44 shall be punished with a fine not exceeding _____ bath or with imprisonment not exceeding _____ or both and may be a fisherman not in good standing for a maximum of ___ months.

Category twelve - Section 132: harvesting or having in possession a designated protected resources (Section 89, see above, *Final Report* part 12.5) and harvesting in a designated protection area (Section 90, see above, *Final Report* part 12.5). These provisions are considered of such seriousness that a violator must become a fisherman not in good standing for a minimum period.

Section 132. Whoever violates Sections 89 or 90 shall be punished with a fine not exceeding _____ baht or with imprisonment not exceeding _____ or both and shall be a fisherman not in good standing for a minimum of ___ months and a maximum of ___ years.

Category thirteen - Section 133: violation of regulations and notifications on fish quality (Section 96, see above, *Final Report* part 21.3); violation of regulations and notifications on standards for premises where fish handled, sold or processed (Section 97, see above, *Final Report* part 21.3); and exporting or attempting to export without a fisheries export permit (Section 98, see above, *Final Report* part 21.4).

Section 133. Whoever violates Sections 96, 97 or 98 shall be punished with a fine not exceeding _____ baht or with imprisonment not exceeding _____ or both.

Category fourteen - Section 134: prohibition on interference with competent official or authorized fisheries officer carrying out their duty (Section 113, see above, *Final Report* part 23.7). This provision is considered of such seriousness that a violator must become a fisherman not in good standing for a minimum period.

Section 134. Whoever violates Section 113 shall be punished with a fine not exceeding _____ baht or with imprisonment not exceeding _____ or both and shall be a fisherman not in good standing for a minimum of ___ months and a maximum of ___ years.

Category fifteen - Section 135: a non-community member fishing in a community-management area (Section 52 (c), see above, *Final Report* part 16.0). The severity of the offence, the number of times the person has been involved in similar offences, and other like-criteria may result in the offender becoming a fisherman not in good standing for up to a maximum period.

Section 135. Unless there is a regulation or notification to the contrary issued pursuant to Section 53 (f), whoever violates Section 52 (c):

- (a) shall be punishable with a fine not exceeding _____ baht or with imprisonment not exceeding _____ or both;
- (b) may be a fisherman not in good standing for a maximum of ___; and
- (c) shall be subject to Sections 139 and 140.

25.2.2 The Amount of a Fine: Use of a Penalty Unit

The appropriate level of fine is a particularly difficult question since, as is clear from the 1947 Fisheries Act, what is an appropriate sum at one time period may not be appropriate a few years later because of inflation, economic conditions and the value of the aquatic resources. One approach would be not to use a set amount of baht in the fines provisions but to use the term "penalty units". For example, the fine for a breach of Sections 40 and 41

(using poison, other harmful substances, or explosives) could be set at a maximum of ___ penalty units (for example, 20). Thus, Section 122 would read:

Section 122. Whoever violates Sections 40 or 41 *shall be punished with a fine not exceeding 20 penalty units . . .*

Violations of other provisions could be set at different numbers of penalty units. For example, Section 121 which deals with the penalty for failing to provide information (Sections 37, paragraph one and 114) could be set at one penalty unit.

Section 121. Whoever violates Sections 37 paragraph one and 114 shall be punished with a fine not exceeding one penalty unit . . .

Having used the penalty unit denomination, by regulation (or notification) the value amount of the penalty unit can both be set and changed more easily than the legislation. When the Draft Act is adopted the penalty unit could be set by regulation, for example, at 1,000 baht. Thus, the penalty under Section 121 would be a maximum of 1,000 baht and the penalty under Section 122 would be a maximum of 20,000 baht. In the future, by adjusting the value of the penalty unit by regulation (or notification), the maximum amount of the fines could better keep pace with inflation, economic conditions and the value of the resources.

The Draft Act has not adopted the penalty unit approach. However, it would be relatively easy to adjust the Draft Act to accommodate the adoption of the penalty unit. The penalty provisions in Chapter Fifteen of the Draft Act would need to be reworded replacing baht with penalty unit. It would be useful to include in the definition provision (Section 10) that a penalty unit means that amount of baht as set by the Minister in a regulation issued pursuant to Section Finally, the Draft Act would need a provision allowing the Minister to issue a regulation setting the amount of baht a penalty unit is to be valued. A separate section allowing this in the Chapter Fifteen would work well.

25.3 Forfeiture

25.3.1 Main Provisions of the Draft Act

Like the 1947 Fisheries Act that provided for forfeiture to the Court in numerous penalty provisions, so to does the Draft Fisheries Act. There are essentially three categories of offences which involve forfeiture:

- (i) those offences for which forfeiture of all items related to offence must be ordered;
- (ii) those offences for which forfeiture of all items related to the offence may be ordered; and
- (iii) those offences for which the fruits or benefits of the offence (the aquatic resources harvested) must be forfeited, but the items (for example, the fishing gear) used in the offence may be ordered forfeited.

Section 137 deals with the first situation where all things “used in or acquired through” the commission of the offence (for example, fishing vessels, fishing gear, fish caught, etc.) are to be forfeited. The prohibitions noted in Section 137 can be considered to be those which require a severe penalty. The listed sections relate to: using poison or harmful substances (Section 40, see above, *Final Report* part 12.3.2); using electricity or explosives (Section 41, see above, *Final Report* part 12.3.2); possession of an aquatic resource which creates a health hazard for humans or other fish (Section 43, see above, *Final Report* part 22.1); using stationary gear (Section 58, see above, *Final Report* part 12.3.2); not being a small-scale fishermen and harvesting in the Coastal Marine Fishery Zone (Section 59, see

above, *Final Report* part 12.3.1); foreign vessels fishing in Thai waters without written permission (Section 79, see above, *Final Report* part 17.0); and harvesting or having in possession a designated protected resources (Section 89, see above, *Final Report* part 12.5).

Section 137. Fishing vessels, fishing gear, aquatic resources, aquatic resource products, the proceeds from sale of aquatic resources and aquatic resource products undertaken pursuant to Section 109, any bond or security posted pursuant to Section 110, and other things used in or acquired through the commission of an offence of Sections 40, 41, 43, 58, 59, 79, or 89 shall be forfeited by the Court.

Section 138 deals with the second situation where the offence may result in forfeiture of all things “used in or acquired through” the commission of the offence. The particular situation where the offence occurred, the person who violated the provision, and other factors would be used to determine whether forfeiture would be either sought or ordered. The prohibitions noted in Section 138 deal with: interference with fishery habitat (Section 42, see above, *Final Report* part 12.4); breaching a regulation or notifications (Section 44, see above, *Final Report* part 11.4); giving a permit to another person or copying a permit (Section 45, see above, *Final Report* part 13.6); receiving a permit from another person (Section 46, see above, *Final Report* part 13.6); being in possession of a copied permit (Section 47, see above, *Final Report* part 13.6); being in possession of illegally caught fish (Section 48, see above, *Final Report* part 20.0); engaging in aquaculture without an aquaculture permit (Section 84, see above, *Final Report* part 19.4); and engaging in aquaculture which interferes with fish habitat (Section 85, see above, *Final Report* part 19.3).

Section 138. Fishing vessels, fishing gear, aquatic resources, aquatic resource products, the proceeds from sale of aquatic resources and aquatic resource products undertaken pursuant to Section 109, any bond or security posted pursuant to Section 110, and other things used in or acquired through the commission of an offence of Sections 42, 44, 45, 46, 47, 48, 84, or 85 may be forfeited by the Court.

Section 141 is also a provision which provides that items involved in a commission of an offence may be forfeited. It has been separated from Section 138 since the items that may be forfeited include buildings (“premises”, see Section 10 (31) and above, *Final Report* part 21.3) which are of a different character than what is covered in Section 138. The offence for which the forfeiture may arise is Section 97 - a person is prohibited from owning or operating a premise which violates health and quality standards issued under Section 95, paragraph one (see above, *Final Report* part 21.3).

Section 141. A premise, vehicle or vessel involved in the commission of an offence of Section 97 and any bond or security posted pursuant to Section 110 may be forfeited by the Court.

Sections 139 and 140 work together and provide that for certain offences the aquatic resources involved in the offence must be forfeited, but the items used in the commission of the offence (for example, fishing gear) only may be forfeited. The prohibitions in Sections 139 and 140 deal with: fishing in a preservation fishery area (Section 57, see above, *Final Report* part 12.3.1); fishing without a local fishing permit (Sections 54 and 60, see above, *Final Report* part 15.2); fishing in the Commercial Marine Fishery Zone without a fishing gear permit (Section 63, see above, *Final Report* part 14.2); fishing outside Thai waters without an overseas fishing permit (Section 69, see above, *Final Report* part 18.3); fishing outside Thai waters in contravention of foreign law (Section 71, see above, *Final Report* part 18.4); fishing outside Thai waters in violation of an approved overseas fishing plan (Section 72, see above, *Final Report* part 18.4); harvesting in a designated protection area (Section 90, see above, *Final Report* part 12.5); selling or producing fish and fish products which do not comply with quality and health standards (Section 96, see above, *Final Report* part 21.3); and

exporting or attempting to export without a fisheries export permit (Section 98, see above, *Final Report* part 21.4).

Section 139. Aquatic resources, aquatic resource products, and the proceeds from sale of aquatic resources and aquatic resource products undertaken pursuant to Section 109, acquired through or involved in the commission of an offence of Sections 54, 57, 60, 63, 69, 71, 72, 90, 96 or 98 shall be forfeited by the Court.

Section 140. Fishing vessels, fishing gear and other things used in the commission of an offence of Sections 54, 57, 60, 63, 69, 71, 72 or 90 and any bond or security posted pursuant to Section 110 related to these offences may be forfeited by the Court.

Sections 139 and 140 are also presumed to apply where a non-community member fishes in a community-management area in breach of Section 52 (c), unless there is a regulation or notification to the contrary pursuant to Section 53 (f) (see above, *Final Report* part 16.0).

Section 135. Unless there is a regulation or notification to the contrary issued pursuant to Section 53 (f), whoever violates Section 52 (c):

...
(c) shall be subject to Sections 139 and 140.

Where forfeiture occurs either as ordered by the Court or by agreement (see Section 136, below, *Final Report* part 25.4), the items forfeited can be disposed of as the Director-General may direct.

Section 143. Any fishing vessel, fishing gear, aquatic resource, aquatic resource product, proceeds from sale of aquatic resources and aquatic resource products undertaken pursuant to Section 109, premise, vehicle or other thing forfeited by the Court pursuant to Sections 137, 138, 139, 140 and 141 or forfeited by agreement pursuant to Section 136 shall be dealt with or disposed of as the Director-General may direct.

25.3.2 Forfeiture and Ownership Questions

Without a legislative provision, a Thai Court cannot order the forfeiture of items used in the commission of an offence if the items in question do not belong the person who committed the offence. However, a legislative provision can deprive an owner of his/her property even where the item was used by a non-owner in the commission of an offence.⁵⁵ Any legislative provision has to be carefully worded to protect an innocent owner who, in good faith, provided an item to a person and that person used the item in the commission of an offence. At the same time, the owner of an item (for example, a fishing vessel) should not be able to avoid having to forfeit the item where the owner put the item into the hands of person who the owner could have reasonable foreseen would commit the offence. In this situation, the owner can not claim to be innocent and should not be able to avoid a situation of forfeiture and thus be able to give the item (for example, a fishing vessel) to another person knowing that the same offence will again be committed.

Section 142 attempts to provide a balance between the injustice of depriving an owner of his property because another has used it in an illegal manner and the realities of the fishing community where vessels, gear and other items are most frequently not owned by the persons operating or controlling them and using them in an illegal manner. The forfeiture of such

55. The 1997 Constitution does not prohibit such a provision. Section 48 of the 1997 Constitution provides that, while a right to property is protected by the Constitution, “the extent and the restriction on such right shall be in accordance with the provisions of law”. Thus, a legislative provision can deprive an owner of his/her property.

items is an important component in the protection and preservation of the Thailand's aquatic resources.

Section 142. There shall be a forfeit of a fishing vessel, fishing gear, aquatic resource product, premise, vehicle or other thing forfeited pursuant to Sections 137, 138, 139, 140 or 141 even if the owner of the item is not the convicted person unless the owner of the item can prove that he had no knowledge that the item was being used or would be used for the purpose of or in connection with the commission of the offence in question and that all reasonable steps had been taken by the owner to prevent the item from being used for or in connection with activities in contravention of this Act.

Section 142 places the burden on the owner of an item (for example, a fishing vessel or fishing gear) to show that: (i) he had no knowledge that the items were or would be used in the commission of an offence, and (ii) that he took reasonable steps to prevent an item from being used in the commission of an offence.⁵⁶ All Section 142 does is place on the person (the owner) with the information respecting the relationship between the owner and the person using the owner's property the duty and responsibility to make that information known.

Under Section 142, it is not sufficient that owner had no knowledge that the items were to be used in the commission of an offence. As the owner of items easily capable of being used in the commission of an offence, the owner has a responsibility to take positive action to prevent the commission of an offence under the Draft Fisheries Act. Again, this is not unreasonable, since the owner has the authority to exercise reasonable control over his/her item and, where that authority is not exercised, the owner should be deprived of the item through forfeiture.

It can be questioned what "reasonable steps" (the wording used in Section 142) can be expected of an owner of a fishing vessel. A reasonable step would be investigating the person to which the owner is to give care and control of a vessel to ensure that the person has no history or reputation of acting in a manner inconsistent with Thai fisheries laws. An unreasonable step is any information given by the owner to a person encouraging or pressuring that person to undertake harvesting in an illegal manner or illegal place. Another reasonable step would be to inform both the person in care and control of the vessel and all other persons on a vessel of the contents of the Fisheries Act and the conditions of any licences, permits or written permissions. Another reasonable step would be to ensure that a vessel is properly equipped with charts, communications equipment, and other items helpful in ensuring that the vessel does not breach laws relating to fishing in areas where harvesting is not legal.

25.4 Accepting a Penalty and Averting Prosecution

Section 136 allows a person who is alleged to have committed an offence under the Draft Act to avert prosecution for the offence where the Director-General or Provincial Governor, depending on the situation, agrees to accept the payment of a fine; a minimum period where the offender is a fisherman not in good standing (where necessary); and forfeiture of items (where necessary). The goal of Section 136 is to set the terms of a "plea bargain" that neither side can change, but leave to both sides the ability not to agree to the "plea bargain".

56. This is not a reverse onus prohibition that may be problematic under Section 33 of the 1997 Constitution (see above, *Final Report* part 24.0). Section 33 deals only with a criminal accused. Section 142 of the Draft Act is not an offence-creating provision. The provision of the 1997 Constitution that is more relevant is Section 48 which allows for legislation to interfere with property rights.

For an alleged offender, Section 136 establishes the penalty that must be faced in order to avert prosecution and possibly a more severe penalty. This avoids negotiation and potential arbitrary decisions on the part of competent officials. However, Section 136 does not require the Director-General or a Provincial Governor to accept the “legislative plea bargain” where prosecution is seen as the best route.

The “legislative plea bargain” in Section 136 is two-thirds of the maximum fine that may be assessed under the provision alleged to have been breached. Plus, where the penalty provision provides for a minimum period when an offender is to be a fisherman not in good standing, that minimum period is to apply. And, where the provision allegedly breached would require the forfeiture of items (in other words, where Sections 137 or 139 would apply), then the items are to be forfeited.

It is the Director-General or the Provincial Governor who decides whether or not to proceed to prosecution or to accept the Section 136 “legislative plea bargain”. Of course, the offender has to volunteer to accept the Section 136 “legislative plea bargain”, in other words, to pay the fine and, where necessary, forfeit items and agree to be a fisherman not in good standing.

Section 136. The Director-General or, where the person alleged to have violated this Act is a small-scale fisherman, the Provincial Governor with jurisdiction where the alleged offence took place, may elect not to proceed with prosecution if:

- (a) the alleged offender pays two-thirds of the maximum fine that applies to the offence;
- (b) where the provision breached provides for a minimum period for a person to be a fisherman not in good standing, the alleged offender accepts to be a fisherman not in good standing for that minimum period; and
- (c) all items for which forfeiture is required pursuant to Section 137 and 139 are forfeited.

26.0 FISHERY FEES AND TAXES

One of the objectives of the 1947 Fisheries Act was the collection of fishery fees. Even though the fee levels under the 1947 Fisheries Act were insignificant, the payment of such fees is recognized as being a hit-and-miss situation. Collection of fees is not one of the objectives of the Draft Fisheries Act. As a result, while fees are referred to in several places in the Draft Act, whether fees will exist or what the amount of the fees should be is left to regulations and notifications.

Section 24, paragraph (d), allows (but does not require) fees to be set for the issuance of any licence or permit under the Draft Act, specifically for a local fishing permit, a fishing gear permit, an overseas fishing permit, an aquaculture permit and a fisheries export permit.

Section 24. For any licence or permit required by this Act, and for greater certainty, for a local fishing permit, a fishing gear permit, an overseas fishing permit, an aquaculture permit and a fisheries export permit, the Minister by regulation or the Director-General by notification shall establish:

- ...
- (d) any fee that may be payable to obtain a licence or permit;

A similar provision (Section 25, paragraph (e)) exists for the issuance of written permission provided for by the Draft Act.

Section 25. For any written permission provided for in this Act, the Minister by regulation or the Director-General by notification may establish:

- ...
- (e) any fee that may be payable to obtain a written permission;

The various provisions of the Draft Act which deal with the issuance of permits requires any fee that exists for the permit to be paid before the permit can be issued:

- the local fishing permit (Sections 55, paragraph (e) and Section 61, paragraph (e));
- the fishing gear permit (Section 65, paragraph (f));
- the overseas fishing permit (Section 75, paragraph (g));
- the aquaculture permit (Section 87, paragraph (h)); and
- the fisheries export permit (Section 100, paragraph (f)).

It can be argued that the beneficiaries of fishing activities (fishermen) should pay for the services of the managers (the Department of Fisheries) through the fees that are payable. This is done respecting the required inspections and certificates for the export of fish and fish products to certain destinations. However, it is recognized that the fees that could be collected for licences, permits and written permissions (even assuming complete compliance) would cover only a small percentage of the costs incurred by the Department of Fisheries. For small-scale and subsistence fishers, the fees, however insignificant, create a disincentive to cooperate and, since officials are reluctant to enforce fee requirements against poor fishermen, this creates a general disrespect for the law.

One suggestion is for a fee or tax that would be based on the value of fish landed. In many respects, this type of fee or tax is fairer than a fee payable for a local fishing permit, a fishing gear permit, or an aquaculture permit since, in these cases, the amount of the fee is unrelated to the value of the product. Moreover, because a permit fee has to be paid before harvesting takes place, it creates a disincentive to pay the fee. Section 15, paragraph (r), provides that by regulation or notification a fee can be made payable based on the harvest or the landing value of an aquatic resource.

Section 15. The Minister may issue regulations and the Director-General, and, respecting the Inland Fishery Zone and the Coastal Marine Fishery Zone, with the approval of the Minister, the provincial governor within his jurisdiction, may issue notifications relating to any matter that arises under this Act including:

- ...
 - (r) any fee that may be payable for the harvesting or the landing of an aquatic resource;

27.0 REVIEWING THE DIFFERENT WATER AREAS

The Draft Act requires or provides for the creation of a number of distinctive areas within Thai waters: the Inland Fisheries Zone; the Coastal Marine Fishery Zone; the Commercial Marine Fishery Zone; areas under the jurisdiction of a Local Fishery Committee; designated community fishery areas; fisheries protection areas; preservation fishery areas; and, as a result of regulations and notifications that may be issued under Section 15, open and closed seasons and other areas where resources cannot be harvested. This part of the Final Report provides an overview of these different water areas. More detailed treatment is provided in other parts of the Final Report.

Section 145 of the Draft Act indicates that the Department of Fisheries is to provide maps and charts that show the various water areas.

Section 145. The Department of Fisheries shall make every effort to provide accurate and timely maps and nautical charts which show:

- (a) the Inland Fishery Zone, the Coastal Marine Fishery Zone and the Commercial Marine Fishery Zone;
- (b) areas under the jurisdiction of Local Fishery Committees;
- (c) designated community fishery areas;
- (d) preservation fishery areas;
- (e) fisheries protection areas;

- (f) the location and times of areas closed to the harvesting of aquatic resources; and
- (g) such other information relating to this Act that is conveniently conveyed on a map or nautical chart.

27.1 Coastal Marine Fishery Zone and Inland Fisheries Zone

The location of the Coastal Marine Fishery Zone is defined in Section 11 and the location of the Inland Fisheries Zone is defined in Section 13 (see above, *Final Report* part 9.1). All the waters of the Coastal Marine Fishery Zone and the Inland Fishery Zone are open to fishing except where the waters are included within a designated community fishery area, a fisheries protection area, a preservation fishery area or have been closed as a result of regulations or notifications issued under Section 15.

The waters within the Coastal Marine Fishery Zone that are available for fishing, are only available for small-scale fisherman unless written permission has been given to a non-small-scale fisherman. Fisherman able to fish in the Coastal Marine Fishery Zone or the Inland Fishery Zone who use a motorized vessel are required to have a local fishing permit. A local fishing permit can be issued by a competent official or, if the waters fall within an area of jurisdiction of a Local Fishery Committee, then the local fishing permit can be issued by the Local Fishery Committee.

Regulation of activities within the waters of the Coastal Marine Fishery Zone and the Inland Fishery Zone may be undertaken through regulations and notifications issued pursuant to Section 15 by the Minister, Director and Provincial Governors.

27.2 Preservation Fishery Area

A preservation fishery area in the Inland Fishery Zone can be established by a regulation or notification issued by the Director-General or a Provincial Governor (see Section 56 above, *Final Report* part 12.3.1). The purpose of a preservation fishery area is to create an area where fishing cannot take place near dams and places of worship where it is either inappropriate or dangerous to fish.

27.3 Areas Under the Jurisdiction of a Local Fishery Committee

A Local Fishery Committee can be established by a regulation or notification issued by the Minister or Director-General to issue local fishing permits and written permissions for fishing activity within a determined area within the Inland Fishery Zone or the Coastal Marine Fishery Zone (Section 19, see above, *Final Report* part 10.6). The goal of the Local Fishery Committee is to involve the local community in the management and preservation of the fishery resources within the area under the jurisdiction of the Local Fishery Committee. The Local Fishery Committee can recommend that resource management measures for their area be implemented as regulations or notifications (Section 21, see above, *Final Report* part 10.6.3).

27.4 Designated Community Fishery Area

A designated community fishery area within the waters of the Inland Fishery Zone and the Coastal Marine Fishery Zone can be established by a regulation or notification issued pursuant to Section 51 by the Minister or the Director-General (see above, *Final Report* part 16.0). Within a designated community fishery area, the designated community is to have primary and direct authority respecting the resource management measures to be applied and determining who is entitled to harvest resources. The goal is to apply community-based management to the resources within the designated community fishery area.

27.5 Commercial Marine Fishery Zone

The location of the Commercial Marine Fishery Zone is defined in Section 12. All the waters of the Commercial Marine Fishery Zone are open to fishing except where the waters are included within a fisheries protection area or have been closed as a result of a regulation or notification issued under Section 15.

Within the waters of the Commercial Marine Fishery Zone that are available for fishing, only fishing gear for which a fishing gear permit has been issued may be used. Regulation of activities within the waters of the Commercial Marine Fishery Zone may be undertaken through regulations and notifications issued pursuant to Section 15 by the Minister or Director-General.

27.6 Section 15 Regulations and Notifications Closing Certain Waters

Regulations and notifications can be issued pursuant to Section 15 closing waters within the Inland Fishery Zone, the Coastal Marine Fishery Zone and the Commercial Marine Fishery Zone from harvesting (Section 15, paragraphs (g) and (h), see above *Final Report* part 12.2.4). The intention is to provide for closed and open seasons and the protection of fisheries habitat.

27.7 Fisheries Protection Areas

By regulation or notification issued pursuant to Section 91 (see above, *Final Report* part 12.5), waters within the Inland Fishery Zone, the Coastal Marine Fishery Zone and the Commercial Marine Fishery Zone can be set aside by the Minister or Director-General as a fisheries protection area. The goal of the fisheries protection area is to create a marine park or marine protected area. Any harvesting of resources with a fisheries protection area must be approved by the Director-General or be explicitly permitted by a regulation or notification.

28.0 TRANSITION AND REQUIRED REGULATIONS AND NOTIFICATIONS

28.1 Required Regulations and Notifications

As has been noted, the Draft Fisheries Act is designed as framework legislation with the expectation and requirement that regulations and notifications be issued to deal with many issues. At the time of entry into force of the Draft Fisheries Act, certain issues and requirements left to regulations and notifications by the Draft Act must be dealt with in order for the Draft Act to operate smoothly. Other matters, of less urgency to the operation of the Draft Act, can be dealt with by regulations and notifications issued after the Draft Fisheries Act enters into force.

The regulations and notifications that will be required at the time of the entry into force of the Draft Act deal with appointment, statistics collection and the requirements for the issuance of the permits set out in the Draft Act (local fishing permit, fishing gear permit, overseas fishing permit, aquaculture permit and fisheries export permit).

Respecting appointment and statistics, the regulations and notifications that will be required at the time of the entry are as follows:

- (i) appointment of competent officials (Section 14, paragraph 2);
- (ii) appointment of authorized fisheries officers (Section 101); and
- (iii) information and data that must be provided (Section 37, paragraph 2).

Respecting the issuance of local fishing permits, fishing gear permits, overseas fishing permits, aquaculture permits and fisheries export permits under the Draft Act, regulations and notifications dealing with the matters raised in Section 24 (see above, *Final Report* part 13.2) will be required:

- the competent official with the authority to issue the requested permit;
- the forms and information required;
- the conditions that must be met before the permit can be granted;
- any fee that is payable before the permit can be issued;
- the period of time for which the permit is to be valid;
- the conditions that must be met during the term of the permit; and
- any financial security that may be requested to ensure the good behaviour of the holder of licence or permit.

Section 24. For any licence or permit required by this Act, and for greater certainty, for a local fishing permit, a fishing gear permit, an overseas fishing permit, an aquaculture permit and a fisheries export permit, the Minister by regulation or the Director-General by notification shall establish:

- (a) the competent officials with the authority to grant a licence or permit or the Local Fishery Committee with the authority to grant a local fishing permit;
- (b) the forms and information that must be provided by a person requesting a licence or permit;
- (c) the conditions, requirements and criteria that must be met before a licence or permit will be issued by a competent official or a Local Fishery Committee;
- (d) any fee that may be payable to obtain a licence or permit;
- (e) the time period for which a licence or permit shall be valid;
- (f) the conditions, requirements and criteria that will apply to the possessor of a licence or permit; and
- (g) the amount and kind of security or surety that a person requesting a licence or permit may be required to provide, the appropriate safeguards for any security or surety held by the Department, the conditions that must be met for the return or release of the security or surety, and the situations which will lead to the forfeiture to the Department of any security or surety.

In addition to the matters covered under Section 24, a regulation or notification will be required to be issued pursuant to Section 15, paragraph (a), at the time of the entry into force of the Draft Act, listing for which fishing gear a fishing gear permit can be issued pursuant to Section 65 (see above, *Final Report* part 14.4). Without such a regulation or notification, no fishing gear permit can be issued.

While not required at the time of entry into force of the Draft Act, regulations and notifications dealing with aquaculture permits permissible under Section 86 (see above, *Final Report* part 19.4) should be of immediate importance.

28.2 Transition

The Draft Act does not have any transition provisions. Such provisions can be useful to assist the replacement of old legislation (the 1947 Fisheries Act) with new legislation (the Draft Act). The most appropriate time for consideration of transition provisions is when the adoption of the Draft Act is imminent. At that time, it can be determined what regulations and notification will be ready to be issued on the entry into force of the Draft Act and what provisions of the 1947 Fisheries Act (for example, licences, permits and permissions) need to be carried over and exist, temporarily, under the Draft Act.