



**Submission to the Primary Production Committee on the
Fisheries Act 1996 Amendment Bill (No.2) (2008)**

5 August 2008

Mere Te Huki
Clerk of the Committee
Primary Production Committee
Parliament Buildings
Wellington

Dear Mere

I attach a submission by Greenpeace New Zealand, Inc.

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Greenpeace wishes to be heard in support of its submission.

Yours sincerely

A handwritten signature in black ink, appearing to be "Carmen Gravatt". The signature is stylized and somewhat cursive.

Carmen Gravatt

Enclosure

Introduction

Greenpeace New Zealand, Inc. supports the Bill, with the provisos and changes suggested in this submission.

1. This is a necessary but insufficient 'quick fix'. The precautionary principle is not adequately incorporated in section 13 and is not adequately integrated in the Act. A full review is necessary to ensure that it is, and the proposed amendment must not act as an impediment or disincentive to such a review. The Minister should be required to take steps to commission research to improve information available on the stock.
2. The Minister must be able to set or vary a total allowable catch (TAC) when there is not adequate information, and the Bill must ensure there will be an incentive to carry out necessary research. It should also be made clear that the Minister may use the new provisions to vary, as well as set, a TAC.
3. A TAC must only be varied downwards. The Minister should not be able to increase a TAC using the new provisions where there is inadequate information. The point of the amendment is to allow the Minister to set a TAC where there is inadequate information. It is clear therefore that the Minister should not be able to increase a TAC in these circumstances.

Discussion

The widely accepted formulation of the precautionary principle is Principle 15 of the Rio Declaration:

In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.

The 1995 United Nations Fish Stocks Agreement, to which New Zealand is a Party, contains detailed provisions on the application of the precautionary approach in Article 6:

1. States shall apply the precautionary approach widely to conservation, management and exploitation of straddling fish stocks and highly migratory fish stocks in order to protect the living marine resources and preserve the marine environment.
2. States shall be more cautious when information is uncertain, unreliable or inadequate. The absence of adequate scientific information shall not be used as a reason for postponing or failing to take conservation and management measures.

Principle 15 of the Rio Declaration and Article 6 of the Fish Stocks Agreement acknowledge that conservation and management of living marine resources and marine biodiversity frequently faces considerable uncertainty and inadequate or incomplete information. Policy and management must recognize and deal with this uncertainty and inadequate or incomplete information. This uncertainty and inadequate or incomplete information has been, and is all too often, frequently used as a reason not to take action to protect the environment, particularly when powerful economic interests benefit from the activities threatening the environment. This is a major problem, as frequently it is not possible to have clear scientific evidence of threat before the damaging activity takes place. We have seen this problem with the recent orange roughy litigation.

Article 10 of the Act uses similar language:

10 Information principles

- All persons exercising or performing functions, duties, or powers under this Act, in relation to the utilisation of fisheries resources or ensuring sustainability, shall take into account the following information principles:
 - (a) Decisions should be based on the best available information:
 - (b) Decision makers should consider any uncertainty in the information available in any case:
 - (c) Decision makers should be cautious when information is uncertain, unreliable, or inadequate:
 - (d) The absence of, or any uncertainty in, any information should not be used as a reason for postponing or failing to take any measure to achieve the purpose of this Act.

However, in *Antons Trawling Company Limited vs Minister of Fisheries* CIV 2007-485-2199 (22 February 2008), Miller J in the High Court said that s10 does not allow the Minister to set TAC under s13(2)(b) without assessing stock levels at all. (para. 50) and that s13(2)(a) requires an assessment of stock levels needed to produce maximum sustainable yield (MSY) (para. 56). The result is that the law is left in a state that is not consistent with New Zealand's international obligations under the Rio Declaration and the UN Fish Stocks Agreement, both of which require that lack of full scientific certainty **shall not** be used as a reason for postponing or failing to take conservation and management measures.

That is why in principle Greenpeace supports this Bill, since as a practical matter, this means that old, unsustainable quotas remain in place, which is unacceptable.

However the proposed Clause 4(1)(c) which would amend s 13 by introducing a clause 2A is inadequate at present. At present it reads

“set a total allowable catch (i) using the best available information and (ii) *that is not inconsistent with the objective of moving the stock at or above, or moving the stock towards or above, a level that can produce the maximum sustainable yield.*”

We emphasise that paragraph 10(d) reads that “The absence of, or any uncertainty in, any information should not be used as a reason for postponing or failing to take any measure to achieve *the purpose of this Act.*” The proposed new section 2A(c)(ii) formulation elevates maximum sustainable yield (MSY) to supercede the purpose of the Act. As the High Court in *Antons* noted (para. 9), the purpose statement of the Act provides, *inter alia*, that the Act is to recognise New Zealand's international obligations relating to fishing. New Zealand's obligations go much further than achieving MSY and encompass wider sustainability goals.

The purpose of the Act is stated in Section 8:

(1) The purpose of this Act is to provide for the utilisation of fisheries resources while ensuring sustainability.

(2) In this Act—

Ensuring sustainability means—

(a) Maintaining the potential of fisheries resources to meet the reasonably foreseeable needs of future generations; and

(b) Avoiding, remedying, or mitigating any adverse effects of fishing on the aquatic environment:

The purpose of the Act is much wider than MSY. Not only does it include the much broader criterion ‘[m]aintaining the potential of fisheries resources to meet the reasonably foreseeable needs of future generations’ but also includes the quite separate issue of adverse effects of fishing on the

aquatic environment – which could include, for instance, the effect of bottom trawling on vulnerable marine ecosystems.

Recommendations

We therefore propose the following amendments to the draft Bill.

We propose that Clause 4(1) should read

- (c) set **or vary a total allowable catch** –*
- (i) using the best available information; and*
- (ii) that is consistent with the purpose and environmental principles of the Act.*

We also submit that new paragraphs (d) and (e) should be added which could read:

- (d) the Minister may not increase a total allowable catch under this section.*
- (e) In considering, setting or varying a total allowable catch under this section, the Minister must have regard to the following:*
 - (a) The need to commission appropriate research to assess the impact of the order on the stock; and*
 - (b) The need to implement measures to improve the quality of information about the stock; and*
 - (c) Whether it is appropriate to close areas to commercial fishing to reduce any sustainability risk to that stock; and*
 - (d) The need to avoid any significant adverse effects on the aquatic environment of which the stock is a component.*

Finally, replace the proposed Amendment to section 13(3) in Clause 4(2) so that the Minister's considerations are subject to the other environmental considerations in the purpose and principlesⁱ of the Act. This is essential to ensure sustainability.

Amend Clause 4.2 to read:

Section 13(3) is amended to read as follows:

(3) In considering the way in which and rate at which a stock is moved towards or above a level that can produce maximum sustainable yield under paragraph (b) or paragraph (c) of subsection (2) of this section, the Minister shall consistently with the purpose and environmental principles of the Act have regard to such social, cultural, and economic factors as the Minister considers relevant.

ⁱ Section 9 reads as follows:

Environmental principles

- All persons exercising or performing functions, duties, or powers under this Act, in relation to the utilisation of fisheries resources or ensuring sustainability, shall take into account the following environmental principles:
 - o (a) Associated or dependent species should be maintained above a level that ensures their long-term viability;
 - o (b) Biological diversity of the aquatic environment should be maintained;
 - o (c) Habitat of particular significance for fisheries management should be protected.