

## **Discussion Document for Meeting with the Minister of Fisheries December 2004**

Non-commercial fishers have become concerned that their rights to fish for food and recreation are becoming increasingly subservient to the rights of commercial fishing interests with the clear support of the Ministry of Fisheries through their policies and recommendations made on allocation.

### **Background**

#### **The Quota Management System**

In 1986 the Quota Management System (QMS) was introduced to restrict and manage the excessive commercial fishing that had seriously depleted inshore fish stocks during the late 1970's and early 1980's. Clearly the intent was to constrain commercial fishers to a sustainable level, and allow those fisheries previously depleted to be given the ability to recover. The target level set for fish stocks was, "at or above the level that can produce the Maximum Sustainable Yield" (MSY).

The initial allocations were set on the basis of a "scientifically determined" Total Allowable Commercial Catch (TACC) for each fishery divided by the total commercial catch history for that fishery. The result gave the overall catch reduction required as a fraction. Each commercial fisher's catch history was multiplied by this fraction to calculate their Individual Transferable Quota Allocation (ITQ).

The key issue was that commercial fishers were to be constrained to a sustainable TACC, with each fisher restricted to a defined portion of it. Compensation was paid to commercial fishers who tendered their quota back to the crown.

#### **The Quota Appeals Authority (QAA)**

Almost immediately, many commercial fishers sought to have their individual allocations increased by lodging appeals through the QAA. Many were successful and the Ministry of Fisheries allowed these new quotas to be cumulative above the existing Total Allowable Commercial Catch (TACC). Quotas on many inshore fish stocks soon rose alarmingly to 20-30% above the previously "scientifically determined" sustainable TACC which the fishing industry had already been compensated to fish to.

In some key shared fisheries the additional commercial catch issued by the QAA has prevented or slowed any rebuild and has clearly impacted adversely on all non-commercial fishers. It is obvious that for the QMS to be effective, it must manage and constrain commercial catch to the scientifically determined sustainable level. It is our view that the quota generated through successful QAA appeals should have been contained within the TACC and then, each commercial fisher's ITQ should have been reduced proportionately. Then the total ITQ would have been equal to the previously "scientifically determined" sustainable level of TACC.

Allowing increases by appeal without regard to the initial science relating to the setting of the TACC or sustainability of the fishery has been at the direct expense of non-commercial fishers. It has resulted in less fish for the non-commercial fishers through a direct reallocation to the sector who were responsible for the over fishing. Many existing TACC's on stocks which are below MSY still include quota issued by the QAA.

### **Deeming**

Since the introduction of the QMS fish taken in excess of a fisher's quota can be sold as long as a penalty deemed value is paid. Deeming has caused TACC's to be consistently exceeded in some fisheries. The causes of deeming range from fishers with unbalanced quota portfolios through to the blatant exploitation of loopholes where a profitable difference between the deemed value and port price existed. Thousands of tonnes of unsustainable inshore fish have been harvested through deeming. Commercial deeming which has led to TACC's being exceeded has been at the direct expense of rebuilding some important depleted shared stocks and is again to the detriment of non-commercial fishers.

### **Dumping**

In those commercial fisheries where price is, or has been, based on the quality or size of fish landed, the illegal practice of dumping unwanted fish called high grading has been widespread. This has caused the loss and wastage of hundreds, possibly thousands, of tonnes of fish in important shared fisheries. Media reports and Ministry records prove this. Another form of dumping is where fishers have insufficient quota to cover the landing of by-catch species which are effectively worthless to the commercial fisher because of new higher deemed values, so they discard the catch. Commercial dumping has been at the direct expense of rebuilding some important depleted shared stocks and to the detriment, yet again, of non-commercial fishers.

### **What was Privatised?**

In 1986 the QMS was the new tool designed to manage excessive commercial fishing which was threatening inshore fish stocks at the time.

The draft National Policy for Marine Recreational Fisheries was released by the Ministry of Fisheries in 1986 four months before the QMS was implemented, this policy remained largely unchanged until its release in 1989. Whether the policy was or was not ratified, is largely irrelevant, the point is it demonstrates the *intent* of the policy makers who designed the QMS at the time and expressed in *good faith* the relationship non-commercial and commercial fishers could expect from the implementation QMS. We believe this has significant legal ramifications.

Both the draft and released policy state "where a species of fish is not sufficiently abundant to support both commercial and non-commercial fishing, preference will be given to non-commercial fishing."

The 1989 document also states “The Quota Management System is now in place for controlling the *commercial component* of the sustainable catch. This system ensures fish stocks are conserved for present and future generations” (italics added).

It is clear that individual commercial fishers were given a guaranteed proportion of a TACC. Not, however, a guaranteed proportion of a TAC – Total Allowable Catch. It is also clear that the TACC was to be subservient to “where a species of fish is not sufficiently abundant to support both commercial and non-commercial fishing, preference will be given to non-commercial fishing.” This has not happened. The undertakings to give preference to non commercial-fishers have been reneged upon.

### **Initial Allocations**

When privatising any resource, it is critical to set the initial allocations correctly. When privatising a portion of publicly used resource and where the public are to retain access, initial allocations become even more critical. In the case of the QMS the privatisation turned into a “lolly scramble” for the benefit of commercial interests, a lolly scramble that continues to this day!

The QMS was promoted and “sold” to the public *in good faith*, on the clear understanding that it was the “surplus” of the part of a fishery that was “sufficiently abundant to support both commercial and non-commercial fishing” that was being privatised. This being the case there was no need to define for all time the respective “shares” between commercial and non-commercial users. If a fishery was later found to be not sufficiently abundant then preference was to be given to non-commercial fishers.

The Ministry have clearly changed the allocation rules and now tend to view commercial and non-commercial fishers as proportional shareholders under the QMS where fisheries are in decline. If the Ministry view is valid and legal (and non-commercial fishers argue strongly that it isn't) then the Ministry should be able to produce evidence of the consultation, acceptance and Ministers approval of proportional allocation and the process for making the initial allocations as well as the process for reviewing those allocations where errors in the initial allocations had occurred.

With hindsight, it is obvious that the non-commercial catch was significantly underestimated until 2000-2001. At this time, serious errors in the previously used MFish estimates of non-commercial were discovered. It was found that historical non-commercial catch was possibly 2-3 times higher than previously thought. Consequently, non-commercial fishers have not had sufficient catch “allowed for” in those fisheries where they have an “interest”.

The commercial sector had the QAA to deal with issues where allocations between commercial fishers could be reviewed and errors in allocation corrected. No such equivalent system or access is provided for correcting allocation errors between sectors, again disadvantaging non commercial fishers. If the system is proportional and “shares” have been allocated why is there no legal recourse equivalent to the QAA available for non-commercial fishers.

On the other hand, when shared fisheries are deemed to be abundant the Ministry forget about the “shared gain” part of their proportional equation and unjust process and give further preference to commercial fishers in their advice to Ministers. A revision of the Ministry SNA 2 advice over the years gives a clear example of this bias.

### **Transparent Re-allocation Method Needed**

A provision in the Act must be made which provides for an increase to the non-commercial sector when occasion warrants it and to clearly allow for such reallocations to be made. This is particularly important when reallocation is necessary because the Ministry didn't get the facts right in making the initial allocation. This would be fair in that it tells a quota owner that his future quota is not sacrosanct, it is not set in letters of stone and anyone buying quota will know what the liability is.

As Ministry fails to get the allocations right in the first place they are creating a financial burden on future governments where tax payer's money is used to right the error and compensate commercial fishers again. This is a simple lose- lose equation for non commercial fishers.

Governments should not have permanently allocated stocks until they had good research showing what each sector was catching. To do otherwise was contrary to the laws of natural justice.

### **MSY**

In a mythical world where research provides accurate and timely results it might be possible to manage a fishery precisely “at or above the level that produces the maximum sustainable yield””

We note that the Act requires the Minister to manage fisheries at or above MSY and the Ministry have interpreted this as a “knife edge” with MSY biomass levels as the target.

Unfortunately in the real world by the time it is realised that a stock is overfished it is too late. This is because the science to determine the extent of any problem takes years to finalise and the stock continues to decline to well below MSY before catches are reduced. For many stocks there is considerable uncertainty whether they have rebuilt under current management strategies or not, which demonstrates the inability of current policies used by Ministry to manage or improve the fishery.

The reality of the “at or above MSY” policy is that we are actually managing many of our fisheries below MSY. There is a demonstrable reallocation from non-commercial fishers to commercial fishers during the fishing down and overfishing phase, and again when catches are reduced “proportionately” to rebuild the fishery. It is a double jeopardy system where non-commercial fishers lose out both times. There are several other ways in which the non-commercial fishers lose out and these are listed below.

### **Ministry Policy Double Jeopardy**

Fishery decisions which reduce catches are generally made when a fishery has been overfished and the biomass has fallen below MSY. Because non-commercial catch is largely driven by the abundance of a fish stock, non-commercial catches, individually and as a sector, decline as the biomass declines.

As the stock declines non-commercial fishers will catch fewer large fish because the average size of fish reduces when overfishing takes place and more undersized fish are caught. This adds up to less landed weight of fish per fisher per trip and a reduced overall catch tonnage. When the Minister decides to cut catches to stabilise or rebuild a fishery the Ministry calculates what non-commercial fishers are currently catching in the depleted fishery and then further reduces their ‘allowance’ from the already reduced amount. Hence non-commercial fishers are penalised twice.

### **What is the Relevance of the Ministers “Allowance”**

Recreational and other non-commercial catches are mainly driven by three factors.

- Abundance of the fish stock
- The number of non-commercial fishers
- Weather

From the three main drivers of recreational catch above, the Minister can only influence the abundance of a fish stock in his decision.

The Ministers “allowance” of a tonnage of fish for non-commercial is more about making the MSY - TAC - TACC books balance than allowing an explicit tonnage for non-commercial “interests”.

If a non-commercial allowance is accidentally set too high or, if the Minister intentionally allows more for them, these fish will go uncaught because non-commercial fishers have no way of catching more than they can already catch. Their effort is so limited by the three drivers above. What this means is that the Minister has no real way of instantly increasing recreational catch as he can with commercial catches.

On the other hand, if the Minister “allows” an insufficient tonnage to cover recreational interests then the Ministry will attempt to reduce bag limits or increase size limits or impose some other restraint to constrain recreational catch to the allowance. What this means is that the Minister has many ways of instantly reducing recreational catch yet has no equivalent way of increasing it.

This is a one way valve; TACC’s and commercial catches can go up or down as the fishing industry can quickly adapt their catching capacity to match varying TACC’s. Recreational catch cannot be similarly increased but can easily be reduced, and often is, when the commercial quotas are reduced. This is another blatant example of biased policy that gives preference to commercial interests and is totally inconsistent with the policy statements made prior to the introduction of the QMS. We believe this policy is irreconcilable with the words “allow for” in statute.

## **Priority**

It is indisputable that in the majority of fisheries the fishing industry has been given total priority. Obviously commercial fishers have priority in all fisheries where there is no non-commercial catch. They also have priority in all shared fisheries where the TACC has been over-allocated and does not, and is not, designed to constrain commercial catch. This clearly places fishing industry objectives before the interests of all non-commercial fishers.

A second form of priority given to commercial fishers is where fisheries have been allowed to run below MSY, this also clearly places fishing industry objectives before the interests of all non-commercial fishers. It leaves non-commercial fishers catching smaller fish, less fish and more undersized fish.

The third form of commercial priority is where the non-commercial catch has been suppressed by the scarcity of fish in fisheries which have been depleted to below the level necessary to produce the MSY and the recreational allowance has been based on current catches. This is a direct re-allocation of fish that was historically taken by non-commercial fishers (before the depletion of the fishery) to commercial fishers.

## **Population**

If every non-commercial fisher in the North Island moved to the South Island would the Minister still make the same allowances for North Island non-commercial fishers? The answer, obviously, is no.

In the situation above would the Ministry advise the Minister to allow for additional non-commercial catch in the South Island? Under the current allocation policy it would appear that they wouldn't. They have never adjusted recreational allowances upwards to allow for population increases since the inception of the QMS in 1986 despite the massive population shifts and increases since that time. This is despite this very subject having been raised in the Court of Appeal by Justice Tipping

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So under both increasing and decreasing population scenarios the Ministry's current allocation model again works against the interests of non-commercial fishers and in favour of commercial fishers.

## **Adaptive Management**

Originally Adaptive Management was introduced as a means of reducing research costs in low value "by-catch" commercial fisheries. The theory proposed that if catch was substantially increased by 30% or more, the increased removals would cause a measurable decline in the stock size. The Catch per Unit of Effort (CPUE) indicators would be monitored through log books and the relative decrease in CPUE would then give some idea of the percentage of the stock removed in the experiment. Put simply, adaptive management applies excessive pressure to a stock and then measures the damage done to the stock.

Obviously the fishing industry like adaptive management because it allows them to catch a lot more fish without any prior evidence that those catches are sustainable. If the additional catch is not sustainable they still have the profit that otherwise would

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<sup>1</sup> A further matter which points against any implication of proportionate reduction is that the Minister is in our judgment entitled to bear in mind changing population patterns and population growth. If over time a greater recreational demand arises it would be strange if the Minister was precluded by some proportional rule from giving some extra allowance to cover it, subject always to his obligation carefully to weigh all the competing demands on the TAC before deciding how much should be allocated to each interest group. In summary, it is our conclusion that neither the specific sections (28D and 21) nor the Acts when viewed as a whole contain any implied duty requiring the Minister to fix or vary the recreational allowance at or to any particular proportion of the TACC or for that matter of the TAC. What the proportion should be, if that is the way the Minister looks at it from time to time, is a matter for the Minister's assessment bearing in mind all relevant considerations.

not have been available to them. Adaptive management is a win-win for commercial but it's a lose-lose for non commercial fishers when used in shared fisheries.

More recently adaptive management has been used in important shared fisheries, and the amount of TACC increase is often well below the level originally determined as being necessary to get a reliable result. Non-commercial fishers are concerned that adaptive management is now being used as a back door by which commercial quotas are increased in shared fisheries at the direct expense of other legitimate users. We would welcome being supplied any meaningful and empirical data which is evidence to the contrary.

A further complication of adaptive management in shared fisheries is that if the extra fish taken under the programme are taken from non-commercial areas, the result may be erroneous. Fish usually caught by non-commercial fishers may make up a large proportion of the increased commercial catch. Under this scenario adaptive management simply becomes another vehicle used to transfer non-commercial fish to the fishing industry. More fish for the fishing industry and less for the people.

Non-commercial fishers therefore bear ALL the risks of adaptive management, they have no chance of any gain whatsoever, and are guaranteed to suffer from reduced catch rates and smaller fish as a result of adaptive management in shared fisheries. It's a lose-lose for non commercial fishers.

## **Compensation**

During discussions on better defining non-commercial fishing rights during the "Soundings" process and the two Ministerial advisory groups since, the Ministry has tried to force proportional allocation on non-commercial fishers as a way of "capping the recreational catch" and "avoiding compensation issues for the crown". This view has been articulated by some Ministry personnel and it is well documented through speeches and presentations which various Ministry representatives have made. Proportional allocation as a way of avoiding compensation issues with commercial fishers also appears to have become a preferred policy of the Ministry of Fisheries in advice to Ministers in shared fisheries.

As a direct consequence of the above policy we believe the ministry has *no option but to favour commercial fishers* in advice to Ministers regarding the management of shared fisheries. This is because compensation to commercial fishers is always a possibility when making allocation decisions in shared fisheries and only commercial fishers can claim compensation. So, the only certain way of avoiding the possibility of compensation is to pander to commercial fishing interests. As non-commercial fishers cannot sue for compensation, little consideration needs be given to their interests to fulfil the policy.

Giving consideration to compensation issues will always tend to create biased advice from the Ministry unless all aggrieved parties have similar access to compensation. Injustices caused by incorrect initial allocations or subsequent re-allocations (QAA etc) or adjustments in the respective allowances between sectors cannot be addressed



while the Ministry follow this policy. This policy also leaves future Governments exposed to the same compensation issues the current policy fails to address.

Another aspect of where the QMS is biased toward commercial fishing interests is that commercial fishers can claim compensation when TACC's are reduced but pay nothing when TACC's are increased.

### **Disputes and Legal Challenge**

Commercial fishing interests can use money derived from the resource to protect their interests. If they win they can gain financially from securing additional valuable catching rights or they can receive compensation. Such is the nature of the sector that hundreds of thousands of dollars can be expended to protect a commercial interest regardless of the impact to other stakeholders. Errors of process and law have seen the commercial fishers win time and time again due to failures of Ministry to carry out their role and their responsibilities.

On the other hand non-commercial fishers have to raise funds from the public to protect their interests and, if they win, they receive no financial gain and cannot receive compensation. We often wonder if there is a deliberate strategy by successive Ministries and governments to ensure that the public are disadvantaged by keeping them poor and unfunded compared to other fisheries sectors?

We believe that having a financially strapped non commercial sector is to the advantage of the Ministry and commercial fishers and introduces a vast bias in all fishery management processes from the science level right through to the policy and decision making processes. Our only defence against the gross inequity of the proportional fishery management system being forced upon us is to become more vocal and raise the issue of poor policy and biased advice with the media, the voters and tax payers in order to be effective. We simply do not have the resources to participate effectively in the system that has been developed.

### **Proportional Shares - The real cost**

It appears to non-commercial fishers that the Ministry is actively and selectively using proportional shares as a means of avoiding compensation while capping, reducing or limiting the recreational catch. If the Ministry truly wish to pursue a fair proportional system they should be directed to investigate the full costs of such a proposal. These certainly need to include the following:

#### **Commercial**

1. Constrain commercial TACC's to pre QAA levels in all shared fisheries where those fisheries are still below MSY
2. Where the new TACC does not constrain commercial catch reduce the TACC to a point where it does
3. Deduct fish deemed in excess of the TACC from the next years TACC annually

4. Where shared fisheries are below MSY set a rebuild in place and allow non-commercial catch to increase to what they should have been had the fishery been properly managed

### **Non-commercial**

1. Accurately determine recreational catch in all shared fisheries and “allow” for that amount.
2. Develop and implement a population-participation allocation model for re-allocating between sectors. Non-commercial “allowance” should drop if participation levels drop and should increase to allow for increased participation levels.
3. Develop and implement a real time reporting system for non-commercial fishers.
4. Assess the TAC for each fishery and where the combined catches exceed the TAC reduce the catch to the TAC and pay compensation to any sector that receives cuts.

As the government has ruled out licensing non-commercial fishers either the Ministry or the government will have to bear the costs of implementing and maintaining the above scheme.

Conversely, reduction of commercial catch without compensation could be achieved if the Minister

1. Reduces TACC's to replace the fish taken in excess of the TACC through deeming over the years
2. Reduces TACC's to replace the fish taken in excess of the TACC through dumping over the years
3. Reduces TACC's to replace the fish taken in excess of the TACC through high grading over the years
4. Reduces TACC's to replace the fish taken in excess of the TACC through non-reporting over the years
5. Reduces TACC's to rebuild fisheries to at or above the MSY stock size

Obviously achieving the above would require the Minister to acknowledge the failure of the Ministry's allocation model and management of shared fisheries to date and correct the erosion of the non commercial sectors' rights caused through their flawed policies.

**The Government might prefer a cheaper alternative.**

### **Balanced Priority**

#### *Commercial Priority*

In those fisheries where there is only a commercial catch, the fishing industry should keep, as its priority, some ability to determine;

- how that stock is researched,
- what level it is managed to,
- rebuild rates,

All to be based purely on commercial arguments made within the limitations of the Fisheries Act and conditional that the fishery does not impact on recreational fishers access to their fisheries (i.e. deplete important baitfish or food chains of important non-commercial species).

Research spending could be based on achieving commercial objectives. Adaptive Management is another form of priority appropriate for commercial only fisheries.

### ***Non-commercial Priority***

To balance the commercial fisher's priority above, up to a dozen inshore fisheries critical to non-commercial fishers need to be clearly defined as having recreational priority and need to be managed toward non-commercial objectives such as, more fish in the water, availability of large fish, increased average size or improved catch rates.

The ONLY way to achieve these kinds of outcomes is to run the fishery at a higher biomass than the biomass that produces the MSY. This should be achieved in such a way that non-commercial fishers should not have to endure further compulsory cuts to their already depleted catch levels until the fishery is at or above the MSY biomass. This is critical and is required undo or prevent the doubly jeopardy allocation model mentioned above. When the fishery is at or above the MSY level bag limits etc could be reviewed to achieve the rest of the rebuild.

The Minister can demand a rebuild to MSY and cut TACC's without reducing non-commercial bag limits in key shared fisheries. If he acknowledges that non-commercial catches have been unfairly reduced for a considerable time by the less than optimum biomass no compensation claim should be able to succeed.

Research spending on these fisheries needs to be based on achieving non-commercial objectives. Adaptive Management TACC increases must not be used in these fisheries.

Possible examples of species candidates required for Non-commercial priority. More consultation would be required to finalise this list.

Kingfish

Snapper

Kahawai

Blue Cod

Crayfish

Shellfish (several species)

Bill Fish

## *Shared Stocks*

Management for all other shared stocks should be directed at getting these stocks to the statutory level of “at or above the level required to produce MSY” with some urgency. Most shared stocks were well below MSY levels in 1986 due to excessive commercial fishing in the late 70’s and early 80’s and have still not rebuilt in the 17 years since. Maintaining stocks below MSY gives preference to the commercial sector while denying non-commercial aspirations and interests in shared fisheries.

The cuts in catches required for rebuilding these shared fisheries should therefore consist of:

- Remove unsustainable quota increases granted through the QAA which were allowed to inflate quotas above levels set to rebuild the fisheries in 1986. Fishermen have already been compensated to fish at the lower pre QAA TACC levels.
- Reduce the TACC in all shared fisheries to a tonnage which constrains commercial catches to a level that will allow the fisheries to rebuild to the “at or above MSY stock level” (Flounder, mullet and gurnard quotas are examples where TACC has been massively over-allocated).
- Cancellation of adaptive management quota
- Rebuilding shared fisheries must be achieved in such a way that non-commercial fishers do not have to endure any cuts to their already depleted catch levels. This is critical and is required to prevent the doubly jeopardy allocation model outlined above.

The Minister can demand a rebuild to MSY and cut TACC’s without reducing non-commercial bag limits. If he acknowledges that non-commercial catches have been unfairly reduced for a considerable time by the reduced biomass, no commercial compensation claim should be able to succeed.

- Research spending in shared stocks to be based on commercial and non-commercial objectives. These fisheries should be managed with certainty of a biomass staying at or above the MSY level.
- Decision rules, such as ; TACC increases could occur if the biomass is say 25% above MSY and TACC reductions would occur automatically if it falls below. When the fishery is at or above the MSY level bag limits etc could be reviewed. It is important to note that the existing bag limits are acceptable. It is the inability of non commercial to catch a bag that is the problem.
- Adaptive Management TACC increases should not be used in key shared fisheries.

### **Species Candidates required for Shared Fishery.**

All fisheries not included in the *Non-commercial Fishery* list above where there is a known significant non-commercial catch.

*Examples of shared fisheries are; (more consultation would be required to finalise this list.)*

Snapper (some QMA's)

Crayfish

Trevally

Mullet

Flounder

Gurnard

Pilchards (Food chain importance)

Mackerel (Food chain importance)

Piper

Shellfish

John Dory

### **Population Fluctuations**

It is important that fluctuations in participation levels are accommodated in allocation decisions. Clearly the current policy has circularity and needs refinement.

If both the Minister and Non-commercial fishers wish to pursue the above issues then non-commercial fishers need to organise a working group to work through the issues with MFish and have regular meetings with the Minister.