

Chair
Cabinet Economic Development Committee

PROPOSED AMENDMENT OF THE FISHERIES ACT 1996: PRECAUTIONARY APPROACH

Proposal

- 1 I propose the Committee approve an amendment to the Fisheries Act 1996 to better reflect the internationally accepted precautionary approach to fisheries management decisions so that, where information is uncertain or limited, decision makers can act cautiously so as to ensure sustainability of fisheries resources and address the impact of fishing on the aquatic environment.

Executive Summary

- 2 Successful management of renewable natural resources requires their use to be constrained within the sustainable limits of the ecosystem. Ecosystems are complex, with inherent natural fluctuations, multiple dependencies between species and varying susceptibility to human activity. When making decisions over the allowable use of a resource in the context of the Fisheries Act 1996 ("the Act"), decision-makers should act cautiously when the information on which to base their decision is uncertain or limited. This approach is reflected in key international environmental agreements, including fisheries agreements and arrangements.
- 3 Recent successful High Court action initiated by fishing industry interests have frustrated my decision to reduce the total allowable catch limit (TAC) in a North Island orange roughy fishery. At an interim hearing, the Court held, for several reasons, that further implementation of my decision should be prevented pending the outcome of a substantive hearing. In my view this situation highlighted deficiencies in the current expression of the precautionary approach in the Act (found in section 10 "information principles"). Therefore I propose the Act be amended to better reflect the internationally accepted view of the precautionary approach to fisheries management decisions where information on sustainability is uncertain or limited. This change will assist future management decisions, but it will not resolve all the issues in the orange roughy case.
- 4 The impact of the proposed change will depend on the specific decisions being made, the stocks they relate to, and the state of information about them. In general it is unlikely to cause abrupt changes in current fisheries management measures. Ultimately, however, there are likely to be changes in the way stock assessment is undertaken and how management advice is prepared and presented to fisheries management decision-makers for fisheries where information is uncertain or limited.

Information to manage fisheries is almost invariably uncertain or limited, and therefore a revision to the precautionary approach in the Act will affect the management decisions. The net effect on harvest levels will be either neutral (where I am confident that stocks are being fished sustainably) or will lead to a decrease in catch.

- 5 If Cabinet agrees to the proposal in this paper, I intend to seek approval for a Bill to be drafted and introduced into the House, with a view to its enactment before the middle of 2007. The reason for urgency is that I would like the legislative change in place prior to the development of my next major set of fisheries management decisions (for the fishing year commencing 1 October 2007).

Background

- 6 On 19 October 2006 the High Court granted injunctive relief against my decision in respect of the Total Allowable Catch (TAC) for the 2006-07 fishing year for an orange roughy fish stock (ORH1). The effect of the injunctive relief has been to prevent the further implementation of my decision to reduce the TAC in this orange roughy fishery, pending the outcome of the substantive hearing set down for 23 January 2007.
- 7 As I advised Cabinet last month, the ORH1 case has underlined a need for legislative change to parts of the Act concerned with ensuring sustainability. Cabinet approved my reporting back on a proposal for making such change. This paper therefore proposes legislative change to ensure New Zealand's fisheries management reflects the internationally accepted approach to application of the precautionary approach. This change will not resolve all the issues raised in the ORH1 case. But the change proposed should lead to a shift in New Zealand's fisheries approach in the long term, as expressed in law, policy, advice and decisions, which will make future situations such as those presently being experienced in the management of the ORH1 fishery less likely to occur.

Comment

Ensuring sustainability under the Fisheries Act 1996

- 8 The Fisheries Act 1996 is the principal statute governing the management of New Zealand's fisheries resources. It empowers the Minister of Fisheries to set various sustainability measures (e.g., TACs, fishing method restrictions). The Act's purpose is to provide for the utilisation of fisheries resources while ensuring sustainability. In order to achieve this, the Act provides for limits to be set within which sustainable fishing can occur. Often there is limited information available on how ecosystems and fish stocks actually behave and this means all decisions to allow harvest carry some degree of risk.
- 9 The Act also provides some guidance, by providing some consistent themes, on how these inherent risks should be taken into account in decision-making. One of these is the purpose of the Act which is set out in section 8. The others are the environmental and information principles set out in sections 9 and 10.

Decision-making under uncertainty

- 10 Successful management of renewable natural resources requires their utilisation to be constrained within the renewable limits of the ecosystem. However, our knowledge of species, and especially ecosystem behaviour, is often incomplete or of unknown quality. A key challenge for fisheries management decision-makers is knowing what information is relevant, and what degree of information certainty is required, that will allow us to perturb an ecosystem (by permitting fishing mortality) without serious or irreversible harm.
- 11 The costs of obtaining additional information, especially about non-target species, can be high. Managers endeavour to make the best decisions they can with the best information they have available. But there is always the risk that the decision is flawed because of defects in the information. The impact of a flawed decision regarding fisheries use will vary according to the nature of the information flaw, the stock characteristics, and other factors. If the decision overestimates the relevant stock levels, sustainability of the fishery is put at risk. If it underestimates the stock levels, then harvest has been unnecessarily constrained.
- 12 The need for resource (including fisheries) managers to act cautiously, when the information to support their decision is uncertain or limited, has been expressed in a number of international conventions or agreements and is often referred to as the “precautionary approach”. It has developed over a number of years and there is an extensive body of literature around it and the strategies required to implement it.
- 13 For fisheries management purposes, the most commonly accepted expression of the precautionary approach can be seen in the FAO Code of Conduct for Responsible Fisheries, which was adopted by the FAO Conference in 1995. Article 6 (2) of the Code provides:

The absence of adequate scientific information should not be used as a reason for postponing or failing to take measures to conserve target species, associated or dependent species and non-target species or their environment.

- 14 Similar wording is evident in the 1995 United Nations Agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks, to which New Zealand is a party, which provides in Article 6(2):

The absence of adequate scientific information shall not be used as a reason for postponing or failing to take adequate conservation measures.

- 15 Australia, Canada and the United States of America have all articulated the precautionary approach in their fisheries management legislation and guidelines.
- 16 The common feature of all these expressions of the approach is their focus on the risk to the resources themselves, as the basis for acting in the face of uncertainty. The key element of the approach is to act in favour of conserving the resource where risks are identified but information is uncertain or limited.

The New Zealand situation

- 17 Guidance on how risks to the resources should be managed in New Zealand is currently provided by section 10 of the Act, which provides that:

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.*

- 18 Paragraphs (a) and (b) essentially have the effect of requiring the decision-maker to make use of the information that is already known, but not to ignore any gaps or lack of detail. Paragraphs (c) and (d) direct the decision-maker to be cautious when information is of poor quality, and not to avoid making a decision simply because of the lack, or poor quality, of information.

- 19 The information principles are not consistent with the international application of the precautionary approach. This is because of the way the principles are applied, in combination with the purpose of the Act, to fisheries management decisions. The purpose of the Act, Section 8, states:

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

- 20 The purpose of the Act has two elements: providing utilisation and ensuring sustainability. It follows that a decision-maker could use the absence of or uncertainty in information as a ground for taking a measure to achieve either sustainability or utilisation, depending on their view of the greater risk at the time. Such an approach is not consistent with the precautionary approach which, as noted above, requires measures to be taken which would ensure sustainability, in preference to providing utilisation, where information is uncertain or limited.

- 21 Sustainability and utilisation both have status in the context of section 10, and one does not receive precedence over the other in the context of decision making. It therefore allows the decision-maker to act in favour of sustainability if they choose to do so, but each such decision must be justified on its facts. In each case therefore, the decision-maker would be required to show that she or he had formed the view that, given the uncertainty surrounding the information, it was appropriate to act in favour of sustainability.

- 22 I do not consider that the current situation is acceptable, particularly with respect to fisheries management decisions made under the Act. The lack of guidance for a decision-maker, including a Minister setting a TAC, on how to weigh risks to either

sustainability and utilisation, when information is uncertain, introduces inappropriate ambiguity to the decision-making process. This raises the risk of inconsistent decisions over time, and increases the risk of lobbying by those whose access rights may be reduced.

- 23 I note that the current situation has arisen despite the original policy intention when the Act was being developed. During its development, one of the clear policy intents was to implement the precautionary approach in New Zealand fisheries management.
- 24 I consider that the international approach in response to risk to the sustainability is preferable. International authorities provide a consistent message that caution should be exercised in favour of conservation over utilisation where there is uncertainty in the information available.

Possible amendment to the Fisheries Act 1996

- 25 The precautionary approach is, as its title suggests, a way of dealing with uncertainty in a general sense, rather than a set of criteria for a specific decision. It will be most effective where it is applied across the range of functions and duties that arise in the course of fisheries management.
- 26 It would be appropriate to amend the Act to reflect the predominant international interpretation of the precautionary approach. Given the requirement that information principles need to be taken into account by all decision-makers, this enables a consistent approach across a variety of management decisions, without requiring substantial change to particular decision criteria. This approach would allow Ministers to make decisions that favour a precautionary approach to ensuring sustainability where information is uncertain or limited.
- 27 The text of an amendment would need to be confirmed with Parliamentary Counsel Office, but my intention is to amend section 10 of the Act so that decision-makers are required, in circumstances where information is uncertain or limited, to act cautiously so as to ensure sustainability. An amendment to section 2 may also be required to ensure the decision makers are not subject to an inappropriate requirement to obtain further information before a decision can be made. There is potential that other sections of the Act may require amendment to ensure the policy intent is clearly articulated in the legislation. These changes would enable sustainability measures to be set and amended, even if there is uncertain or limited information regarding the state of the fishery and the impacts of current utilisation.

Impact of proposed change

- 28 The impact of the proposed change will depend on the specific decisions being made, the stocks they relate to, and the state of information about them. In general it is unlikely to cause sudden changes in current fisheries management measures. There are, however, likely to be changes in the way stock assessment is performed, and how management advice is prepared in relation to fisheries for which information is uncertain or limited. These changes will be reflected in the policy approaches and advice developed by the Ministry of Fisheries and the research services the Ministry purchases to support management advice.

- 29 In some fisheries a cautious approach in favour of sustainability may lead to recommendations for TAC reductions, even though no additional information on stock performance has become available since setting the original TAC. Fishers will likely oppose any TAC reductions. It will therefore be important that the implementation of the precautionary approach is seen as part of the long-term management strategy for the fishery.
- 30 The overall impact of this change should be positive in terms of ensuring sustainability of fisheries and the health of the aquatic ecosystem. It may negatively impact on utilisation in certain circumstances in the short-term, but it should ensure a more stable and sustainable resource base so fisheries utilisation can continue to make a contribution to economic development.

Next Steps

- 31 If the Committee agrees to the proposal in this paper, I will seek Cabinet Legislation Committee approval for a Bill to be drafted and introduced into the House, with a view to its enactment before the middle of 2007.
- 32 The reason for this urgency is that I would like the legislative change in place prior to the development of my next major set of fisheries management decisions (for the fishing year commencing 1 October 2007).

Consultation on this paper

- 33 No consultation has yet occurred with other departments or with stakeholders on this paper.
- 34 I will instruct the Ministry of Fisheries officials to discuss the proposal with other departments once Cabinet has made its decisions.
- 35 I have not consulted with stakeholders on the proposal in this paper. I expect a high degree of interest in this proposal and I will be writing to fisheries stakeholders (commercial, customary Māori, recreational and environmental), informing them of the proposal and the Government's intention to introduce amending legislation. This will provide them with ample opportunity to prepare their views for the Select Committee submission process.

Financial Implications

- 36 There are no financial implications arising from the recommendations in this paper.

Human Rights

- 37 There are no implications in relation to the New Zealand Bill of Rights Act 1990 or the Human Rights Act 1993.

Legislative Implications

- 38 Implementation of this proposal would require amendment to the Fisheries Act 1996. The amended Act would be intended to bind the Crown. If agreed to, I intend to seek

provision in the 2007 legislative programme for an appropriate Bill to be enacted before the middle of 2007.

Regulatory impact and business cost compliance statement

39 A Regulatory Impact Statement (RIS) is attached that complies with the requirements for RISs. There are no business compliance costs arising directly from this proposal.

Recommendations

40 I recommend that the Committee:

- a. **Note** that the Fisheries Act 1996 needs amendment to better reflect widely accepted international interpretation of the precautionary approach as it applies to fisheries;
- b. **Agree** that the Act be amended so that, in circumstances where information is uncertain or limited, decision makers can act cautiously so as to ensure sustainability of fisheries resources and address adverse effects of fishing on the aquatic environment;
- c. **Invite** the Minister of Fisheries to issue drafting instructions to Parliamentary Counsel Office to prepare an amendment Bill to give effect to the decision in b);
- d. **Note** the need for the proposed Bill to be enacted before the middle of 2007; and
- e. **Note** that the Minister of Fisheries intends to seek a place for the proposed Bill on the 2007 Legislative Programme.

Hon Jim Anderton
Minister of Fisheries