

SEABIRD MITIGATION MEASURES BY CIRCULAR - INITIAL POSITION PAPER

Executive Summary

- 1 The Ministry of Fisheries (MFish) proposes to amend the Fisheries (Commercial Fishing) Regulations 2001 (the regulations) to allow for:
 - a) The promulgation of circulars specifying criteria for seabird mitigation measures for classes or types of vessels;
 - b) The promulgation of seabird mitigation measures by circular for specific vessels.
- 2 In February 2008 the previous Minister of Fisheries (the Minister) determined minimum acceptable mitigation measures that all trawl and longline vessels should be using in the short term. The Minister's decisions were implemented by *Gazette* Notices, pursuant to section 11 of the Fisheries Act 1996 (the Act). MFish's expectation was that the gazetted measures would eventually be promulgated through regulation. Subsequently, *Gazette* Notices for trawl vessel were revoked to allow for further collaborative work with stakeholders.
- 3 At the time the Minister made his decisions, he indicated to stakeholders that the regulations would be amended to allow the MFish Chief Executive to issue circulars in relation to a range of seabird mitigation measures and types of vessels. MFish would consult with stakeholders on the content of seabird mitigation circulars prior to their being issued. However, the Minister signalled that they would likely initially replicate the current *Gazette* Notice measures, unless new information came to light.
- 4 In April 2008, the Minister initiated consultation with stakeholders on a proposal to enable the MFish Chief Executive to issue circulars for seabird mitigation measures. MFish received submissions from commercial stakeholders setting out an alternative proposal based on a Vessel Management Plan (VMP) regime, supported by a regulatory framework. MFish and fishing industry representatives undertook discussions on whether the VMP approach could be accommodated within the regulatory framework that MFish is proposing.
- 5 In order to progress the Minister's directives, MFish proposes the following:
 - a) MFish would proceed with its original proposal to amend the regulations to empower the MFish Chief Executive to promulgate circulars specifying general criteria for seabird mitigation measures;
 - b) MFish would also amend the regulations to empower the MFish Chief Executive to promulgate seabird mitigation measures for specific vessels
- 6 As this proposal differs materially from the IPP that MFish consulted on in 2008, MFish is undertaking further targeted consultation with those stakeholder groups with a direct interest in this issue.

Regulatory Impact Analysis Requirements

- 7 A Regulatory Impact Statement on this proposal has been reviewed by MFish. For more information on the Regulatory Impact Analysis Requirements, please refer to the Treasury website, www.treasury.govt.nz/publications/guidance/regulatory.

The Issue

- 8 MFish's management objective, as required by section 8 of the Act, is to avoid, remedy, or mitigate the adverse effects of fishing on seabirds.

Risk to seabirds from fishing

- 9 New Zealand is an important breeding ground for approximately eighty seabird species and has the greatest variety of albatross and petrel species in the world. These species range in IUCN threat ranking from critically endangered (e.g., Chatham albatross) to least concern (e.g., flesh-footed shearwaters). One of the key threats is the incidental mortality of seabirds in the course of fishing activity.
- 10 Several population characteristics of albatrosses and petrels make them susceptible to long-term population decline from fishing-related mortalities. Albatrosses and petrels typically have late maturity, low productivity, and take a long time to form pair bonds if a partner is killed. If the death of a breeding individual occurs, the chick almost always dies and the remaining partner may take several years to start nesting again with a new partner.
- 11 The intrinsic rate of population increase for these species is very low, meaning that birds may not be able to reproduce sufficiently rapidly to compensate for fishing related removals at the population level. As a result of such fishing related removals, decreases in population sizes and an associated increase in threat status are likely to occur.

Immediate Action on Mitigation Measures

- 12 The National Plan of Action to reduce the Incidental Catch of Seabirds in New Zealand Fisheries (NPOA Seabirds) is the main policy framework for delivering on MFish's obligations under the Act. The NPOA Seabirds sets out a long term, strategic approach to reducing the incidental catch of seabirds that includes goals, objectives, management measures and supporting services such as monitoring and research. A revised NPOA Seabirds is currently being developed in consultation with stakeholders.
- 13 While conscious that a comprehensive management framework for seabirds is being consulted on, the Minister is also concerned about the level of risk in the period before the management framework can be implemented. Following a stakeholder consultation process, in February 2008 the Minister determined minimum acceptable mitigation that all trawl and longline vessels should be using in the short term. The Minister's decisions were implemented by *Gazette* Notices, pursuant to section 11 of the Act. The *Gazette* Notices provided an

exemption to the offal management requirements to those vessels where it could be shown that safety would be compromised.

- 14 Subsequent to gazettal, fishers in both the deepwater and inshore fisheries raised a number of significant safety and practicality concerns. They stated that there was insufficient time to work through those concerns and to provide the industry with sufficient notice of how an exemption process would operate. The Minister therefore decided to revoke two *Gazette* Notices relating to trawl vessels greater than and less than 28 meters (m), that were due to come into force on 1 September 2008. In his decision letter to stakeholders dated 28 July 2008, he made the following points about inshore and deepwater trawl fisheries:
- a) *Vessels over 28 m* – the Minister noted that there are already regulatory minimum seabird mitigation measures in place in these fisheries to reduce seabird interactions and a non-regulatory management regime through VMPs. He directed MFish to work with industry and environmental groups to address a number of issues concerning VMPs, including effective mitigation measures, fleet coverage, and appropriate auditing and monitoring.
 - b) *Vessels under 28 m* – the Minister noted that there are currently no regulatory seabird mitigation measures in place in inshore trawl fisheries. He directed MFish to begin discussions with industry on possible mitigation measures, with a view to developing regulatory minimum measures for these vessels at the earliest opportunity.
- 15 The measures specified for longline fisheries, where there is the greatest unmanaged risk, were gazetted in 2008 and remain in place. They are:
- a) Fisheries (Seabird Sustainability Measures – Surface Longlines) Notice 2008 – took effect 19 February 2008;
 - b) Fisheries (Seabird Sustainability Measures – Bottom Longlines) Notice (No.2) 2008 – took effect 12 April 2008.
- 16 Regardless of the revocation of the most recent notices relating to trawlers, MFish notes that mandatory measures remain in place for longline vessels and trawlers over 28 m (requiring the use of seabird scaring devices). These regulations are generic and apply to all vessels using a specific fishing method. Work is underway with inshore trawl vessel operators on mitigation measures.
- 17 MFish considers that the creation of a framework allowing specification of required measures by circular would allow a more flexible management approach (vessel and/or area specific) for measures already in place (should they require amendment) and for any new measures which require regulatory support for implementation.

Summary of Options

Option 1 – Status Quo – No amendment to the regulations

- 18 The status quo would mean a continuation of the current situation whereby seabird mitigation measures are promulgated by *Gazette* Notice.

- 19 The likely outcome of the status quo would be that MFish would not have the ability to respond as quickly as is desirable to changes and innovations in mitigation measures.

Option 2 – MFish Preferred Option

- 20 MFish’s preferred option, consistent with the Minister’s decisions in his letter of 28 July 2008, is to amend the commercial fishing to create an enabling regulatory framework that would allow for both generic and vessel specific seabird mitigation measures to be specified by circular.
- 21 This is MFish’s preferred option because it would allow for the most flexible means of responding to changes in circumstances. MFish also considers that the availability of effective regulatory measures is essential in circumstances where VMPs may prove inadequate.

Rationale for Management Options

- 22 MFish proposes that Option 2 would be implemented by s 297 of the Act. In particular, subsection 297(1)(a)(vii) allows regulations to be made for the purposes of regulating or prohibiting any method of fishing. Section 297(1)(e) of the Act provides that “The Governor General may ...make regulations ... for ... the following purposes: defining the vessels or classes or types of vessels to which any regulations are to apply.”
- 23 MFish proposes that the amendment would come into effect on or before 1 October 2009. MFish has been consulting with stakeholders since 2008, and this consultation document is a continuation this work. MFish would contact them well in advance to ensure that they are aware of and can comply with any new requirements. MFish emphasises that it is consulting only on the enabling framework. MFish would consult with stakeholders on any circulars subsequently issued by the Chief Executive.
- 24 The key criteria to take into account when considering the management options 1 and 2 are –
- a) Which of the options allows greatest flexibility for least cost;
 - b) Which of the options allows for the quickest response to changes and innovations in mitigation practices and technology;
 - c) Which of the options allows for implementation of a range of mitigation measures across a wide range of types of vessel; and
 - d) Which of the options allows for vessel specific mitigation measures.
- 25 MFish and the Minister wish to work with stakeholders to investigate workable mitigation measures. Voluntary VMPs provide a good basis for developing further mitigation measures in some fisheries. However, the nature of the risk posed by fishing on seabird mortality (as set out above) is such that it is necessary to give MFish tools to specify immediate measures should they be needed.

Assessment of Management Options

Option 1 – Status Quo – No amendment to the regulations

Impact

- 26 Fishers in the bottom longline and surface longline fisheries are required to implement, or begin implementing, a range of seabird mitigation measures. These measures are promulgated by *Gazette* Notice. Under this option, these notices would remain in place, although there is the option to promulgate further measures through Notice if required.
- 27 In the inshore trawl and deepwater trawl fisheries, the *Gazette* Notices that were to come into effect later in the year have been revoked (as noted above). In the meantime, there are either no regulatory seabird mitigation measures in place (as in the inshore trawl fishery), or a mixture of regulatory seabird mitigation measures and voluntary VMPs (as in the deepwater trawl fishery).
- 28 The status quo would not provide MFish with the flexibility to respond in a timely fashion to frequent changes and reiterations in mitigation technology and practice as further research and trials of such devices and measures is carried out. It would also not enable the regulatory framework to implement possible regional or vessel specific mitigation measures that may result in better seabird management and impose less cost on fishers.

Costs

- 29 MFish note that the key cost to fishers would be continuation of the current less flexible (when compared to circulars) regulatory framework.

Benefits

- 30 MFish does not consider that there are any benefits associated with a continuation of the status quo.

Option 2 – Generic and Vessel Specific Enabling Framework

Generic Mitigation Measures

- 31 The first element of the preferred option is regulations that would allow for the issue of circulars relating to seabird mitigation measures for a particular fleet. The matters that the Chief Executive may issue such a circular in respect of would include –
- a) The classes or types of vessel, based on length or fishing method;
 - b) The date, area and/or time of fishing;
 - c) The method of discharge of offal;
 - d) ‘Back of the boat’ mitigation methods, e.g., tori lines.
- 32 This proposal is essentially the same as that which MFish consulted on in 2008.

Vessel Specific Mitigation Measures

- 33 Seabird mitigation in the deepwater fishery (trawlers over 28 meters) is given effect by regulations requiring the use of back of the boat seabird scaring devices and voluntary VMPs. The proposed circular framework would enable more flexible measures (vessel/area/method and/or time specific) to be implemented for vessels operating in this fishery if necessary.
- 34 The rationale for Option 2 is as follows –
- a) At present, the regulations are relatively narrow in their scope, requiring for the carrying and use of seabird scaring devices by trawlers over 28 metres, and the issue of circulars relating only to seabird scaring devices. Further mitigation measures may well allow for a broader range of measures such as restrictions on the use of lines, line weighting and restrictions on offal or fish discharge while setting and hauling. Existing requirements may need to be changed in light of current difficulties, newly identified risks and developing technologies. It is therefore important that the requirements can be altered if and when it is necessary to reflect this broader scope, an amendment to the regulations would allow this;
 - b) The proposed amendments to the regulations would allow greater flexibility through the use of circulars issued by the MFish Chief Executive, rather than by *Gazette* Notices approved by the Minister of Fisheries. Given that the measures are typically highly detailed and technical, it is important that the tool used to promulgate the measures is quick and responsive to innovations in mitigation technology. MFish considers that circulars meet this criteria more readily than do *Gazette* Notices issued by the Minister;
 - c) As the Minister noted in his letter of 28 July to fishers, VMPs appear to provide a good foundation for developing further mitigation measures in some fisheries. He stated that vessels following their VMPs have reduced their bycatch of larger seabirds, including albatrosses. However, the Minister also expressed his wish that effective measures must be available to deal with vessels that are not following their VMPs, are unlikely to follow VMPs, or where VMPS are unlikely to be sufficiently effective. To address this concern, MFish proposes that the Chief Executive be given the power to promulgate vessel specific measures;
 - d) The regulations would provide a single point of reference for legislation. It is preferable to have all measures related to seabird mitigation consolidated in one place in regulation for easy reference by fishers and other stakeholders.

Impact

- 35 The impact of this proposal is that an enabling framework would be established. This provides flexibility in the management of impacts of fishing on seabirds, particularly around changes to mitigation devices and deployment of such devices, which could be quickly adopted if circulars are issued by the MFish Chief Executive.

Costs

36 There are no costs as such associated with the regulatory proposal, as it only proposes to establish an enabling framework. However, if the Chief Executive does issue a circular under that framework, the costs are likely to fall into two areas –

- i) Purchase of seabird mitigation measures; or
- ii) Changes in fishing practice that may affect fishing efficiency.

Benefits

37 The benefits of option 2 are:

- a) The proposed amendments to the regulations would allow greater flexibility through the use of circulars issued by the MFish Chief Executive, rather than by *Gazette* Notices approved by the Minister. Given that the measures are highly detailed and technical, it is important that the tool used to promulgate the measures is quick and responsive to innovations in mitigation technology. MFish considers that circulars meet this criteria more readily than do *Gazette* Notices issued by the Minister;
- b) Measures implemented can be more area/method/vessel specific which will provide greater effectiveness and efficiency of measures which should reduce cost impacts on fishers.
- c) Effective measures must be available to deal with vessels that are not following, or are not likely to follow, VMPs. To address this concern, MFish proposes that the Chief Executive be given the power to promulgate vessel specific measures, where this is appropriate;
- d) The regulations would provide a framework for additional seabird mitigation measures to be introduced as part of the longer term framework for managing seabird interactions.

Statutory considerations

38 In forming the proposal, the following statutory considerations under the Fisheries Act 1996 have been taken into account.

- a) **Section 5(a) and (b)** require the Act to be interpreted consistently with New Zealand's international obligations with respect to fishing and with the provisions of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992. Provisions of general international instruments such as the United Nations Convention on the Law of the Sea (UNCLOS) and the Fishstocks Agreement have been implemented through the provisions of the Fisheries Act 1996. MFish considers that the proposal is consistent with both New Zealand's international obligations and the provisions of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992.
- b) **Section 8** describes the purpose of the Act as being to provide for the utilisation of fisheries resources while ensuring sustainability, and defines the meaning of sustainability and utilisation. The management option presented in the IPP seeks to achieve the purpose of the Act, in particular

the requirement to avoid, remedy or mitigate any adverse effects of fishing on the aquatic environment.

- c) **Section 9(a) and (b)** requires the Minister of Fisheries to take into account that associated or dependent species (those that are not harvested) be maintained at or above a level that ensures their long-term viability and that the biological diversity of the aquatic environment should be maintained. MFish considers that the proposed measures are consistent with the environmental principles of the Act.
- d) **Section 9(c)** requires the Minister of Fisheries to take into account the principle that habitat of particular importance for fisheries management should be protected. MFish considers that the proposed measure is consistent with this principle.
- e) **Section 10** sets out the information principles, which requires that decisions be based on the best available information, taking into account any uncertainty in that information, and applying caution when information is uncertain, unreliable or inadequate. In accordance with s 10, the absence of information should not be used as a reason to postpone, or fail to take, any measure to achieve the purpose of the Act. On balance, MFish considers that the proposal is derived from the best available information and covers an appropriate range of caution in relation to the uncertainty in that information.
- f) **Section 297(1)** empowers the Governor General to make regulations for certain purposes. MFish considers that the proposed changes to the commercial regulations fit within the relevant provisions of section 297. MFish propose that the recommended regulations be made pursuant to section 297(1)(a) of the Fisheries Act which allows regulations to be made for the purpose of regulating or controlling fishing. In particular, subsection 297(1)(a)(vii) allows regulations to be made for the purposes of regulating or prohibiting any method of fishing, while subsection 297(1)(y) provides for regulations to be made for such other matters as are contemplated by or necessary for giving full effect to the provisions of this Act and for its due administration.

REGULATORY IMPACT STATEMENT

Implementing Seabird Mitigation Measures by Circular

a) Executive Summary

The Ministry of Fisheries (MFish) proposes to amend Regulation 58 of the Fisheries (Commercial Fishing) Regulations 2001 to empower the Chief Executive of the Ministry of Fisheries (MFish) to:

- Promulgate seabird mitigation measures by circular for classes or types of vessels; and
- Promulgate seabird mitigation measures by circular for specific vessels.

The proposed amendments will allow greater flexibility through the use of circulars, address the narrow scope of regulation 58, and allow for the promulgation of vessel specific measures where a vessel is not following its vessel management plan (VMP).

b) Adequacy Statement

This Regulatory Impact Statement has been reviewed by the Ministry of Fisheries' Regulatory Impact Analysis Review Committee and is considered to meet the criteria agreed by Cabinet.

c) Status Quo and Problem

One of the key threats to the long-term viability of seabird species is incidental mortality in the course of fishing activity. Several population characteristics of albatrosses and petrels in particular make them susceptible to long-term population decline from fishing-related mortalities. Albatrosses and petrels typically have late maturity, low productivity, and take a long time to form pairbonds if a partner is killed.

Mandatory measures are in place for longline vessels and trawlers over 28 m (requiring the use of seabird scaring devices). These regulations are generic and apply to all vessels using a specific fishing method.

The current regulatory management framework is generic by method and in the case of trawlers size of vessel. This means that measures are not tailored most effectively to specific vessel/area/method related threats to seabirds. This can impose unnecessary constraint on industry practice.

d) Objectives

The key fisheries management objectives for this proposal is to ensure that any adverse effects of fishing on seabirds are avoided, remedied or mitigated. Analysis by MFish suggests that fishing is likely to be having an adverse effect on at least some species of seabirds. The purpose of the proposed measure is to create a more flexible regulatory framework for requiring mitigation measures and specifying what mitigation measures may be used (when Government intervention is considered necessary). The framework will enable mitigation measures to be better tailored to specific areas/methods and or vessels which pose a risk to seabirds.

e) Preferred Option

MFish's preferred option is to amend Regulation 58 of the Fisheries (Commercial Fishing) Regulations 2001 to empower the Chief Executive of MFish to promulgate both generic and vessel specific seabird mitigation measures by circular.

Benefits

The proposed amendments will allow greater flexibility through the use of circulars issued by the MFish Chief Executive, rather than by *Gazette* Notices approved by the Minister of Fisheries. Given that the measures are highly detailed and technical, it is important that the tool used to promulgate the measures is quick and responsive to innovations in mitigation technology. MFish considers that circulars meet this criteria more readily than do *Gazette* Notices. Circulars will enable amendment to existing measures (if necessary) and implementation of any new measures (as required) using a more flexible vessel specific, method and/or area approach to be taken this will mean the measures are more effective in reducing seabird mortality because they can be tailored more directly to specific risks.

The measures could also reduce costs to industry by enabling measures vessel or area specific measures to be implemented which have less impact on fishing practices than current generic measures.

Costs

There are no costs as such associated with the regulatory proposal, as it only proposes to establish an enabling framework. However, if the MFish Chief Executive does issue a circular under that framework, the costs are likely to fall into two areas –

- Purchase of seabird mitigation measures; or
- Changes in fishing practice that may affect fishing efficiency.

f) Implementation and Review

MFish proposes that the amendments to the Fisheries (Commercial Fishing) Regulations 2001, if approved, will come into effect on 1 October 2009.

The proposed regulations empower the Chief Executive of MFish to establish new seabird mitigation measures, on either a generic or vessel-specific basis, through the use of circulars. On an on-going basis, MFish, when considering such new measures, will prepare and publish the equivalent of Regulatory Impact Statements.

For both these regulations and the on-going use of circulars, commercial fishers will be notified of changes on the MFish external website and through contact with MFish staff.

MFish will give priority to monitoring and evaluating the measures on an on-going basis, concentrating on such indicators as the number of seabirds caught, and working with the fishing industry and interested agencies such as Maritime New Zealand on revising and refining the measures, particularly in relation to information on impacts.

g) Consultation

The seabird mitigation measures have been through an extensive consultation process with stakeholders in the lead-up to their notification by *Gazette* Notice. MFish proposed a range of sustainability measures for bottom longline, surface longline, inshore trawl and deepwater trawl fisheries. While all stakeholders supported the desired outcome of the proposals, ie, that all vessels using the methods of trawl and longlines within New Zealand waters, the majority of Industry representatives did not see the need for urgent measures and did not support the use of blanket regulations to reduce fishing-related mortality of seabirds. Environmental stakeholders stressed the importance of mitigating fishing-related mortality fishing-related mortality by applying workable and effective measures. MFish amended the proposals in light of stakeholder feedback.

Key government departments (ie, the Department of Conservation and Maritime New Zealand) have also been closely involved in the development of the measures. The proposed measures will take account of developing best international practices.

SEABIRD MITIGATION MEASURES BY CIRCULAR - SUMMARY OF SUBMISSIONS

Submissions Received

39 MFish received three submissions regarding this proposal from:

- New Zealand Recreational Fishing Council (**NZRFC**);
- New Zealand Seafood Industry Council (**SeaFIC**), and;
- Te Ohu Kai Moana (**TOKM**).

MFish Discussion

40 **NZRFC** supports a flexible approach to managing fishing-related seabird mortality. Option 2 is more flexible than the status quo.

41 **SeaFIC** argues that the IPP does not demonstrate the merits and drawbacks of a seabird mitigation framework that revolves around circulars as opposed to one that revolves around *Gazette* notices. In particular, **SeaFIC** is concerned that the IPP did not discuss the difference in the administrative procedure, legal status, and penalty regime. MFish has organised this Final Advice Paper to explain why MFish favours a flexible circular-based approach to seabird mitigation as opposed to the status quo.

42 **SeaFIC** also argues that some of the problems with the existing mitigation framework revolve around poor consultation and errors in drafting. **SeaFIC** states that neither of these problems is addressed by shifting to a circular framework. However, **SeaFIC** is comfortable with the proposed amendment to the commercial fishing regulations providing the circular process is accompanied by thorough consultation and attention to drafting. **TOKM** also supports Option 2 noting in particular the flexibility and cost effectiveness offered by a seabird mitigation framework that revolves around circulars.