

# SEABIRD MITIGATION MEASURES BY CIRCULAR – FINAL ADVICE

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## Executive Summary

- 1 The Ministry of Fisheries (MFish) recommends that you agree to amend the Fisheries (Commercial Fishing) Regulations 2001 (the Regulations) to authorise the Chief Executive of MFish to issue, amend or revoke seabird mitigation rules in circulars and to apply the rules to one or more fishing vessels.
- 2 The amendment will, in effect, enable the Chief Executive to specify, as necessary, the type of seabird mitigation measures that fishers must adopt across specific fisheries, fishing methods, vessel types (and even individual vessels), and areas. Currently, the Regulations limit the scope of the rules that the Chief Executive can issue by circular – the rules can only involve seabird scaring devices in trawl and surface longline fisheries. This limitation is a problem because MFish considers that, on an ongoing basis, a circular framework is the best way to deliver seabird mitigation rules.
- 3 MFish prefers the circular framework because it will allow us to:
  - a) Respond more quickly to changing mitigation technology to support more effective and efficient seabird mitigation;
  - b) Translate non regulatory mitigation rules that operate in deepwater fisheries into mandatory requirements if particular vessels do not comply with the existing non regulatory programme;
  - c) Amend existing seabird mitigation rules already in circulars to refine the measures on a fishery, area, method, vessel type or vessel basis, and;
  - d) Ensure that highly technical decisions about specification of mitigation measures are made under the appropriate delegated authority (*i.e.*, the Chief Executive).
- 4 MFish consulted on two options in the IPP:
  - a) Deliver seabird mitigation rules through s 11 *Gazette* notices and amend the Regulations on a case by case basis to permit circulars covering new mitigation measures across specific fisheries, methods, vessels, or areas (status quo), and;
  - b) Amend the Regulations now to authorise the Chief Executive to issue, amend or revoke seabird mitigation rules in circulars and to apply the rules to one or more fishing vessels.
- 5 Amending the Regulations now would establish a more flexible, responsive and efficient regulatory framework that would enable government and industry to better mitigate the effects of fishing-related mortality on seabirds. Amending the Regulations now only changes the enabling framework (*i.e.*, the

nature of the delegated authority given to the Chief Executive) – it does not introduce new rules or change existing rules. MFish would need to consult with stakeholders should it decide that changes to the actual rules, or new rules, were necessary.

## The Issue

- 6 The Act requires those administering it to avoid, remedy, or mitigate the adverse effects of fishing on seabirds.<sup>1</sup> Mechanisms that the government use to deliver the rules include *Gazette* notices issued under s 11 of the Act and circulars issued under an authority granted to the Chief Executive in the Regulations.
- 7 Currently, the Regulations limit the scope of the rules that the Chief Executive can issue by circular – the rules can only involve seabird scaring devices in trawl and surface longline fisheries. This limitation is a problem because MFish considers that on an ongoing basis, a circular framework is the best way to deliver seabird mitigation rules.

## Summary of Options

### *Initial Proposals*

- 8 MFish proposed the following options in the IPP:
  - a) *Option one – status quo*: Government would continue to deliver seabird mitigation rules under the authority of s 11 of the Act and r 58 and r 58B of the Regulations and therefore would remain subject to the limitations described above. Government would need to continue amending the Regulations on a case by case basis to permit new mitigation measures across specific fisheries, methods, vessels, or areas as necessary.
  - b) *Option two – generic and vessel specific framework*: you would agree to amend the Regulations to authorise the Chief Executive to issue, amend or revoke issue seabird mitigation rules in circulars and to apply the rules to one or more fishing vessels.

### *Final Proposal – Option Two*

- 9 MFish recommends that you agree to amend the Regulations to authorise the Chief Executive to issue, amend or revoke seabird mitigation rules in circulars and to apply the rules to one or more fishing vessels.
- 10 The amendment will, in effect, enable the Chief Executive to specify, as necessary, the type of seabird mitigation measures that fishers must adopt across specific fisheries, fishing methods, vessel types (and even individual vessels), and areas. MFish emphasises that the amendment only changes the

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<sup>1</sup> 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. However, several population characteristics of albatrosses and petrels make them susceptible to the effects of human-induced mortality – incidental mortality in commercial longline and trawl fisheries are key threats.

enabling framework – the amendment does not introduce new rules or change existing rules.

- 11 MFish would still be required to consult with stakeholders on any new rules issued, amended or revoked under the circular and to demonstrate why any new rules are necessary. Currently, MFish is required to consult with stakeholders under the Regulations before issuing, amending or revoking a circular. MFish envisages that this consultation process would remain.

## Submissions Received

- 12 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

- 13 **NZRFC** supports a flexible approach to managing fishing-related seabird mortality. Option 2 is more flexible than the status quo.
- 14 **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.
- 15 **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.

## Rationale for Management Options

- 16 MFish considers that we need a flexible regulatory framework to specify measures to avoid, remedy or mitigate the effects of fishing on seabirds. One approach is for Government to amend the existing regulatory framework on a case by case basis to specify seabird mitigation rules as new information about risk and mitigation technology becomes available (status quo). The second approach is to create an enabling regulatory framework that provides scope for mitigation decisions to be made by the Chief Executive.

- 17 In deciding which approach is best, you should consider that fishers continue to innovate with a variety of new measures, and that flexibility is needed to apply mitigation measures at the appropriate scale (*i.e.*, fishery, area, method, and vessel type or vessel basis).

## **Assessment of Management Options**

### ***Option 1 – status quo***

- 18 Government would continue to deliver seabird mitigation rules under the authority of s 11 of the Act and r 58 and r 58B of the Regulations. This option includes ongoing changes to the Regulations as necessary.

### ***Impact***

- 19 Existing seabird mitigation rules issued under the authority of s 11 of the Act and the Regulations include:
- a) *Gazette* notices issued by a previous Fisheries Minister pursuant to s 11 of the Act that require longline fishers to implement a range of mitigation measures, and;
  - b) Circulars issued by a previous MFish Chief Executive under the authority of r 58 and r 58B of the Regulations that require all trawl fishers in vessels over 28m (*i.e.*, deepwater trawlers) and all tuna longline fishers to use specified seabird scaring devices.
- 20 Under Option 1, these measures would remain and government would continue to have the ability to issue additional rules through *Gazette* notice and circular – subject to limitations already described – if necessary.

### ***Costs***

- 21 Fishers are constantly developing new mitigation technology, and there is often a need for fishery or vessel-specific standards and specifications to optimise mitigation measures. It would be impractical to reflect this dynamic situation by specifying mitigation measures directly into the Regulations and changing them on an ongoing basis.
- 22 MFish believes the existing framework may be limiting the uptake of improved and potentially more cost effective mitigation measures.
- 23 Option 1 would also prevent MFish from readily implementing regional or vessel specific mitigation measures that may result in improved seabird bycatch management and impose less cost on fishers.
- 24 Government and stakeholders would endure future administrative costs associated with amending the Regulations on a case by case basis to permit new mitigation measures across specific fisheries, methods, vessels, or areas.

### ***Benefits***

- 25 MFish does not consider there are any other benefits associated with the status quo when compared with the flexibility, responsiveness and efficiencies of the amended regulatory framework proposed in Option 2.

### ***Option 2 – generic and vessel specific framework***

- 26 You agree to amend the Regulations to authorise the Chief Executive to issue, amend or revoke seabird mitigation rules in circulars and to apply the rules to one or more fishing vessels.

### ***Impact***

- 27 Option 2 will have no immediate impact on fishers because only the enabling provisions are being amended. However, Option 2 increases the potential for MFish and stakeholders to develop innovative approaches to further improve existing seabird mitigation measures.
- 28 Should the Chief Executive decide at a later date to issue, amend or revoke seabird mitigation rules, MFish would need to consult with affected parties and demonstrate why the rules are necessary. The same recourse would be available to people wishing to challenge a circular as would be available under Option 1. MFish envisages that Option 2 will enable consultation to be more efficient by being targeted at people with a tangible interest in seabird mitigation measures.

### ***Costs***

- 29 There are no immediate costs associated with Option 2 because only the enabling provision is being amended. Costs would be incurred in the future if the Chief Executive issues a circular – fishers may need to purchase mitigation gear or adopt seabird-friendly, but less efficient, fishing practices.

### ***Benefits***

- 30 The benefits are:

- a) MFish could respond more quickly to changing mitigation technology to support more effective and efficient seabird mitigation:

The constant development of new mitigation technology, combined with the need for fishery-specific or vessel-specific standards and specifications to optimise mitigation measures, means that it would not be practical to attempt to reflect this dynamic situation through specifying mitigation measures directly into regulations. The use of circulars allows the Chief Executive to respond to new information on mitigation device efficacy, and allows technical adjustments to standards and specifications to be made more easily.

- b) MFish could translate non regulatory mitigation rules that operate in deepwater fisheries into mandatory requirements if particular vessels do not comply with the existing non regulatory programme:

All deepwater trawl vessels have vessel specific management plans (VMPs) that include mandatory and voluntary seabird mitigation measures. There is

stakeholder support for a framework that enables VMPs to be regulated in circumstances where individual vessels are not complying with the non regulatory framework. The circular approach provides the most efficient vehicle to make non regulatory measures mandatory for particular vessels.

- c) MFish could amend existing seabird mitigation rules already in circulars to refine the measures on a fishery, area, method, and vessel type or vessel basis:

There are existing circulars and Gazette notices that specify mitigation measures for particular fishing methods. The circular based approach will enable MFish to amend existing measures where necessary to the appropriate scale of management (*i.e.*, fishery, area, method, and vessel type or vessel basis) to ensure they are as efficient and effective as possible.

- d) Highly technical decisions about specification of mitigation measures will be made under the appropriate delegated authority (*i.e.*, the Chief Executive):

Specification of seabird mitigation measures is highly technical in nature and MFish considers is best delegated to the level of Chief Executive to avoid burdening Government unnecessary technical matters.

- 31 MFish also has more flexibility to define the penalty regime under Option 2. The penalty for breaching s 11 *Gazette* notices is set in statute as a fine not exceeding \$100,000, while the penalty for breaching rules in circulars issued by the Chief Executive under the Regulations currently ranges between \$10,000 and \$20,000. MFish does not envisage amending the lesser penalty regime should you decide to adopt Option 2.

## **Statutory Considerations**

- 32 Your key statutory consideration in deciding between Option 1 and Option 2 is to determine which Option best enables government to avoid, remedy, or mitigate the adverse effects of fishing on seabirds. MFish considers that both Options enable government to meet this s 8 obligation but that Option 2 is more flexible and responsive.

## APPENDICES

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### *Statutory Considerations*

- 33 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 Option 1 and Option 2 are 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. Option 1 and Option 2 seek 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. Option 1 and Option 2 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 Option 1 and Option 2 are 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. Option 1 and Option 2 are derived from the best available information.
  - f) **Section 297(1)** empowers the Governor General to make regulations for certain purposes. MFish considers that Option 2 fits within the relevant provisions of section 297. MFish propose that Option 2 be made pursuant to section 297(1)(a) of the 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.

- g) **Section 298** empowers the Governor General to make regulations for certain purposes, including, if there is no applicable approved population management plan for the time being in force under section 14F of the Wildlife Act 1953, imposing such measures as may be necessary or expedient to avoid, remedy, or mitigate the effect of fishing-related mortality on any protected species.