

TE OHU KAIMOANA



MĀORI FISHERIES TRUST

12 October 2010

File: Policy / MS

Denise Ashley
Ministry of Fisheries
PO Box 1020
Wellington

Email: hectors.dolphin@mfish.govt.nz

SUBMISSION ON RECONSIDERATION OF MEASURES TO MANAGE FISHING-RELATED THREATS TO MAUI'S AND HECTOR'S DOLPHINS

Introduction

1. This submission is from Te Ohu Kaimoana in its role as corporate trustee of Te Ohu Kai Moana Trust (Te Ohu) and responds to the Initial Position Paper from the Ministry of Fisheries (MFish) on a Reconsideration of Measures to Manage Fishing-Related Threats to Maui's and Hector's dolphins (IPP).
2. In making this submission Te Ohu does not seek to undermine any submission that you may receive from iwi or their representative organisations. We have not yet had an opportunity to fully canvass the views of iwi in respect of the IPP proposals and the view set out in our submission. Therefore we make this submission as a final draft pending feedback received from iwi. If we do receive feedback from iwi by Tuesday 19 October we will forward this to MFish.

The Proposals

3. The IPP follows the judicial review proceedings brought by the fishing industry in the High Court challenging six of the measures proposed by the Ministry to mitigate the impacts of fishing on Hector's and Maui's dolphins populations within defined areas of the West Coast of the North Island (WCNI) and East Coast of the South Island (ECSI). On 23 February 2010 the High Court issued its decision which upheld four of the six measures but referred two back to the Minister of Fisheries (Minister) for reconsideration. The two measures that have been referred back to the Minister and are therefore the subject of this IPP are:

Final Draft

- a. the extension of the set net closure for commercial fishers on the WCNI to include the area between 4 and 7 nautical miles (nm); and
- b. the inclusion of the commercial targeted butterfish fishery in the closure of part of the ECSI to set net fishing.

Extension of Set Net Closure - MFish Preference

4. Table 1 below shows the IPP options for the extension of the set net closure on the WCNI:

Option	Description
Option one	Allow set net fishing between 4-7 nm from shore
Option one (a)	Allow set net fishing between 4-7 nm and introduce monitoring
Option two	Close smaller area beyond 4 nm
Option three	Retain closure of area between 4-7 nm

Table 1: Options

5. MFish has indicated an initial preference for Option three - to retain the closure of area between 4-7 nm for Maui's dolphins. MFish states that its preference is based on the best available information on likelihood of interaction with fishing gear in this area and the consequence of any mortality from fishing on the Maui's dolphin population.

Inclusion of Butterfish in ECSI Closure - MFish Preference

Option	Description
Option one	Allow Exemption
Option two	Allow Exemption with Monitoring
Option three	Do not provide for Exemption

Table 2: Options

6. MFish has indicated an initial preference for Option one – to allow an exemption to butterfish fishing by commercial fishers at the top of the ECSI on the basis that the likelihood of mortality from fishing in this area is low given the size of the area and the type of fishing involved.

Summary

Extension of Set Net Closure

7. In terms of the extension of set net closure on the WCNI, Te Ohu's preference is for Option one which is to allow set net fishing between 4-7 nm from shore. However, should the Minister consider Option one untenable then we would support Option two with conditions. We do not support Option three.
8. Option one(a) would seem to provide a good compromise should Option one be unacceptable to the Minister. However, as set out in the submission of the New Zealand Seafood Industry Council (SeaFIC) the cost of full-time observer monitoring under Option one(a) would far outweigh the economic returns provided by rig and school shark, and by-catch making this option untenable.
9. Option two is tenable as a compromise on Option one provided the area between Port Waikato and Manukau Harbour which contains the highest

numbers of dolphins is closed but the remaining areas left open. The interim relief set by the High Court has resulted in nil dolphin deaths since 2008. Therefore the interim relief measures ought to be allowed to continue with the adjustments referred to in SeaFIC's submission including replacement of the nil death term with one consistent with an adjusted Potential Biological Removal (PBR) level.

10. We do not believe the IPP provides sufficient rationale to support Option three. The primary basis put forward in the IPP to support the preference for Option three is the precautionary approach based on a claimed lack of information. In our view sufficient information either exists or can be readily obtained to support a preference other than Option three. The fact that the IPP considers the chance of a Maui's dolphin interaction with a set net as "low" should be sufficient information. The next question here is how low is low enough because what if the risk were so small that it was virtually zero? The probability should be ascertained as a specific percentage so as to allow a fully informed decision by the Minister.

Inclusion of Butterfish in ECSI Closure

11. In terms of the inclusion of the commercial targeted butterfish fishery on the ECSI to set net fishing, Te Ohu supports Option one which is to allow an exemption to butterfish fishing by commercial fishers. Option two appears to be a good compromise but there are demonstrated economical and legal impediments to this option. We do not believe there are sufficient grounds to support a ban on the butterfish fishery under Option three.

General Comments

12. Our submission refers to a number of matters that are covered in some detail within the submission of SeaFIC. We acknowledge the level of detail and analysis contained in SeaFIC's submission. The SeaFIC analysis has helped us greatly in writing our submission and we refer to it a number of times throughout our submission. Rather than replicate the same information and views we have focused on what we consider to be the primary issues and added new information in relation to the potential impact of each proposal on iwi that own rig and school shark and butterfish settlement quota in the relevant areas.
13. Te Ohu supports the sustainable management of Maui's and Hector's dolphin populations through programmes that manage the risk to dolphin populations providing those programmes are based on factual information, sound scientific research and analysis including comprehensive risk analysis, and balance the need for sustainability with the positive social, economic and cultural benefits that derive from utilisation of the fisheries resource.
14. Our submission primarily focuses on the extension of the Set Net Closure on the WCNI with a few comments on the inclusion of butterfish on the ECSI. We have taken this approach because of MFish's preference in the IPP against allowing set netting in the 4 to 7nm zone on the WCNI whereas we agree with MFish's preference to allow the exemption in terms of butterfish on the ECSI.

Estimated Numbers of Maui's Dolphins & PBR

15. The size of the Maui's dolphin's population is a key issue in this debate. The IPP relies on the Slooten et al aerial survey which estimated a Maui's dolphin population of 111 (95% confidence interval of 48 – 252). However, the evidence presented in SeaFIC's submission estimates the population to be larger than 111 but probably less than 350 (section 5.1). This goes to the PBR level which has been a key determinant in setting the set net closures on the WCNI to date and the proposed 4 to 7nm closure. The Information Principles contained in section 10 of the Fisheries Act 1996 (Fisheries Act) would suggest that the best available information ought to be obtained and used by the Minister in his/her decision. The best available information is defined in s2(1) as "*the best information that, in the particular circumstances, is available without unreasonable cost, effort, or time*".
16. There is one particular study underway that would help to resolve some of the discrepancies on the population size of Maui's dolphins. The IPP at paragraph 39 refers to microsatellite genotype biopsy study by the Auckland University and DOC that aims to estimate abundance for the Maui dolphin population. The results of this study are said to be available in June 2011. The IPP considers that the information to come out of this study will be useful for "*further analysis of the impact of fishing on the population and any review of management measures...*".
17. The results of this study would be freely available to MFish in 9 months time without unreasonable cost, effort or time. Given that the High Court interim relief measures have already been in place for over 2 years it would not be unreasonable to wait another 9 months for the results of the study, especially given that the information goes to the PBR level which is one of the primary issues in this debate. For clarity sake the High Court interim relief measures could continue until the new IPP is completed and Minister's decision made.
18. However, it appears that the Ministry is not prepared to wait for the study results. In our view paragraph 39 of the IPP misapplies s 10 of the FA by claiming that "*the absence of, or uncertainty in, any information should not be used as a reason for postponing or failing to take any measure to achieve the purpose of the Act*". We submit that this component of s 10 only applies where information does not exist anywhere or adequate information cannot be sought within reasonable cost, effort or time. In this case the Auckland University study is already underway and the results will become available in June 2011. In our view it would not be unreasonable to delay any recommendation to the Minister until after the results of the study are known. Then the information can be included in the brief to the Minister. We believe that our view is further supported by the High Court decision at paragraph 40.

The Treaty of Waitangi and the Fisheries Settlement

19. The IPP has not given any consideration to the impact that the proposed changes could have on rights granted to Maori under the Fisheries Settlement – including the right to utilise fisheries resources under the Quota Management System or the customary regulations. Clearly Te Ohu has a fundamental concern with protecting and enhancing the rights of Maori secured and guaranteed by the Treaty of Waitangi. The Treaty recognises the rights and duties of the Crown, Maori and citizens and provides the framework within which these rights and duties can be negotiated.

20. Te Ohu considers that it is an important principle that decision-makers ensure that they do not erode or prevent the full implementation of existing and future settlements.
21. In the case of the Maui's dolphins, several iwi own rig and school shark quota in the WCNI between Maungaraki Bluff and Pariokariwa Point which is the area subject to this IPP. A number of the Taranaki iwi as well as Waikato, Ngati Maniapoto, Nga Puhī and many other iwi own quota SPO1, SPO2, SCH 1 and SCH 8 quota. For a few iwi their quota shares are currently held on trust by Te Ohu until the transfer of ownership takes place. The majority, if not all, of these iwi would have commercial arrangements with fishing vessels to catch their rig and school shark ACE. The potential economic and social impacts of the current closures on fishing vessel owners are already well documented. However, iwi quota owners will absorb some of those impacts as well.
22. The unfavourable impact on iwi quota owners is multiplied by the structure of the Fisheries Settlement which places stringent restrictions on the sale of settlement quota. Unlike other general quota owners iwi quota owners are unable to sell their settlement quota on the open market but must instead sell to a restricted pool. Therefore the proposed extension to the set net closures from 4 to 7 nm has the potential to devalue iwi settlement assets. This is the same for the Te Tau Ihu and Ngai Tahu iwi who have butterfish quota interests in the ECSI. These iwi have already had their quota interests impacted by the inshore and harbour closures estimated to be at approximately \$79 million over a 5 to 10 year period.¹ Therefore, any decision to close off additional areas ought to be considered carefully.
23. Te Ohu accepts that sustainability of the fisheries resource is paramount. However in the absence of a systematic approach to decision-making that includes an assessment of the real risks being faced in any given situation, and an assessment of different options, it is too easy for decisions to be made in reaction to political imperatives under the guise of sustainability. The Crown, in accordance with its Article I responsibilities, needs to ensure that Maori rights are not unnecessarily compromised by such imperatives. Where those rights are displaced for reasons other than sustainability then Maori would expect to be compensated.

Extension of Set Net Closure – Maui's Dolphins

24. In addition to the reasons set out above Te Ohu supports Option one for the following reasons:
 - a) We continue to encourage the use of satellite tags as set out in our earlier submission (Te Ohu Kaimoana 24 October 2007). We also continue to support the development of a long-term threat management plan that all fishing sectors own and make a success.
 - b) Closure is likely to unnecessarily devalue iwi fisheries settlement assets for iwi that own or have interests in jig and school shark in SCH1, SCH8,

¹ High Court decision.

SPO1 and SPO8).² Te Ohu has a statutory obligation to protect the value of the fisheries settlement. MFish estimates the overall value of the rig and school shark fishery affected (present and capitalised future returns) is approximately \$970,000 although SeaFIC's estimation is much higher at \$1,213,252.

- c) In para 58 of the IPP the lack of sightings beyond 4 nm documented in the Ferreira & Roberts (2003) surveys are downplayed because the survey was predominantly carried out in summer whereas Maui's dolphins are said to be distributed further offshore more during winter. However, the fishing vessels observed in paragraph 68 operated from September to November when Maui's dolphins are distributed closer to shore. The vessels have reduced effort throughout the rest of the year including winter and therefore the risk to Maui's dolphins is reduced even further.
- d) Paragraph 67 states that fishing is "*a demonstrated threat to Maui's dolphins in the WCNI region because records indicate that there are two fishing-related mortalities out of a total of 41 reported mortalities*". Fishing nets may have been the cause of these two deaths but they cannot claim to have been caused by commercial set nets.
- e) It is unsatisfactory that the submission process be used to gather information on unknown factors. For example in paragraph 80, MFish does not provide an estimate as to the cost of monitoring under Option one (a). MFish ought to have obtained this information and included it in the IPP so that submitters can take the true costs into account in writing their submissions. SeaFIC's submission states that full observer coverage at \$1200 per day would exceed the revenue from fishing.
- f) The IPP at paragraph 76 notes that commercial set netting in this area presents a risk to the long term viability of Maui's dolphins and this may justify a precautionary approach in determining whether measures are necessary. There are other risks to Maui's dolphins besides those created by commercial and even recreational fishing. If there truly is concern for the Maui's dolphin population then consideration should be given to all risks and threats. There is little logic in focusing on set netting alone given that other vessels travelling through the area could pose just as much risk and threat as set net fishing if not greater. Paragraph 27 refers to non-fishing threats "*including disease, pollution, boat strike, tourism and entanglement in marine debris*". It is inequitable that commercial fishing would be targeted and banned but all non-fishing threats and risks are allowed to continue unchanged.
- g) The IPP states that there are no comparative abundance surveys to establish trends over time but DNA studies suggest abundance is smaller now than in the past.³ We understand, however, that there may be some DNA sampling results that show that Maui's and Hector's dolphins have recently, or could, interbreed.⁴ If this is the case, Maui's dolphins when

² 34% of rig shark caught in statistical areas 040 to 046 were caught in the 4 nm to 7 nm area as opposed to 3.5% of all school shark. This information was taken from the 2008/09 fishing year on targeted set netting from 1 September to 24 December.

³ Para 37, IPP.

⁴ Para 110, SeaFIC submission.

coupled with Hector's dolphins numbers will be more abundant than first estimated by DOC. This would have flow on effects for the PBR level which has been set at 1 human-induced mortality every 5 years. The higher the Maui's dolphin population, the shorter the term for a single mortality eg. 1 in every 2 years. If Maui's and Hector's dolphins naturally interbred then we would support a programme that would enable this to happen.

Inclusion of Butterfish in ECSI Closure

25. In terms of the inclusion of the commercial targeted butterfish fishery within the "defined area" on the ECSI to set net fishing, Te Ohu supports Option one which is to allow an exemption to butterfish fishing by commercial fishers. Option two appears to be the next best option should Option one prove untenable to the Minister. However, SeaFIC's submission points to the legal and economic impediments to this option. We do not believe there are sufficient grounds to support a ban on the butterfish fishery under Option three.
26. We support Option one because there is no evidence to show a sufficient level of risk to Hector's dolphins to warrant closure of the butterfish fishery within the defined area. It is generally accepted within the IPP and referred to in SeaFIC's submission that the butterfish set nets are located in an inshore area that Hector's dolphins do not frequent. The lack of deaths since the interim measures were put in place in 2008 supports this.
27. We oppose any allowance for recreational set net targeting of butterfish within the defined area. Paragraph 114 of the IPP points out the difference between recreational and commercial set net practices...*[r]ecreational nets may be set in more open areas, be set deeper and use incorrect floatation...* ". These differences mean that recreational set netting pose a greater level of risk of dolphin mortality.
28. The number of Hector's dolphin deaths caused by recreational fishing to date alone warrants a ban on this type of fishing. We would not want to see the risk created by amateur fishing and related dolphin mortality indirectly and unfairly passed on to commercial set net fishers. We feel the need to make this point because of paragraph 14 of the IPP which states that the conditions set down for commercial fishers will not necessarily automatically apply to amateur fishers.
29. If you have any questions about this submission please contact Maru Samuels in the first instance at maru.samuels@teohu.maori.nz.

Kirsty Woods
Manager, Fisheries Leadership