

FINAL ADVICE PAPER - ALTERING THE FISHERIES (COST RECOVERY) RULES 2001 WITH RESPECT TO THE BENTHIC PROTECTION AREAS ACCORD

- 1 This paper provides you with the final advice on the proposal to amend the schedule relating to the apportionment of costs of fisheries and conservation services contained in the Fisheries (Cost Recovery) Rules 2001 (the cost recovery rules) to reflect the requirements of the 2007 Benthic Protection Area (BPA) Accord.

Executive Summary

- 2 In April 2007, the Ministry of Fisheries (MFish) consulted on the above proposal to amend the cost recovery rules.
- 3 In this paper 'benthic environment' refers to the seabed and any plant, animal or structure attached to the seabed.
- 4 The BPA Accord is a commercial fishing industry (Industry) initiative approved by Cabinet. The BPA Accord proposes the closure of about 1.2 million km² (around 30%) of New Zealand waters to bottom trawling and dredging. MFish envisages that the BPA Accord will be implemented later this calendar year.
- 5 Previously, interest in the benthic environment centred on harvesting fish resources and research focussed on avoiding, mitigating or remedying the impacts of fishing. As such, Industry accepted the full cost of research. Now, however, there is a growing public interest in the benthos and the nature of New Zealand's benthic habitats. Therefore, it is inappropriate to cost recover all research from Industry. This is especially more so as Industry are no longer bottom trawling or dredging 30% of the EEZ. For this reason, it is appropriate to adjust the proportion of costs borne by the Industry for deepwater benthic research for fisheries services. This proposal does not in any way limit the total spend on benthic research in general.
- 6 The Initial Position Paper proposed that from 1 October 2007, the cost-recovered proportion of fisheries services for deepwater benthic research in the EEZ would be 1/3rd of the annual total cost of that research. One submission suggested 50% would be a more appropriate split of costs. This paper provides you with information upon which to make a reasonable choice as to what percentage of benthic research will now be recovered.
- 7 As proposed in the BPA the amount recovered from Industry will not exceed \$0.333 million in any one year.
- 8 These proposals relate to the costs of fisheries services for benthic research between 12 nautical miles and 200 nautical miles. They do not affect the costs recovered from Industry for conservation services or benthic research within the territorial sea.
- 9 The proposed amendments to the cost recovery rules comply with the cost recovery principles in section 262 of the Act.

- 10 MFish received three submissions in support of the proposal and two submissions opposed to the proposal.

Summary of Options

Initial and Final Position

Amend the Fisheries (Cost Recovery) Rules 2001

- 11 Amend the schedule relating to the apportionment of costs of fisheries and conservation services contained in the Fisheries (Cost Recovery) Rules 2001 to reflect the changes agreed to in the BPA Accord.

Submissions Received

- 12 MFish received five submissions:

- The Deepwater Group Limited (DWG)
- The Environment and Conservation Organisations of New Zealand Inc. (ECO)
- New Zealand Conservation Authority (NZCA)
- The New Zealand Seafood Industry Council (SeaFIC)
- Sanford Limited

- 13 A summary of submissions and copies of submissions are included in Volume 2

Background and Rationale for the Management Option

- 14 The BPA Accord is an Industry initiative approved by Cabinet. The BPA Accord proposes the closure of about 1.2 million km² (around 30%) of New Zealand fisheries waters to bottom trawling and dredging. The areas proposed for closure are largely unfished and encompass a range of habitat types. Within the BPA Accord, Industry acknowledges that bottom trawling may have an impact on the benthic environment and permanently relinquishes the opportunity to bottom trawl or dredge for fish within approximately 30% of New Zealand's EEZ. In return, Industry seeks certainty over the amount that will be cost recovered for research to assess the impacts of bottom trawling.

- 15 In signing the BPA Accord, the Crown recognised in clauses 5.6 b) and c) that:

- a) The establishment of BPAs alters the balance between cost recovery principles in the Fisheries Act 1996 such that it is appropriate to adjust the proportion of the costs borne by the Industry for deepwater benthic research for fisheries services; and
- b) Recognising the increased general public interest in deepwater benthic research due to the establishment of BPAs, the Minister agrees to promote changes to the cost recovery rules to give effect to the following: from 1

October 2007 the cost recovered proportion of deepwater benthic research in the EEZ will not exceed 1/3rd of the annual total cost of that research. The Minister commits from 1 October 2007 that the amount recovered will not exceed \$0.333 million in one year. This would not restrict the level of deepwater benthic research in the EEZ undertaken in the public interest.

- 16 The BPA Proposal was approved by EDC, with power to act, on 4 April 2007 (EDC (07) 57).
- 17 If the proposal proceeds and the cost recovery rules are amended, from 1 October 2007 all deepwater benthic research will be 1/3rd cost recovered up to a maximum of \$0.333 million per annum. The \$0.333 million limit applies to all existing active multi-annual contracts and any new contracts that extend beyond 30 September 2007 (Appendix I). This limit is inclusive of all indirect costs.
- 18 The proposal to amend the cost recovery rules does not affect the costs recovered from Industry for conservation services or benthic research within the territorial sea. It affects only deepwater benthic research that the BPA Accord defines as research relating to:
 - a) avoiding, remedying or mitigating the adverse effects of bottom trawling on the benthic environment and its biological diversity; and
 - b) the benthic environment when there is a general public interest in that research;
- 19 Under the present cost recovery rules industry bears the costs of most deepwater benthic research. Apportioning the costs of deepwater benthic research between commercial levy payers and the Crown as described above requires a change to the cost recovery rules.

Assessment of the Management Option

Alter the Fisheries (Cost Recovery) Rules 2001

- 20 The first issue that you need to consider is whether the existing rule to recover 100% of these costs from industry should be changed.
- 21 ECO's view was that recovery should be at least 50% and up to 100%. NZCA is concerned that the changes proposed in the IPP will undermine the research base and the acquisition of new knowledge. MFish notes that the proposed amendment to the cost recovery rules will not change the quantity of research, rather just how it is funded. Moreover, MFish is confident quality or quantity of future research will not be affected by this proposal. Altering the cost recovery rules will only affect the share of the research costs that industry pay. It does not restrict the amount of research that may be undertaken. Industry submitters were in favour of a reduction in cost recovery, stating it would give effect to the BPA Accord.
- 22 There is incomplete information as to precisely how much research benefits either the public interest or industry. MFish considers that to some extent benthic research is a public benefit. Therefore, as per s. 262 (b) of the Act, costs of services in the general public interest may not be recovered. However, industry accepts that fishing may

actually affect the benthic habitat. Under s. 262 (d) of the Act, the costs of remedying or mitigating these impacts must be attributed to the person who caused them 'as far as is practicable'.

- 23 Given the establishment of BPAs, MFish believe that leaving the cost recovery rules unchanged would no longer fairly apply the cost recovery principles that deal with benefit and risk as set out in s 262(b) and (d). Therefore, MFish's preferred option is to amend the cost recovery rules to more accurately reflect the cost recovery principles.

What proportion of these costs should now be recovered from Industry?

- 24 If you accept the cost recovery rules should be changed, the next issue you need to consider is what proportion of the costs of this research should now be recovered from Industry.

- 25 Cost recovery rules are prescribed under section 263 of the Fisheries Act 1996 and may prescribe the proportion of costs to be recovered as levies. Before making a recommendation under that section, you must be satisfied that the rules to which the recommendation relates comply with the cost recovery principles in section 262. Those principles are:

- a) If a conservation service or fisheries service is provided at the request of an identifiable person, that person must pay a fee for the service:
- b) Costs of conservation services or fisheries services provided in the general public interest rather than in the interest of an identifiable person or class of person, may not be recovered:
- c) Costs of conservation services or fisheries services provided to manage or administer the harvesting or farming of fisheries resources must, in so far as is practicable, be attributed to the persons who benefit from harvesting or farming the resources:
- d) Costs of conservation services or fisheries services provided to avoid, remedy or mitigate a risk to, or adverse effect on, the aquatic environment or the biological diversity of the aquatic environment must, so far as is practicable, be attributed to the persons who caused the risk or adverse effect:
- e) The Crown may not recover under this Part the costs of services provided by an approved service delivery organisation under Part 15A of the Act.

- 26 You must also have regard to the extent to which conservation or fisheries services are wholly or partly purchased or provided by persons other than the crown. This proposal only relates to services determined by you as fisheries services (in the Ministry of Fisheries' Statement of Intent) and purchased by the Ministry on your behalf.

- 27 The two cost recovery principles that are particularly relevant here are s 262 (b) and (d).

- 28 MFish consider that some aspects of deepwater benthic research are provided in the general public interest. Fishing may also affect the benthic habitat, but the nature and extent of the impact of bottom trawling on the benthic environment is not well

researched or understood. The cost recovery principles require that as far as is practicable benthic research provided to avoid or remedy or mitigate this risk must be recovered from Industry. "As far as is practicable" means what is realistic or feasible in the circumstances, what is actually possible to do.

- 29 There is incomplete information as to precisely how much research benefits either the public interest or industry. MFish considers that to some extent benthic research is a public benefit. Therefore, as per s. 262 (b) of the Act, costs of services in the general public interest may not be recovered. However, industry accepts that fishing may actually affect the benthic habitat. Under s. 262 (d) of the Act, the costs of remedying or mitigating these impacts must be attributed to the person who caused them 'as far as is practicable'.
- 30 Therefore, the outcomes of deepwater benthic research are not entirely attributable to an identifiable person or class of person and the wider public benefit from deepwater benthic research. It is unclear exactly how much each party benefits from the research. Working out who should pay is time consuming and expensive. In addition, decisions about attributing costs may become somewhat arbitrary in nature.
- 31 In these circumstances where it is not practicable to attribute the risks precisely, it is a reasonable approach to set a percentage within a reasonable range. This is the most feasible approach and provides greater transparency to those who will bear the costs.
- 32 The split in research that is in the general public interest and that provided to avoid, remedy or mitigate a risk attributable to bottom trawling or dredging falls somewhere between 0 and 100%. There are two options suggested from the consultation – 1/3rd as proposed by industry and supported by the BPA accord and 50% as proposed by ECO. MFish recognises that there are a range of options that meet the cost recovery principles set out in s. 262 of the Act and that ECO's submission of 50% recovery is a valid option. In neither case is it possible to define a mechanism or formula for how the figure is reached. It is a question of judgement, appropriately left to you as Minister.
- 33 You need to make a decision within the range available that is reasonable taking into account the cost recovery principles. You must approach this decision with an open mind taking into account all relevant information including the submissions from this consultation and the circumstances surrounding the BPA Accord. However, while relevant, the fact that you have signed the Accord cannot be determinative of this decision. It is open to you to recover a higher proportion of costs from Industry than 1/3rd. If you decide to do so, you may need to renegotiate the BPA Accord.
- 34 If, after considering this advice, you decide not to pursue the changes to the cost recovery rules, you may consider discussing with industry the impact of such a decision on the BPA accord.
- 35 SeaFIC and the Deepwater Group submit that such an approach imports a new condition into the BPA Accord and that consultation on this proposal should not have occurred. MFish disagrees. The Cabinet Economic Development Committee paper, paragraphs 46 and 86 f (EDC (07) 57), makes it clear that you are required to consult on the proposal. The fact that both ECO and NZCA made submissions demonstrates that interest in this issue extends beyond DWG, SeaFIC and its shareholders.

Other issues for consideration

Unders and Overs

- 36 SeaFIC believes that the exercise of discretion by you in respect of consideration of a previous year's Unders and Overs is bound by the BPA Accord. MFish notes this submission; however, we note that the proposed changes to the cost recovery rules will not alter your obligations with respect to under and over recovery. The Accord cannot fetter your position with regard to levying under-recoveries arising from consideration of previous years' activities in respect to deepwater benthic research. The BPA Accord is a relevant consideration for the exercise of any discretion on Unders and Overs.

Consultation:

- 37 SeaFIC argues that the process the Ministry has embarked upon cannot be completed in a proper manner within the time available before 1 October 2007. MFish maintains that the process can be achieved by 1 October 2007 and that internal modelling of alternative cost recovery models, should you choose to amend the cost recovery rules, is underway.
- 38 ECO is concerned you will not consider this advice with an open mind and claim that the proposal is predetermined given the signing of the BPA Accord.
- 39 MFish note that your initial agreement in principle about cost recovery with Industry was reached after taking the cost recovery principles in the Fisheries Act 1996 into account. By signing the BPA Accord you agreed only to promote those changes to the cost recovery rules. Furthermore, the Cabinet paper (EDC (07) 57) clearly stipulated at paragraph 46 and in recommendation six that further consultation on this issue would take place. It was clear to all involved in the negotiation that your cost recovery decision would be made following that consultation and would take into account all relevant matters including any submissions received. That decision would then also be the subject of further Cabinet approval prior to the cost recovery rules being changed. It is important that you consider this decision with an open mind, reconsidering your initial view in light of all the relevant information both from your negotiations with industry over this matter and from submissions received. MFish present here all the pertinent issues raised in submissions in order that you can make an informed decision on this matter. A full copy of those submissions is attached in Volume 2.

The BPA Accord

- 40 Both ECO and NZCA took the opportunity to revisit their concerns about the BPA. This paper is not a mechanism for renegotiating the terms and conditions of the BPA Accord.

Recommendation

- 41 MFish recommend that you:

- a) **Agree** to amend the schedule relating to the apportionment of costs of fisheries and conservation services contained in the Fisheries (Cost Recovery) Rules 2001 to amend the proportion of costs recovered from Industry in relation to benthic research to reflect that a proportion of this research will now be conducted in the general public interest.
- b) **Decide**
- i) That the cost recovered proportion of fisheries services for deepwater benthic research in the EEZ will be 1/3rd – supported by Industry and in the BPA Accord.
- OR**
- ii) That the cost recovered proportion of fisheries services for deepwater benthic research in the EEZ will be 50% – supported by ECO.
- OR**
- iii) That the cost recovered proportion of fisheries services for deepwater benthic research in the EEZ will be more than 50%, and if so stipulate a percentage more than 50% and less than 100%.
- c) **Note** – that following your decision appropriate Cabinet papers will be prepared.

R J Burnard
Manager Regulatory and Information

Approved/Not approved

Jim Anderton
Minister of Fisheries

Statutory Considerations

- 42 In considering the issues and options outlined in this paper, the statutory criteria set out below are relevant.
- 43 **Section 8** – Section 8 describes the purpose of the Act as providing for utilisation whilst ensuring sustainability. The proposed changes to the cost recovery rules will continue to provide for utilisation and ensure the sustainability of benthic areas.
- 44 **Section 9** – Section 9 sets out the environmental principles that MFish must take into account when exercising powers in relation to the Act. MFish has considered these principles and is of the view that they do not affect this proposal.
- 45 **Section 10** – Section 10 sets out the information principles of the Act. The proposed changes to the cost recovery rules represent a decision made with the best available information. In preparing this paper, MFish relied primarily on the following information sources:
- i) The Fisheries (Cost Recovery) Rules 2001
 - ii) A Proposal by the Fishing Industry to establish Benthic Protection Areas – Cabinet Economic Development Committee Paper (EDC (07) 57)
 - iii) The Benthic Protection Areas Accord 2007
 - iv) Submissions from
 - Deepwater Group Limited.
 - The Environmental and Conservation Organisations of New Zealand Inc.
 - New Zealand Conservation Authority.
 - The New Zealand Seafood Industry Council.
 - Sanford Limited.
- 46 **Section 262** – Section 262 of the Act sets out the cost recovery principles. Under s 262(a), fisheries services are provided at the request of an identifiable person, that person must pay a fee for the service. Through s 262(b), the costs of research in the general public interest may not be recovered. Under s 262(c) management costs must, as far as practicable, be attributed to the person who benefits from harvesting the resource. Section 262(d) states that the costs of mitigating risks to, or adverse effects caused by harvesting resources must be attributed to the persons causing the effects or risks. Section 262(e) notes that the costs of services provided by an approved service delivery organisation may not be recovered.
- 47 **Section 263** – Section 263 (1) empowers the making of rules relating to the imposition of levies. Cost recovery rules may prescribe the proportion of costs that are recovered as levies; who must pay levies; how the costs are apportioned between the persons who must pay. Different rules may apply for different classes of person,

stocks, quota management areas, fishery management areas, conservation services, fisheries services, or any combination of them.

- 48 **Section 265** – Section 265 of the Act requires that the Minister of Fisheries must have regard to any under- or over-recovery of costs in a prior year when recommending the making of a levy order.

Appendix I

Historic benthic research projects 2000/01-2005/06 open as at 04 April 2007

Project code	
ENV2003-03	Determining the spatial extent, nature and effect of mobile bottom trawling methods
ENV2005-15	Information for managing the effects of fishing on physical features of the deep sea environment
ENV2005-16	Investigate the effects of fishing on physical features of the deep sea environment
ENV2005-20	Benthic invertebrate sampling and species identification in trawl fisheries
ENV2005-23	Monitoring recovery of the benthic community between North Cape and Cape Reinga
BEN2006-01	Mapping the spatial and temporal extent of fishing in the EEZ