

REGULATORY IMPACT STATEMENT

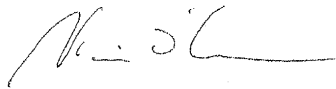
Regulatory amendments to support management measures for basking sharks to give effect to New Zealand's international obligations

Agency Disclosure Statement

1. This Regulatory Impact Statement has been jointly prepared by the Ministry of Fisheries (MFish) and the Department of Conservation (DOC).
2. It provides an analysis of regulatory options for providing protection for basking sharks in New Zealand waters and from New Zealand fishing vessels on the high seas.
3. There are no assumptions or constraints relating to the regulatory proposals that require highlighting in the RIS.
4. The preferred options will not impair private property rights, market competition or the incentives on businesses to innovate and invest. They will not override fundamental common law principles. The preferred options may impose some additional costs on fishers as they will prohibit utilisation of basking shark.



Gavin Lockwood
Deputy Chief Executive Fisheries Management
Ministry of Fisheries



Kevin O'Connor
General Manager Research & Development Group
Department of Conservation

Status quo and problem definition

5. Through the National Plan of Action- Sharks (NPOA-Sharks) New Zealand has agreed to protect basking shark (*Cetorhinus maximus*) within New Zealand waters and by New Zealand flagged vessels on the high seas. This agreement recognises that basking sharks are listed on Appendix I of the Convention on the Conservation of Migratory Species of Wild Animals (CMS).
6. New Zealand acceded to the CMS in 2000, and in 2005 basking shark was listed on Appendices I and II to this Convention. Appendix I lists migratory species that are in danger of extinction while Appendix II lists migratory species that have an unfavourable conservation status or that would benefit from international cooperation through tailored agreements.
7. In 2008 MFish published the NPOA-Sharks, a policy document describing a range of management actions New Zealand must achieve to improve the conservation and management of shark species in New Zealand waters. Action iii) in the NPOA-Sharks states that New Zealand will protect the basking shark.
8. Basking shark is a large shark species that is occasionally taken as incidental bycatch while commercial fishers target other species. Current fisheries legislation prevents fishers from targeting basking shark but any incidental take can be retained and sold. There is understood to be some demand for basking shark fins and this is usually the only part of the fish that is kept.
9. By allowing utilisation of basking shark bycatch, there is concern that incentives under the current statutory approach are not aligned with the objectives of the CMS and the NPOA-Sharks. The remaining incentives to retain and sell basking shark bycatch should be removed, by prohibiting all future take and use. The regulatory proposals described herein are considered the most appropriate measures to achieve this.

Objectives

10. The objective of the regulatory proposals is to give effect to MFish's policy decision, taken in consultation with DOC, to give basking shark protected species status, as detailed in the NPOA-Sharks, which was published in 2008.
11. The NPOA-Sharks indicated that New Zealand would implement protection measures for basking shark during 2009. As this date has already passed it is desirable that the proposed protection measures are in place as soon as possible.
12. The proposed protection measures also recognise New Zealand's consent, through acceding to the CMS, to prohibit the taking of animals listed on Appendix I of this Convention.

Regulatory impact analysis

13. MFish and DoC consider that only regulatory proposals will best ensure that basking shark is afforded protected species status; current management, voluntary agreements or alternative arrangements are not considered adequate in this case.
14. In order to ensure that fishers do not retain and sell any incidental by-catch of basking shark within New Zealand fisheries waters, MFish and DOC propose that this species is added to Schedule 7A of the Wildlife Act 1953 (Wildlife Act). This would give basking shark absolutely protected species status within New Zealand's Exclusive Economic Zone (EEZ) and would require incidentally caught basking shark to be returned to the sea unharmed.
15. Absolute protection under the Wildlife Act would mean that any person taking, or attempting to take basking shark without lawful authority, would be committing an offence against the Act. Penalties include fines up to \$250,000 or imprisonment for no longer than 6 months. A further penalty fine, not exceeding \$10,000 for every item of

marine wildlife (other than coral) in respect of which the offence was committed, may also be incurred.

16. The powers of the Wildlife Act have limited application beyond the boundaries of New Zealand's EEZ, and in order to prohibit the take of basking shark by New Zealand fishing vessels on the high seas MFish and DOC also propose that regulations are created under section 297 of the Fisheries Act 1996. It will be an offence to contravene this prohibition, and a penalty fine of up to \$100,000 could be incurred.
17. An option was available to MFish and DOC to manage basking shark take on the high seas through placing conditions on all high seas permits, prohibiting the use of all incidental catch of basking sharks. However, the proposed regulatory approach was considered to provide more transparency and less administrative burden than amending all high seas permits. In addition, the regulatory proposals are consistent with the approach used to prohibit the use of white pointer shark in 2007.
18. The primary impact of both proposals is that fishers would be prevented from using incidental bycatch of basking shark. This would come at a cost to those fishers who currently do so. The value of such fish to fishers is uncertain although information received during consultation indicated that 91kg of basking shark fins were sold in 2008 for \$2247.
19. In addition, MFish and DOC note that approximately 70% of all basking shark reported as being taken by fishers during the past decade was discarded. This indicates that, for the majority of fishers at least, basking shark is perceived as having nil value.
20. Defences for sharks taken incidentally would be available under the Wildlife Act and the Fisheries Act. Under the Wildlife Act, there is a defence for incidentally killing or injuring protected species if this takes place as part of a lawful fishing operation and the reporting requirements of the Act are met. Under the Fisheries Act, a defence is available if the fisher can prove that, despite taking reasonable precautions and exercising due diligence, the taking was beyond the fisher's control and the fish was immediately returned to the sea.
21. An impact of including the basking shark as a protected species under the Wildlife Act is that reporting requirements under fisheries legislation would change. This change requires a consequential amendment be made to the Fisheries (Reporting) Regulations 2001, removing basking shark from Part 2 of Schedule 3, and relisting it in Part 2C of Schedule 3. The result of this change would simply require captures to be reported on a different form. Compliance would be monitored with only minor changes to the existing procedures and processes undertaken by agencies. In view of this MFish and DOC consider the costs associated with this change to be minimal.
22. If basking shark becomes an absolutely protected species under the Wildlife Act, that Act currently prescribes separate reporting requirements in the event that marine wildlife is incidentally killed or injured. However DOC is in the process of streamlining the protected species reporting provisions of the Wildlife Act with the reporting requirements under fisheries legislation.

Consultation

23. The intention to implement protection measures for basking shark was signalled in the NPOA-Sharks that was released for public consultation in 2008. All submissions that commented on this issue supported the implementation of protection measures for this species.
24. In addition, the proposed management measures for basking sharks were released for public consultation between 4 May and 16 June 2010. Although some submissions raised issues with the preferred management measures, the majority of submissions showed strong support for all proposals.

25. The main opposition to the management measures proposed under the Fisheries Act is described in submissions from the DeepWater Group (DWG), Independent Fisheries Limited (IFL), the Seafood Industry Council (SeaFIC) and Te Ohu Kai Moana (TOKM). These stakeholders note that the purpose of the Act is to provide for utilisation, and the proposed regulations do not share this purpose as they aim to prohibit use of basking sharks. MFish and DOC acknowledge these points but note that the Fisheries Act also requires that the adverse effects of fishing are avoided, remedied or mitigated, and permits regulation to this effect.

Conclusions and recommendations

26. MFish and DOC recommend:

- a) That basking shark (*Cetorhinus maximus*) be listed on Schedule 7A of the Wildlife Act 1953, thereby making it an absolutely protected species;
- b) That regulations be created under section 297(1)(o) of the Fisheries Act 1996 prohibiting the taking of basking shark by New Zealand fishing vessels on the high seas;
- c) That the Fisheries (Reporting) Regulations 2001 be amended to include basking shark on Part 2C to Schedule 3; and
- d) Corresponding offences and penalties will be created.

Implementation

27. Amendments to Schedule 7A of the Wildlife Act to include basking shark can be made by an Order in Council under section 8 of that Act. The Order in Council would be submitted to Cabinet Legislative Committee for approval before being submitted to the Executive Council.
28. Regulations under the Fisheries Act will be submitted to Cabinet Legislative Committee for approval before being submitted to the Executive Council.
29. No transitional arrangements are necessary.
30. There are no additional compliance costs associated with these proposals. Any basking shark taken incidentally as part of fisheries operations for other species must be reported on the appropriate return.

Monitoring, evaluation and review

31. If implemented, the reporting requirements of the Wildlife Act would enable agencies to monitor and evaluate the proposed protection measures.
32. Unless basking shark is removed from Appendix 1 of the CMS, or the obligations to protect basking shark cease to apply to New Zealand, there will be no requirement to review the proposed protection measures.