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Maui's dolphin TMP

PO Box 5853

WELLINGTON 6011

By email: MauiTMP@doc.govt.nz

MauiTMP@mpi.govt.nz

REVIEW OF THE MAUI'S DOLPHIN THREAT MANAGEMENT PLAN

The Environmental Defence Society (EDS) welcomes the opportunity to comment on the Department of Conservation and Ministry for Primary Industries joint discussion paper on review of the Maui's dolphin Threat Management Plan.

The Maui's dolphin is in a perilous state, and it is clear that human activities continue to be a highly significant threat to the population. In June 2012 an expert panel convened by the Department of Conservation and the Ministry for Primary Industries undertook a *Risk assessment of threats to Maui's dolphins*¹ (the risk assessment) and agreed that *estimated total human-induced Maui's dolphin mortalities equate to a level of impact that is many times higher than the estimated Potential Biological Removals*. The panel's scores indicated a median of 5.27 human induced mortalities to occur per year over the next five years, whilst the population can sustain only one human induced mortality every 10-23 years. As a result, EDS considers that a revised Threat Management Plan must provide for effective and precautionary measures to be taken as a matter of urgency if the Maui's dolphin is to be saved from extinction.

OVERVIEW OF EDS

EDS is a public interest environmental organisation, formed in 1971, with a membership consisting largely of resource management professionals. The focus of EDS's work is on achieving good environmental outcomes through improving the quality of New Zealand's legal and policy frameworks and statutory decision-making processes. EDS both litigates in favour of the environment and operates as an environmental think tank.

EDS has had a long interest in the management of New Zealand's coast and oceans and in marine conservation more generally.

- In 2005 EDS published a report on oceans governance titled *Looking out to sea: New Zealand as a model for ocean governance*.
- In 2007 EDS published a report investigating integrated coastal management titled *Beyond the tide: Integrating the management of New Zealand's coasts*. The report was reprinted in 2009 with support from the Hauraki Gulf Forum.
- In 2009, EDS released a policy paper on the establishment of an Environmental Protection Authority titled *Improving environmental governance: The role of an Environmental Protection Authority*.
- In 2009 EDS also launched a comprehensive book on coastal management titled *Castles in the Sand: What's happening to the New Zealand coast?*
- In 2010 EDS launched a comprehensive guide to how the New Zealand's marine area is currently managed titled *Managing the Marine Environment*.
- In 2011 EDS published a policy paper titled *Governing our Oceans: Environmental reform for the exclusive economic zone* which analysed the deficiencies in existing law and called for urgent environmental effects legislation for the EEZ, which has since been passed.
- In August 2012 EDS published a policy report titled *Wonders of the Sea: The protection of New Zealand's marine mammals*. This report analysed the existing framework for the management and protection of marine mammals, in the context of some key species, and made recommendations for improvements to this framework.
- In October 2012 EDS published a policy report titled *Safeguarding Our Oceans: Strengthening marine protection in New Zealand*. This report assessed the adequacy of New Zealand's marine protection system, in comparison with developments overseas, and made recommendations for overhaul of the system.

CONSULTATION TIMEFRAME

EDS has particular concerns about the timeframe in which decisions about new management measures are to be considered. EDS notes that in March 2012 the Ministers for Primary Industries and of Conservation requested that the review of the Maui's dolphin Threat Management Plan be brought forward, requiring that the review be completed before the end of 2012. EDS agrees that the gravity of the circumstances facing the Maui's dolphin mean that urgent action is required, but considers that this gravity also means that measures should be carefully considered and designed.

EDS is concerned that the Department of Conservation and the Ministry for Primary Industries have had insufficient time to prepare proposals for consultation, particularly when taking into account the fact that the risk assessment was not undertaken until June 2012 (and not published until September 2012). We also have particular concerns about the time available to the Ministry for Primary Industries and Department of Conservation to review submissions and to respond to the consultation by developing alternative proposals, should the consultation highlight the need to do so.

EDS is concerned that this arrangement means that the Department of Conservation and Ministry of Primary Industries are at risk of failing to meet their consultation obligations under section 12 of the Fisheries Act 1996, under administrative law and in accordance with the Ministry for Primary Industries Stakeholder Consultation Process Standard and the Department of Conservation's Consultation Policy.

RESPECTIVE ROLES OF DOC AND MPI

EDS notes that the current government favours the allocation of the management of fishing threats to the Ministry for Primary Industries. However, EDS has grave concerns about this approach. The Ministry for Primary Industries is not best placed to address the challenges raised by a critically endangered species, because its central responsibility is to promote the sustainable utilisation of fisheries.

EDS also notes that the history of decision making under the Fisheries Act in relation to the protection of associated and/or dependent marine mammal species has not been an easy one. Decisions made under the Fisheries Act are frequently subject to legal challenge, at least in part because the legislation was not designed to provide for the conservation of critically threatened species.

Conversely, the Department of Conservation is the government agency specifically tasked with the protection of native and threatened species. Under the Marine Mammals Protection Act the Minister has broad powers to take measures to protect marine mammals, principally through the use of marine mammal sanctuaries and population management plans.

The discussion paper states that a key reason for allocating the management of fishing threats to the Ministry for Primary Industries is that the Ministry has much greater resource for enforcement of regulations than the Department of Conservation. EDS notes that section 11 of the Marine Mammals Protection Act provides for Fisheries Officers also to operate as Marine Mammal Officers, who could thus enforce regulations under the Marine Mammals Protection Act. It is therefore evident that this need not be a barrier to Department of Conservation leadership on this issue, provided that there is cooperation between the two agencies, and such cooperation has been evident in the current review of the Threat Management Plan.

PURPOSE OF THE THREAT MANAGEMENT PLAN

The stated goals of the draft Threat Management Plan are:

- *To ensure that the long-term viability of Maui's dolphins is not threatened by human activities; and*
- *To further reduce impacts of human activities as far as possible, taking into account advances in technology and knowledge, and financial, social and cultural implications.*

EDS considers that these goals do not adequately reflect the gravity of the threat facing Maui's dolphins. It would be appropriate to reference the critical state of the Maui's dolphin population and the need to implement measures which eradicate the continuing threats to their survival. Furthermore, EDS is concerned that this statement does not provide for a measurable goal by which the success or otherwise of the Threat Management Plan can be assessed.

We note that the government's vision statement for Maui's dolphins is "... *Maui's dolphins should be managed for their long term viability and recovery throughout their natural range.*" It is unclear whether the term 'natural' refers to the historic range of the Maui's dolphin or its current range. This is significant in terms of the identification of appropriate management measures, and it would be appropriate for the draft Threat Management Plan to clarify what is meant by this term.

URGENT NEED FOR REGULATION OF THREATS

EDS notes that the risk assessment produced by the expert panel and recent population studies (e.g. Hanmer *et al* 2012) give a deeply concerning prognosis for the Maui's dolphin if the threats posed by human activities are permitted to continue. The expert panel's finding that the population can sustain only one human-induced mortality every 10-23 years indicates that new management measures must

be designed to eradicate all key threats to the Maui's dolphin. Decisive and radical action is required to prevent what will otherwise be certain extinction.

The extinction of a dolphin is of global concern, reflected most recently in the motion passed at the IUCN World Conservation Congress in September 2012 and in a 2012 report of the Scientific Committee of the International Whaling Commission. EDS is concerned that a failure to remove the threats posed to Maui's dolphins by human activity will not only likely result in the extinction of the dolphin but will have a very significant negative impact on international perceptions of New Zealand. This perception will be enduring, as New Zealand will be documented as one of the very few countries in the world to allow a dolphin subspecies to become extinct.

New Zealand has international obligations to protect Maui's dolphins: in particular, article 8 of the Convention on Biological Diversity provides that member states *shall, as far as possible and as appropriate ... [p]romote the protection of ecosystems, natural habitats and the maintenance of viable populations of species in natural surroundings ... and [r]ehabilitate and restore degraded ecosystems and promote the recovery of threatened species, inter alia, through the development and implementation of plans or other management strategies*. The United Nations Convention on the Law of the Sea provides that *States have the obligation to protect and preserve the marine environment*. EDS notes that the discussion paper suggests that the proposed management options are consistent with these obligations. However, we urge that the Ministers exercise caution in this regard.

FISHING REGULATION

Options presented

EDS is concerned that the options presented are not accompanied by an assessment of the extent to which each will effectively address the risk to the dolphins, and what are the likely different outcomes to the dolphin population resulting from the Minister adopting each option. Without this information EDS considers that the Minister will be unable to make an informed decision.

In addition, EDS is concerned that the range of options on which the Ministry is consulting in each of the categories is overly narrow, comprising similar measures which would likely have a similar effect in terms of mitigating risk to the dolphins. EDS considers that stakeholders should have the opportunity to comment on a broad range of options. Further, the Minister should be advised of the full range of options available to him and in particular what is required to fully protect the Maui's dolphin from fishing activity.

In particular, EDS strongly suggests that one of the options included in the discussion paper should have provided for full protection of the Maui's dolphin range – i.e. prohibitions on trawling and set netting out to 12 nautical miles, from Maunganui Bluff to Hawera (aligning with the existing and proposed marine mammal sanctuary). EDS notes that protection out to 12 nautical miles was one of the options presented to the Minister in the 2007 Threat Management Plan advice paper.

In addition, EDS notes that the assessment of the distribution of Maui's dolphins by the expert panel undertaking the risk assessment extends further south than Hawera, which is the southern extent of both existing and proposed fishing regulation. The discussion paper contains no explanation of why the proposals for new regulation do not cover this additional area. In order to ensure that decisions are made in accordance with the best available information, the options presented to the Minister should include coverage of this area out to 12 nautical miles.

Environmental principles

EDS is concerned that the options proposed in the discussion paper would not allow the Minister to make a decision which is consistent with the requirement under the Fisheries Act 1996 that decision makers must take into account the environmental principles, which include that *associated or dependent species should be maintained above a level that ensures their long term viability*. Long term viability is defined as meaning that there is a *low risk of collapse of the stock or species and the stock or species has the potential to recover to a higher biomass level*.

In light of the findings of the risk assessment and other research, EDS considers that in order to comply with the environmental principles, and to be lawful, the Minister must be provided with an option which provides for full protection from fishing threats.

Further, EDS considers that whilst the Fisheries Act provides for decision makers under the Act to balance utilisation and sustainability, this balancing can only be undertaken to the extent that associated or dependant species remain viable. This balancing approach is not appropriate where there is a risk that a subspecies or species may become extinct if particular measures are not taken.

Information principles

The Ministry for Primary Industries emphasises the wide confidence intervals in the risk assessment and continuing information uncertainty to justify a cautious approach to the implementation of new management measures, focusing on the gathering of supplementary data. EDS supports proposals for new research but considers that the discussion paper fails to give appropriate weight to what *is* known.

The information principles provide that the Minister must take into account that *decisions should be based on the best available information*. The Maui's dolphin has been studied in detail for many years. There is a large amount of scientific research, as well as the 2012 risk assessment by an expert panel which indicates that the Maui's dolphin is in a critical state and that fishing activities continue to be a very significant threat (95.5% of the total threat from human activity was attributed to fishing by the risk assessment panel). Furthermore, it is accepted that the dolphins' habitat extends at least out to seven nautical miles and potentially out to 12 nautical miles. This should be treated as the best available information.

The information principles also provide the Minister must take into account the fact that *the absence of, or any uncertainty in, any information should not be used as a reason for postponing or failing to take any measure to achieve the purpose of this Act*. In order to achieve the purpose of the Act, the Maui's dolphin population must be protected from any further fishing related mortalities. As such, compliance with the information principles requires the Minister to take effective action based on the available information, rather than simply opting to undertake further research.

In the absence of population recovery, data gathering is highly unlikely to become easier. As a result, decision makers in respect of Maui's dolphins will likely always operate in an uncertain environment. EDS considers that the adoption of increased observer coverage rather than regulation is not appropriate in this context. As noted in the discussion paper, observer coverage will not prevent dolphin mortalities. The critical state of the population means that whilst the likelihood of catching a dolphin is very low, the significance of catching one is extremely high. Put simply, there is no time left for observing dolphin mortalities.

In respect of decisions made under section 15(2) of the Fisheries Act, The Courts have confirmed that the Minister is permitted to adopt a precautionary approach to decision-making.ⁱⁱ This approach is highly appropriate in the current context, in which there are uncertainties surrounding the data but the cost of error is known to be so high. If a precautionary approach is taken, regulation of activity can be reduced as the population recovers and/or information becomes more certain. If recovery of the population is the objective, this is the only logical approach.

Monitoring and compliance

EDS strongly believes that any management measures that are implemented must be accompanied by an effective and comprehensive monitoring programme. In particular, if the measures selected by the Minister provide for any set net or trawling activity to occur within Maui's dolphin habitat (i.e. from Maunganui Bluff to south of Hawera, and out to 12 nautical miles) 100 per cent observer coverage should be implemented in these fisheries.

EDS notes that the discussion paper contains no reference to the success or otherwise of existing regulation in terms of compliance and enforcement. EDS considers that an updated threat management plan should include an assessment of compliance to date, the effectiveness of monitoring and enforcement measures and proposals for improvements where appropriate. Furthermore, management measures should be identified with reference to these matters. In short, there is little point in implementing new regulations, if there is no compliance with the existing ones, and a low likelihood of compliance with new ones.

EDS preferred option

EDS strongly suggests that the Minister should be presented with options which provide for full protection of the Maui's dolphin from Maunganui Bluff to Taranaki (including the additional area south of Hawera identified in the risk assessment as part of Maui's dolphin habitat). This full protection should include prohibitions on set netting and trawling out to 12 nautical miles (consistent with the marine mammal sanctuary).

EDS considers that in order to meet the requirements of the Fisheries Act, the Minister must adopt measures which provide for this full protection. At the very least, the Minister should provide for the prohibition of set netting and trawling in the area set out above out to seven nautical miles, which would cover the areas where activities pose the highest risk to the dolphins (consistent with the findings of the risk assessment).

EXTENSION OF THE WEST COAST NORTH ISLAND MARINE MAMMAL SANCTUARY

EDS strongly supports the proposal to extend the west coast North Island marine mammal sanctuary South from Oakura beach to Hawera, out to 12 nautical miles. EDS suggests that this is the best available tool to provide for the protection of Maui's dolphins throughout their range. EDS notes that the risk assessment found that Maui's dolphin distribution extends slightly further south than Hawera, and recommends that the Department of Conservation should consider aligning the Southern extent of the marine mammal sanctuary with that finding.

EDS recommends that the establishment of a marine mammal sanctuary should not be undertaken without the establishment of strong regulatory provisions managing human activity within the sanctuary, as the real value of a marine mammal sanctuary lies in the protection of marine mammals from activities that might otherwise threaten them there. As stated above, EDS strongly believes that fishing activity should be regulated through measures attached to the marine mammal sanctuary.

SEISMIC SURVEYING

EDS supports the proposal (option 3a) to extend the existing legal restrictions on seismic surveying south to Hawera (although see reference above to southern-most boundary of the marine mammal sanctuary) and throughout an entire extended marine mammal sanctuary. This would reflect current knowledge about the distribution of Maui's dolphins, providing for uniform protection throughout their current range, and throughout an extended marine mammal sanctuary.

EDS also suggests that option 5 (the prohibition of petroleum mining) should be considered. EDS believes that the Department of Conservation's reasoning in respect of this option is inappropriate. Although limited activity is expected within the next five years, it is possible that interest will grow in this area. It would be preferable for the Department of Conservation to implement management measures now, before more serious impacts occur. This will establish certainty for industry and long term effective protection for Maui's dolphins.

SEABED MINERALS EXPLOITATION

There is strong interest and investment in seabed minerals exploitation in Maui's dolphin habitat, and the risks posed by this activity are not well known, but potentially very significant. Given these factors, together with the critical state of the Maui's dolphin population, EDS believes that a precautionary approach to the management of minerals mining should be adopted by the Minister.

EDS notes that at present activity is limited to prospecting and exploration, and that none of the five industry stakeholders who hold permits has indicated that mining activity is expected to occur within five years. However, EDS does not believe that these are good reasons for failing to put in place effective measures to manage the threat posed by seabed minerals exploitation. Clearly, stakeholders investing in prospecting and exploration activity do so with an expectation that they will have access to the minerals for mining should this prove economically viable. The Crown Minerals permitting system reflects this assumption. As a result, the earlier that appropriate management measures are implemented, the greater the certainty for stakeholders, and the lesser the likelihood that new regulation will disrupt their activity. Furthermore, EDS considers that it would be appropriate to implement management measures before mining activity begins to impact significantly on the dolphins.

Accordingly, EDS supports option 3d) comprising the extension of mining restrictions south to Hawera (or to the southern extent of the distribution identified in the risk assessment) and over the entire 12 nautical mile extended marine mammal sanctuary.

TOURISM

EDS agrees with the Department of Conservation that the low level of interest in commercial Maui's dolphin tourism means that a moratorium on the issue of permits is not appropriate. EDS supports option 3 which would provide for measures regulating tourism to be applied to the entire marine mammal sanctuary. EDS agrees that the regulations should include the following restrictions:

- No commercial tourism operations are allowed to target Maui's dolphins.
- No swimming with Maui's dolphins.
- For recreational boats, in addition to observing MMPR 18-20, opportunistic viewing should have a stipulated time limit of 10 minutes per vessel.

EDS considers that option 4, involving increased engagement and compliance monitoring would be appropriate given the critical state of the dolphin population. EDS is concerned that at present, there is much less public awareness of the risk that recreational activity might pose to Maui's dolphins than there is about the risks of fishing and mining.

COMMERCIAL SHIPPING

EDS supports the proposal to make a submission to the International Maritime Organisation for the designation of a Particularly Sensitive Sea Area. All viable measures to reduce the risk of shipping activity to the Maui's dolphin should be pursued, taking into account the need to allow continued access to the Port of Taranaki and Cook Strait.

LAND BASED ACTIVITIES AND COASTAL DEVELOPMENT

As noted in the discussion paper, there are a range of land based and coastal development activities which could have an impact on Maui's dolphins. In particular, marine energy development and aquaculture in harbours could pose particular problems in the future. EDS's preference is for all activities in the marine area which pose a threat to Maui's dolphins to be regulated through the marine mammal sanctuary.

However, an alternative approach would be for the Department of Conservation to initiate private plan changes in the relevant regional coastal plans (Taranaki, Waikato, Auckland and Northland). This approach is less attractive because of the likely need to duplicate measures across numerous plans, the more onerous requirements of the plan change process and the fact that where possible the

Department of Conservation should retain responsibility for management measures. Nevertheless, this approach may be appropriate in certain circumstances.

Furthermore, EDS suggests that the Department of Conservation should work closely with the relevant councils to draw up a plan of action for the management of land-based threats such as agricultural and industrial runoff, sewage and stormwater discharge. These problems are complex and will require close cooperation between all the relevant agencies, together with a commitment to invest in solutions.

RESEARCH PLANNING PROCESS

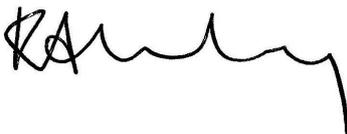
EDS strongly supports the proposals for the development of a Research and Monitoring Advisory Group and for an annual planning and review process. Improvements in our understanding of the Maui's dolphin population will likely provide the opportunity for improvements in the management framework.

However, EDS cautions that the gaps in the available information, and the need to undertake further research, should not be used as a basis for failing to take precautionary regulatory measures now, given the critical state of the population.

EDS strongly suggests that the development of an annual planning and review process should include a detailed programme of research, including measurable goals and a timeframe for implementation. Further, development of the annual planning and review process must be accompanied by a commitment to funding of the research plan. Without new funding, it is unlikely that a new research plan will be effective.

EDS would welcome the opportunity to discuss our submission further with you.

Yours faithfully

A handwritten signature in black ink, appearing to read 'Kate Mulcahy', written in a cursive style.

Kate Mulcahy

Senior Researcher

Environmental Defence Society

Contact details

Environmental Defence Society

P O Box 95 152

Swanson

Auckland 0653

Phone: 09 480 2565

Website: www.eds.org.nz

ⁱ Currey R *et al* 2012

ⁱⁱ NZ Federation of Commercial Fishermen Inc & Ors v Ministry of Fisheries & Anor (2011) 24 NZULR 364