

19 August 2008

The Chairman
Primary Production Committee
Parliament Buildings
Molesworth Street
WELLINGTON 6160



Dear Sir,

RE: SUBMISSIONS ON FISHERIES ACT 1996 AMENDMENT BILL (NO. 2)

Introduction

These submissions are made on behalf of the Antons Group of Companies and an associated company, Orneagan Developments Ltd. The Antons Group is an integrated fishing operation based in Auckland active in all aspects of the fishing industry from catching and processing through to marketing and export. The group is a substantial earner of overseas income. Two of the companies from the group, (Antons Trawling Co Ltd and Esperance Fishing Co Ltd) together with Orneagan Developments Ltd, were the plaintiffs in proceedings which led to the judgement of Miller J in *Antons Trawling Co Ltd v The Ministry of Fisheries* (High Court Wellington, CIV 20007-485-2199, 22 February 2008).

Position on Bill – Introduction

The Antons Group does not accept that amendments are required to the Fisheries Act 1996 as a consequence of the Antons decision. In particular the Group does not accept that the changes are required with regard to the ORH1 stock which was the subject of the dispute leading to the Antons decision. Antons notes the submissions from the Seafood Industry Council to the effect that this Bill does not change the law but instead restores the status quo. Notwithstanding this the Antons Group opposes the Bill because of concerns that the amendment will be used as a vehicle to reduce TACCs, with all the consequential economic and social losses, without the need for proper scientific analysis.

ORH1 and the Antons Decision

The Antons Group has been involved in the ORH1 fishery ever since the first significant quantities of ORH were taken by an Anton's vessel in 1994. All the stakeholders in ORH1 were very conscious of the mistakes that had been made in other ORH fisheries between the mid 70's and mid 80's leading to their rapid depletion. Accordingly from the inception of this fishery the stakeholders have worked closely with the Ministry of Fisheries to develop and implement innovative management and harvesting regimes designed to ensure the ongoing sustainable harvest of this important species. These Management measures, including sub area and feature catch limits, have been developed and implemented on a voluntary basis by the quota owners

As fishers we have not seen any sign of stress in the fishery and are confident that catches can be maintained at or above current levels now and into the future. ORH1 covers a large area in which only a relatively small area and Seamount features have been explored to date and the quota owners believe that the resource has potential for expansion.

Notwithstanding the above, the Minister of Fisheries has twice attempted to slash the TACC levels by up to 40% and the Antons Group has been forced to go to court on four occasions

over two years to protect the viability of the commercial fishery from these totally unreasonable decisions. During the first legal action undertaken (for the 2006/2007 Fishing Year Sustainability Round) the Minister abandoned his decision before a substantive hearing could be held but still made essentially the same decision the following year.

It was the legal challenge to the Minister's second decision for the 2007/2008 Fishing Year Sustainability Round which led to the "Anton's decision".

In deciding that the Minister had to form at least some view of where the stock was at with regard to MSY before adjusting the TACC under s13 the court was only re-stating what was clearly provided for in s13. In addition the court clearly acknowledged that there could often be difficulties in assessing MSY but those difficulties could be accommodated within the current framework of s13. For example at paragraph 50 of the judgement Miller J says;

"I accept that B_{msy} cannot be calculated accurately for many species. But s10 undoubtedly applies to TACC setting under s13, so the Minister may act, cautiously, when information is uncertain, unreliable or inadequate, and should not postpone a measure to achieve the Acts purposes only because of the absence of or uncertainty of any information. This section accordingly admits estimates of stock levels, and "way and rate" valuations, although the quantity and quality of the best available information is poor. Risks must be weighed, and there is room for a precautionary approach where information is inadequate;"

The problem we had was that the Minister had not been supplied with any estimate whatsoever of MSY and yet purported to make a decision under s13 in the total absence of any estimate.

The above shows that there is already a large degree of flexibility built into the Act and the suggested changes are not needed.

Also the suggested change will not cure the problems which developed with regard to ORH1 over the past three fishing years as these problems were not caused by the law but how information was used by the Ministry and Minister. With regard to the first decision which came under attack our primary objection was that there was a substantial amount of additional information which was available for analysis and that the decision to drastically cut the TACC in this fishery should not be made, in the absence of any evidence of any immediate risk, until that additional information had been analysed. The Ministry had incorrectly told the Minister that it is not possible for the additional information to be analysed at that time for technical reasons. Accordingly the Minister was not making his decision based on the best possible information.

With regard to the second attempt at a TACC reduction which led to the Anton's decision, the Minister had not been supplied with the best available information contrary to s10(a). In particular he was not told that a topographical survey could be undertaken. There was common ground between the Ministry and Industry that a topographical study was feasible and that, in conjunction with trial fishing on features, such a survey could indicate the likely order and magnitude of ORH stocks in ORH1. Much was already known of Orange Roughy spawning patterns in large areas of ORH1 based on research and Mfish observer data collected since 1994/1995. Apparently the Ministry officials had discounted the topographical survey because it would not produce "conclusive" information. This overlooked the best evidence principals in s10. This failure to obtain the best information will not be cured by the proposed changes to s13 and may well be used as an excuse not to obtain this information.

Given that the proposed changes to s13 simply clarify and re-state the law as it existed at the time of Anton's decision it might be said that the Anton's Group should not be concerned by

this proposed amendment. However given the history of this matter it is hoped that the Select Committee will understand the Antons Group's scepticism about the intent of this amendment and how it may be used or interpreted in the future by the Ministry and the Minister of Fisheries.

The Minister of Fisheries has consistently refused to meet with Antons Group or discuss the ORH1 fisheries with it. Each time the Court have made findings against the Minister this has been followed by intemperate outbursts from him claiming that we do not understand the concept of long-term sustainable management accompanied by threats to change the law or "bury" us in additional research costs. The claim that the Antons Group, as a long standing (and indeed founding) member of the current commercial fishing industry does not understand the concept of sustainable utilisation is offensive and totally rejected. There is a concern that a personal element has entered this debate and that the Ministry or Minister may use this amendment to "have the final word" next year and cut the catch levels without carrying out further research.

This view is reinforced by the fact that the Ministry has essentially done nothing to follow-up on the comments in the Antons decision regarding the adoption of the topographical survey. Notwithstanding concessions made in court, the Ministry has not advanced the topographical survey issue but has tried to implement other meaningless research which was unanimously rejected by the industry and SeaFic scientists. The Antons Group has also invited the Ministry to consider implementing sustainability measures through s11 to provide any required safe-guards for the current levels of fishing. For example, the current catch spreading agreement which eliminates the risk of over-fishing single features could be implemented through s11. Again the Ministry has not pursued this suggestion.

The Ministry appears fixated on changing the law rather than pursuing the sensible measures aimed at increasing our knowledge of ORH1 stock and their ongoing sustainable utilisation. The Quota owners are developing and implementing a comprehensive research programme on their own initiative which will over the next two seasons include a topographical survey, to further enhance the knowledge of the fishery. In the meantime another ORH1 fishing season has passed with all indications from our vessels showing that the stock remains in good heart. I would note to the Select Committee that we have 100% Mfish scientific observer coverage in this fishery on every vessel for the four main catching months of the fishing year (October, November, June & July) over the last two years, and prior to this we maintained approximately 50% observer coverage annually.

We are concerned that the proposed changes are driven by an incorrect legal analysis of the Antons decision by Crown Law and are also concerned with the claim that these important changes must be driven through as a matter of urgency so that two stocks can be assessed this fishing year. With regard to the later point we find it very difficult to accept that the ORH3B and the BNS stocks can not be assessed under the current framework, particularly given the flexibility inherent in that framework where any information is scarce or unreliable.

In terms of the urgency proposed by the Ministry in respect of this year's Sustainability Decisions there are other Management mechanisms available.

Please note:

1. ORH3B Quota Holders could shelve the quota and agree not to take that amount that the Minister is proposing to reduce, and
2. In respect of BNS1 the TACC has not been fully taken for the last 3 years and the current indications are that the proposed reduced TACC will be the same as the average annual catch level for the last three years. If the TACC is adjusted, the catch levels would very likely remain the same as the vessels are not available to increase commercial catch beyond the current levels.

Conclusion

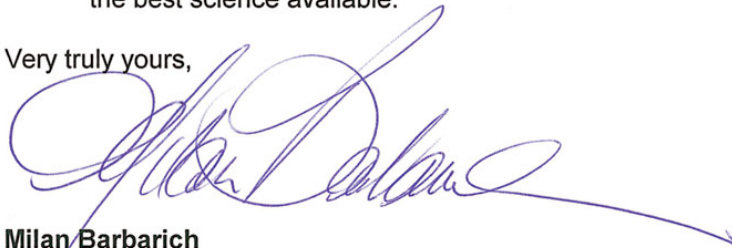
These changes are not required and they may be used unreasonably by the Ministry and accordingly Antons opposes their introduction.

It is noted that this Committee deals with primary production and this is a timely reminder that the fishing industry is a significant primary production industry. Too often it seems to us that the Government loses sight of the significant role the industry plays in the economy and the very real effects, both social and economic, which are felt when our ability to produce is curtailed by quota cuts and other restrictions. If the Minister had had his way many millions of dollars of earnings would have been destroyed and jobs lost to address a risk he had no evidence even existed. Some TACC adjustments are necessary from time to time but such adjustments should not be made without proper science that unites all stakeholders in the view that sacrifices have to be made. This science was missing in the previous ORH1 decisions and any changes to the law will not cure that defect.

I invite the Select Committee to review the **attached** article by Prof. Ray Hillborn, a scientist of significant standing in the USA, New Zealand and International Scientific Community.

- We have a Fisheries Act that was carefully designed from the outset and we now have a Ministry and Minister that are now trying to make faith based gut feel TACC adjustments.
- As a stakeholder in the NZQMS we have a right to have our quotas managed under the best science available.

Very truly yours,



Milan Barbarich
Managing Director

Encl: Hillborn R. "Faith-based Fisheries" Fisheries, Vol.31, No.11, November 2006,
www.fisheries.org