Bob Gutsell
President
NZ Sport Fishing Council
PO Box 54242, The Marina
Half Moon Bay, Auckland 2144
secretary@nzsportfishing.org.nz

Kahawai and Blue Mackerel
Limit Exemptions 2020
Fisheries Management
Fisheries New Zealand
PO Box 53030
Auckland 2022
FMSubmissions@mpi.govt.nz

18 September 2020

Kahawai and Blue Mackerel Aggregation Limit Exemption Application

Submission summary

1. The submitters support the principle of aggregation limits constraining the establishment of monopolies within the Quota Management System.

2. The submitters do not support the Pelco application for exemptions to the kahawai and blue mackerel aggregation limit. Allowing the establishment of monopolies and the consolidation of quota shares is not consistent with our Rescue Fish Policy of avoiding market dominance and regulatory capture. We ask that Fisheries New Zealand clarifies the official policy on quota aggregations and explains how this serves the function of the Quota Management System.

3. We are concerned about the adequacy of this consultation process, especially the failure by MPI to release all the application documents. Annexures have been redacted or removed from the application document, such that these annexures are information that is not available for the purposes of consultation. We ask the Minister to extend or defer consultation to allow for Fisheries New Zealand to release the annexures to the application, and to allow for further consultation pending that release.

4. We maintain that the consultation process has not been transparent and is effectively an ex post facto approval of an aggregation extension which has already been exceeded. We request a review of this process against s 59, 60, and 61 of the Fisheries Act 1996.

5. Due to Ombudsman complaint 534482 **(**requested under urgency) relating to documents of this application not being resolved, it is NZSFC's request that this consultation period be extended until 3 weeks post the resolution date. With MPI's tight consultation timelines and refusal to pass on all relevant information we feel this is the only just outcome.

The submitters

6. The New Zealand Sport Fishing Council (NZSFC) appreciates the opportunity to submit on the proposals for the future management of Kahawai (KAH 1, 2, 3, & 8) and Blue Mackerel (EMA 1, 2, 3, & 7). Fisheries New Zealand (FNZ) advice of consultation was received on 20 July 2020, with submissions due by 28 August 2020, then extended to 18 September 2020.
7. The NZ Sport Fishing Council is a recognised national sports organisation of 54 affiliated clubs with over 35,000 members nationwide. The Council has initiated LegaSea to generate widespread awareness and support for the need to restore abundance in our inshore marine environment. Also, to broaden NZSFC involvement in marine management advocacy, research, education and alignment on behalf of our members and LegaSea supporters. www.legasea.co.nz.
8. The New Zealand Angling and Casting Association (NZACA) is the representative body for its 35 member clubs throughout the country. The Association promotes recreational fishing and the camaraderie of enjoying the activity with fellow fishers. The NZACA is committed to protecting fish stocks and representing its members' right to fish.
9. Collectively we are '*the submitters'*. The joint submitters are committed to ensuring that sustainability measures and environmental management controls are designed and implemented to achieve the Purpose and Principles of the Fisheries Act 1996, including "maintaining the potential of fisheries resources to meet the reasonably foreseeable needs of future generations…" [s8(2)(a) Fisheries Act 1996].
10. Our representatives are available to discuss this submission in more detail if required. We look forward to positive outcomes from these reviews and would like to be kept informed of future developments. Our contact is Helen Pastor, secretary@nzsportfishing.org.nz

Background

11. Fisheries New Zealand is seeking feedback from persons or organisations having an interest in a blue mackerel (EMA) and kahawai (KAH) quota aggregation limit exemption application. The application is from Pelco NZ Limited. The requests are to hold:
    - 45.993% of all KAH quota, with an authorisation to hold up to 51% to accommodate future TAC/TACC changes.
    - 55.304% of all EMA quota, with an authorisation to hold up to 61% to accommodate future TAC/TACC changes.
12. The Fisheries Act 1996 contains provisions that place restrictions (aggregation limits) on the amount of quota that may be owned by any one person or entity. For blue mackerel, the aggregation limit is 45%, and for kahawai, it is 35% of the combined total allowable commercial catches (TACCs) for each stock.
13. Section 60 of the Fisheries Act 1996 makes the provision for the Minister of Fisheries to consent to persons holding quota in excess of such aggregation limits, following consultation.
14. The Ministry website notes that consultation on the application will run until 18 September 2020 and includes a link to the application submitted by Pelco. Of interest:
    a. The application includes a 5-page covering letter from lawyers, Ocean Law, dated 11 March 2020. All of paragraph 12, containing the contents of all of page 4 of the covering

letter from Ocean Law under the heading '*Additional matters*' has been redacted from the available material.

b. The application documentation provided by MPI has various redactions. In particular annexures 1 – 5 have been redacted or removed from the application document, such that these annexures are information that is not available for the purposes of consultation.

c. The redactions include an affidavit or statement by the managing director of Pelco, Mr Rolleston.

d. Also not included in the application documentation is a copy of any agreement or contract existing between Pelco and *"an unrelated third party"*. MPI said (in response to an information request) that MPI don't have a copy of any agreement between Pelco Ltd and any unrelated third party. However, the application document by Pelco Ltd states (page 15) that "*Details of the sale of the Divested Quota Package are outlined in the attached copy of the agreement which also provides the option to re-purchase the Divested Quota Package in the event consent is granted under s.60"*. Clearly the agreement referenced is not disclosed in the consultation documentation.

e. The application is described as relating to "*a genuine prospective purchase (in this case repurchase) of an existing quota package*" (Ocean Law, para 9).

15. The covering letter from Ocean Law dated March 2020 notes at paragraphs 3-6 the sequence whereby Pelco purchased the pelagic fisheries assets from Sanford, then on-sold quota (described as the divested quota package) in excess of aggregation limits to a third party. Ocean Law states:

a. This application relates to the purchase of quota (the Divested Quota Package) consisting of blue mackerel and kahawai that was previously owned by Pelco NZ.

b. As at 1 January 2019 Pelco NZ, a company that focuses primarily on fishing pelagic species using the method of purse seine fishing, held a total of 13.5% of the national blue mackerel quota shares and 11.3% of kahawai the national quota shares. That quota holding was within the aggregation thresholds set out in section 59 of the Fisheries Act 1996 (Fisheries Act).

c. As outlined in the attached application, Pelco NZ was approached in late 2018 by Sanford notifying that its pelagic fishery assets were for sale, inclusive of both vessels and associated quota package ('Sanford Asset Package'). Pelco NZ had identified prior to this approach from Sanford a need to expand its fishing operations and increase quota holding in these pelagic species in order to strengthen the long-term prospects of the company.

d. Unfortunately, the time frame within which Sanford required Pelco NZ to complete the purchase of the Sanford Asset Package did not allow Pelco NZ enough time to make an application under section 60 of the Fisheries Act to exceed the aggregation limits under the Fisheries Act. Given the critical importance of purchasing the Sanford Asset Package to the company's long term future, it was decided that Pelco NZ would divest itself of sufficient quota then held by the company to enable sufficient head room for the incoming Sanford Asset Package.

e. That Divested Quota Package was sold to an unrelated third party under a contract for sale, which included an option to re-purchase that quota package in the event Pelco NZ made a successful application to exceed the aggregation limits under the Fisheries Act.

f. Pelco NZ is a subsidiary of Pelco Holdings Limited, as is Pelco Quota Holdings Limited. While Pelco NZ has secured the right to repurchase the Divested Quota Parcel, Pelco Quota Holdings Limited holds the quota that was acquired from Sanford. As the companies are subsidiaries of Pelco Holdings Limited, they are therefore associated entities in terms of s59(10) of the Fisheries Act, and s YB of the Income Tax Act 2007.

g. As a result of this sequence of transactions Pelco NZ, on its own behalf, and on behalf of Pelco Quota Holdings Limited and Pelco Holdings Limited now applies to the Minister under s 60 of the Fisheries Act for the purposes of reacquiring the Divested Quota Package.

16. Through examining the FishServe quota registry records, and public announcements of the Sanford sale, the sequence appears to be that:

    a. A conditional sale of the pelagic assets of Sanford is announced on 19 November 2018;

    b. Sanford announces that the sale is unconditional on 6 December 2018;

    c. The FishServe records identify that quota was transferred from Pelco to Quota Management Systems Ltd (QMSL) on 1 April 2019;

    d. Quota was transferred from Sanford to Pelco on 3 April 2019;

    e. Pelco makes the application for consent to exceed the aggregation limits on 11 March 2020.

17. The Act provides that quota held in excess of the aggregation limits is to be forfeited to the Crown, subject to rights to apply for relief against forfeiture pursuant to s 61 of the Fisheries Act. The Act provides the Minister:

    a. must consult with such persons or organisations as the Minister considers are representative of those classes of persons having an interest in his decision under s 60, by notice in the *Gazette*: s 60(1);

    b. may grant consent subject to such conditions as the Minister may impose: s 60(2);

    c. is required to consider a number of mandatory relevant considerations in s 60(3), including *"such other matters as the Minister considers relevant"*: s 60(3).

Submission

18. Pelco Ltd have had adequate time between entering a contract with Sanford Ltd and their settlement date to make an application for exemption but they chose not to do so. The 1 April 2019 sale of shares to an associated third party (QMSL) appears to be a fabrication to appease s 59 of the Fisheries Act.

19. Pelco Ltd sale transaction to QMSL included specific conditions for repurchase, making the sole purpose of the transaction to avoid breaching s 59 of the Fisheries Act and avoid having their shares confiscated by the Crown. However, the exact nature of the contractual relationships is unknown because the relevant contractual agreements (which appear to be part of the annexures to the application documents) have not been disclosed for consultation purposes.

20. We question why any unrelated investor such as QMSL would agree to such a deal. If the transaction from Pelco Ltd to a third party was for the purpose of not breaching s 59 of the

Fisheries Act, then the relationship between the buyer and the vendor is material to determine if they are associated persons, and if selling with a clause giving right of repurchase should be considered a sale for the purpose of aggregation.

21. Because this consultation process has not been transparent in that not all relevant information has been disclosed, it becomes an ex post facto approval of an aggregation extension which has already been exceeded. We therefore request a review of this process against s 59, 60, and 61 of the Fisheries Act to ensure that no breaches have occurred through the sale of shares to an unrelated third party. We also query why there were such limited efforts by Fisheries New Zealand officials to investigate the related party issue.

22. Aggregation limits have been steadily weakened over time. A share of the quota for each WMS has been amended to apply to the combined share of all stocks of the same species. When once KAH and EMA would be limited to a maximum of 20% for each stock we are now considering permitting the ownership of over 60% of EMA1. This breaches every principle of the aggregation limit regime and enables complete control to be exercised over a stock by a single entity and blocks potential newcomers to the fishery.

23. To compound the matter the applicants operate a high volume low value business model that fails to add any value domestically and is sold as a bulk commodity for less than $2/Kg. This trade should not be incentivised by lax aggregation rules.

24. There are growing call to ban purse seining due to the impacts on both stocks and the environment, an issue that the public is rightly concerned about. The NZSFC has repeatedly called on Fisheries New Zealand to manage purse seining effort sustainably and to constrain this bulk harvesting method beyond the twelve nautical mile limit. For the past 50 years purse seining has also disrupted ocean ecosystems by removing vast numbers of small foraging surface predator fish and decimating stocks such as kahawai and mackerel. These are the fish that keep small fish on, or near the surface for birds to feed on (boil ups), and with these predatory fish are removed from the food chain nothing remains to keep the smaller fish on the surface were birds can feed on them. Many sea birds are washed ashore and found to have died of starvation, and the NZSFC maintains that such an ecologically disruptive fishery as purse seining should not be further incentivised by lax aggregation rules. The NZSFC maintains that quota aggregation limits must be maintained and enforced to constrain cooperate bulk harvesting of our inshore fisheries.

25. The NZSFC believe that Pelco Ltd have had every opportunity to apply for an aggregation extension, and the third-party transition with QMSL is all that avoids a section 61 forfeiture (roughly $1.1m) to the Crown. We ask that the Minister clarifies the official policy on quota aggregations (e.g., the upper limit to exemptions for fin fish) and explains how this serves the function of the Quota Management System.

26. We are concerned about the adequacy of the consultation process, including the failure by Fisheries New Zealand to release all the application and relevant documents. Annexures have been redacted or removed from the application document, such that these annexures are information that is not available for the purposes of consultation. We ask the Minister to extend or defer consultation to allow for MPI to release the annexures to the application, and to allow for further consultation pending that release.

27. The submitters highlight the serious concerns around consultation. This matter has been considered by the Courts who have made it abundantly clear that parties to consultation will

be properly informed[1], saying in part, "Implicit in the concept is a requirement that the party consulted will be (or will be made) adequately informed so as to be able to make intelligent and useful responses…" We submit that we cannot make an adequately informed response to this application due to the absence and redaction of information relating to the contract between Pelco and the third party.

28. We consider that by not disclosing the annexures to the application (which form part of that application) the Minister (or his advisers) have not adequately consulted, including on the important issue of the nature of the relationship between QMSL and Pelco. In particular:

    a. The failure to disclose the nature of the contractual arrangements with QMSL does not dispel any concern that the nature of the arrangements may, at law, be a partnership, or that the arrangement is artificial or a ruse in order to get around the policy imperatives to the aggregation limits.

    b. Transparency is relevant here because in practice the application is likely to have been preceded by engagement between the vendor (Sanford), the purchaser (Pelco) and Fisheries New Zealand officials.

    c. The 'track record' suggests that the Ministry and previous Ministers have a history overwhelmingly in favour of granting applications to exceed the aggregation limits. The application by Pelco refers (at page 15) to the Minister (or previous Ministers) having approved 90 applications to exceed the aggregation limits for all quota species, and that few if any applications have been declined in their entirety.

29. The application documents make several statements about the objectives to the aggregation limits including in relation to trade competition policies against the establishment of monopolies. However, this is an extremely limited description of the evident policy behind the aggregation limits in the Fisheries Act. We note:

    a. If the Minister is to approve aggregation limits which allow for quota shares to be aggregated to a sole industry operator with an major interest in all pelagic stocks, then it is foreseeable this substantial degree of power may constrain the Minister (and future Ministers) from making future allocation decisions in favour of other sector interests.

    b. Aggregation in favour of a single industry operator does not address concerns around regulatory capture of MPI, which goes to the issue of public confidence in the administration of the Fisheries Act.

    c. Few if any applications have been declined in their entirety.

[1] Wellington International Airport Limited and others v Air New Zealand [1993] 1 NZLR671, at p675.