



**Fisheries New Zealand**

Tini a Tangaroa

## **Review of Sustainability Measures for 2018/19**

### **Proposals to Alter Total Allowable Catch, Allowances, Total Allowable Commercial Catch and Deemed Value Rates for Selected Fishstocks**

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# 1. Submission Information

1. Fisheries New Zealand welcomes written submissions on any or all of the proposals contained in the Discussion Document. All written submissions must be received by Fisheries New Zealand no later than **5pm Friday 27 July 2018**.

Submission can be emailed to: [FMSubmissions@mpi.govt.nz](mailto:FMSubmissions@mpi.govt.nz)

Alternatively, the postal address is:

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## 1.1 OFFICIAL INFORMATION ACT 1982

2. All submissions are subject to the Official Information Act and can be released (along with personal details of the submitter) under the Act. If you have specific reasons for wanting to have your submission or personal details withheld, please set out your reasons in the submission. Fisheries New Zealand will consider those reasons when making any assessment for the release of submissions if requested under the Official Information Act.



## 2. Statutory Considerations

3. This section provides an overview of the Minister’s legal obligations under the Fisheries Act 1996 (the **Act** or the **Fisheries Act**) when setting or varying TACs, TACCs and deemed values for New Zealand fish stocks.
4. Where relevant, stock-specific details relating to these obligations are set out in the section of the discussion paper relating to each stock.

### 2.1 SECTION 5(a) – INTERNATIONAL OBLIGATIONS

5. Section 5(a) says the Act is to be interpreted, and all persons exercising or performing functions, duties, or powers under it are required to act, in a manner consistent with New Zealand’s international obligations relating to fishing. As a general principle, where there is a choice in the interpretation of the Act or the exercise of discretion, the decision maker must choose the option that is consistent with New Zealand’s international obligations relating to fishing.
6. The two key pieces of international law relating to fishing, and to which New Zealand is a party, are the United Nations Convention on the Law of the Sea, 1982 (**UNCLOS**) and the United Nations Convention on Biological Diversity 1992 (the **CBD**). International obligations also derive from New Zealand being a signatory to a number of international conventions. Of particular relevance are regional fisheries management organisations, Convention on International Trade in Endangered Species of Wild Fauna and Flora (**CITES**) and the Convention on Migratory Species (**CMS**).

### 2.2 SECTION 5(b) – TREATY OF WAITANGI (FISHERIES CLAIMS) SETTLEMENT ACT 1992

7. Section 5(b) says the Act is to be interpreted, and all persons exercising or performing functions, duties, or powers under it are required to act, in a manner consistent with the provisions of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 (the **Settlement Act**). This obligation furthers the agreements expressed in the Deed of Settlement referred to in the Preamble to the Settlement Act.
8. The development of customary regulations, Iwi Fisheries Forums, and providing for the input and participation of iwi in fisheries decisions, discussed elsewhere in this paper, are some of the ways in which the obligations in the Settlement Act are given effect to.

### 2.3 SECTION 8 – PURPOSE OF THE FISHERIES ACT 1996

9. Section 8 says the purpose of the Act is to provide for the utilisation of fisheries resources while ensuring sustainability.

10. “Ensuring sustainability” is defined as: “maintaining the potential of fisheries resources to meet the reasonably foreseeable needs of future generations; and avoiding, remedying, or mitigating any adverse effects of fishing on the aquatic environment”. “Utilisation” of fisheries resources is defined as “conserving, using, enhancing, and developing fisheries resources to enable people to provide for their social, economic, and cultural wellbeing.”
11. The Supreme Court has stated that the purpose statement incorporates “the two competing social policies reflected in the Act” and that “both policies are to be accommodated as far as is practicable in the administration of fisheries under the quota management system...[I]n the attribution of due weight to each policy that given to utilisation must not be such as to jeopardise sustainability”.<sup>1</sup>

## 2.4 SECTION 9 – ENVIRONMENTAL PRINCIPLES

12. Section 9 prescribes three environmental principles that the Minister must take into account when exercising powers in relation to the utilising of fisheries resources or ensuring sustainability.

### **Principle 1: Associated or dependent species should be maintained above a level that ensures their long-term viability.**

13. The Act defines “associated and dependent species” as any non-harvested species taken or otherwise affected by the taking of a harvested species. “Harvested species” is defined to mean any fish, aquatic life or seaweed that may for the time being be taken with lawful authority. So this principle is focussed on species (such as protected species) for which a permission to target commercially cannot be given.
14. The term “long-term viability” (in relation to a biomass level of a stock or species) is defined in the Act as 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. This principle therefore requires the continuing existence of species by maintaining populations in a condition that ensures a particular level of reproductive success.
15. Where fishing is affecting the viability of associated and dependent species, appropriate measures such as method restrictions, area closures, and potentially adjustments to the TAC of the target stock should be considered.

### **Principle 2: Biological diversity of the aquatic environment should be maintained.**

16. “Biological diversity” is defined in the Act as ‘the variability among living organisms, including diversity within species, between species, and of ecosystems’. Determining the level of fishing or the impacts of fishing that can occur requires an assessment of the risk that fishing might cause catastrophic decline in species abundance or cause biodiversity to be reduced to an unacceptable level.

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<sup>1</sup> Recreational Fishing Council Inc v Sanford Limited and Ors [2009] NZSC 54 at [39].

### **Principle 3: Habitat of particular significance for fisheries management should be protected.**

17. Habitat is defined in the Oxford Dictionary of English to mean the natural home or environment of an animal, plant or species. In the Ministry for Primary Industries' (MPI's) view, in the fisheries context, this means those waters and substrates necessary for fish to spawn, breed, feed or grow to maturity. These should be protected and adverse effects on them avoided, remedied, or mitigated.

## **2.5 SECTION 10 – INFORMATION PRINCIPLES**

18. Section 10 prescribes four information principles that the Minister must take into account when exercising powers in relation to the utilising of fisheries resources or ensuring sustainability:
  - a) Decisions should be based on the best available information;
  - b) Decision makers should take into account any uncertainty in the available information;
  - c) Decision makers should be cautious when information is uncertain, unreliable, or inadequate; and
  - d) 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 the Act.
19. Less than full information suggests caution in decision-making, not deferral of a decision completely. “The fact that a dispute exists as to the basic material upon which the decision must rest, does not mean that necessarily the most conservative approach must be adopted. The obligation is to consider the material and decide upon the weight which can be given it with such care as the situation requires.”<sup>2</sup>
20. Both scientific and anecdotal information need to be considered and weighed accordingly when making management decisions. The weighting assigned to particular information is subject to the certainty, reliability, and adequacy of that information.
21. As a general principle, information outlined in the MPI Fishery Assessment Plenary Report is considered the best available information on stock status and should be given significant weighting. The information presented in the Plenary Report is subject to a robust process of scientific peer review and is assessed against the Research and Science Information Standard for New Zealand Fisheries.<sup>3</sup> Corroborated anecdotal information also has a useful role to play in the stock assessment process and in the management process.

## **2.6 SECTION 11 – SUSTAINABILITY MEASURES**

22. Section 11(1) allows sustainability measures (such as a TAC) to be set or varied after the following factors are taken into account:

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<sup>2</sup> *Greenpeace NZ Inc v Minister of Fisheries* (HC, Wellington CP 492/93, 27/11/95, Gallen J) p 32.

<sup>3</sup> A non-binding MPI Policy Document.

- (a) Any effects of fishing on the stock and the aquatic environment
  - (b) Any existing controls that apply to the stock or area concerned
  - (c) The natural variability of the stock concerned.
23. These factors are discussed in the section of the decision document relating to each stock.
24. Section 11 (2) says that before any sustainability measure is set or varied the Minister must have regard to any provision of:
- (a) Any regional policy statement, regional plan, or proposed regional plan under the Resource Management Act 1991.
  - (b) Any management strategy or management plan under the Conservation Act 1987 that apply to the coastal marine area and which the Minister considers to be relevant
  - (c) Sections 7 and 8 of the Hauraki Gulf Marine Park Act 2000
  - (ca) regulations made under the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012; and
  - (d) a planning document lodged with the Minister of Fisheries by a customary marine title group under section 91 of the Marine and Coastal Area (Takutai Moana) Act 2011

that apply to the coastal marine area and are considered to be relevant.

25. Section 11 (2A) requires the Minister to take into account:
- (a) Any conservation services or fisheries services
  - (b) Any relevant fisheries plan approved under this Part-see discussion of section 11A below
  - (c) Any decisions not to require conservation services or fisheries services.
26. Services of particular relevance to the decisions in this paper relate to programmed research used to monitor stock abundance. To date national fisheries plans have been approved only for deepwater and highly migratory species.

## **2.7 SECTION 12 – CONSULTATION AND INPUT AND PARTICIPATION OF TANGATA WHENUA**

27. Section 12(1) says that before setting or varying any sustainability measure under the Act the Minister is required to:
- consult with those classes of persons having an interest in the stock or the effects of fishing on the aquatic environment in the area concerned, including, but not limited to, Māori, environmental, commercial and recreational interests; and
  - provide for the input and participation of tangata whenua having a non-commercial interest in the stock concerned or an interest in the effects of fishing on the aquatic environment in the area concerned; and have particular regard to kaitiakitanga.
28. The Act defines Kaitiakitanga to mean “the exercise of guardianship; and, in relation to any fisheries resources, includes the ethic of stewardship based on the nature of the

resources, as exercised by the appropriate tangata whenua in accordance with tikanga Māori”, where tikanga Māori refers to Māori customary values and practices.

29. Iwi Fisheries Forums and Forum Fisheries Plans are the main ways in which input and participation of tangata whenua is provided for. Information provided by Forums and iwi views on the management of fisheries resources and fish stocks set out in Iwi Fisheries Plans express how tangata whenua exercise kaitiakitanga in respect of the stocks and areas in this sustainability round.
30. Section 12 (2) says that as soon as practicable after setting or varying any sustainability measure, the Minister shall give the persons consulted under 12(1), the reasons in writing for his or her decisions.

## **2.10 SECTIONS 13 &14 - SETTING AND VARIATION OF THE TOTAL ALLOWABLE CATCH (TAC)**

### **Section 13 – Total Allowable Catch**

31. The TAC for most stocks in the Quota Management System (**QMS**) is set under section 13 of the Act.
32. Under s 13 the general premise is to set a TAC that maintains the biomass of a fishstock at or above a level that can produce the maximum sustainable yield (**MSY**). That biomass level is abbreviated as  $B_{MSY}$ .
33. **MSY** is defined, in relation to any fish stock, as being the greatest yield that can be achieved over time while maintaining the stock’s productive capacity, having regard to the population dynamics of the stock and any environmental factors that influence the stock.
34. Section 13(2) of the Act requires a TAC to be set that maintains a stock at or above **MSY** or that moves or restores it to or above that level, having regard to the interdependence of stocks.
35. Section 13(2A) says that if the Minister considers that the current level of a stock or the level of a stock that can produce the **MSY** is not able to be estimated reliably using the best available information, he or she must:
  - not use this lack of information as a reason for postponing, or failing to set a TAC for the stock, and
  - have regard to the interdependence of stocks, the biological characteristics of the stock and any environmental conditions affecting the stock, and
  - set a TAC using the best available information that is not inconsistent with the objective of maintaining the stock at or above, or moving the stock towards or above, a level which can produce the **MSY**.
36. The Minister may set the TAC to achieve the objective in a way and rate which has regard to the interdependence of stocks and within a period appropriate to the stock.

37. In considering the way in which and rate at which a stock is moved towards or above a level that can produce maximum sustainable yield (s13(3)) the Minister may have regard to such social, cultural, and economic factors as he or she considers relevant. This provision applies to TACs set under s13(2) or s13(2A) (if applicable).
38. The obligation to have regard to the interdependence of stocks when setting a TAC requires consideration of the effects of fishing on associated stocks harvested with the target stock. Examples include other non-target fish species (bycatch) or benthic species that are incidentally impacted by trawl gear. The role of the target stock in the food chain should also be considered. In particular, interdependence involves a direct trophic (i.e. one stock is likely to be directly affected through a predator or prey relationship by the abundance of another stock) relationship between stocks.

### **Section 14 – Alternative total allowable catch for stock specified in Schedule 3**

39. Section 14 says that notwithstanding anything in section 13, if satisfied, in the case of any quota management stock listed in Schedule 3, that the purpose of this Act would be better achieved by setting or varying a TAC otherwise than in accordance with section 13(2) the Minister may at any time, set or vary a TAC for that stock that he or she considers appropriate to achieve the purpose of this Act. In other words section 14 allows a TAC to be set or varied for the limited number of stocks listed on Schedule 3 otherwise than by reference to  $B_{MSY}$ .
40. Schedule 3 stocks are ones where:
  - it is not possible because of the biological characteristics of the stock to estimate  $B_{MSY}$ ;
  - a national allocation for New Zealand has been determined as part of an international agreement;
  - the stock is managed on a rotational or enhanced basis; or
  - the stock comprises one or more highly migratory species.
41. Section 14(8) of the Act allows for stocks to be added to or deleted from Schedule 3.

### **2.11 SECTIONS 20 & 21 - SETTING AND VARIATION OF THE TOTAL ALLOWABLE CATCH (TACC)**

42. After setting or varying the TAC, a separate decision arises in respect of allocating the TAC, i.e., deciding what portion of the TAC is to be available for commercial and other purposes.
43. Section 20 requires a TACC to be set for each QMS stock and allows it to be varied from time to time. A TACC can be set at zero. This would occur in situations where the TAC was set at zero for sustainability reasons (i.e. the fishery was closed).
44. Section 21 of the Act says that in setting or varying the TACC the Minister must have regard to the TAC and allow for:
  - a) Māori customary non-commercial fishing interests;

- b) Recreational interests; and
  - c) All other mortality to that stock caused by fishing.
45. The Courts have in a number of cases considered what is involved in allowing for non-commercial interests. In *Snapper 1*<sup>4</sup> the Court of Appeal said that the recreational allowance is simply the best estimate of what recreational fishers will catch while being subject to the controls which the Minister decides to impose upon them e.g. bag limits and minimum lawful sizes. Having set the TAC the Minister in effect apportioned it between the relevant interests.<sup>5</sup>
46. The Supreme Court in *Kahawai*<sup>6</sup> endorsed this approach and said that the words “allow for” require the Minister both to take into account the interests and make provision for them in the calculation of the TACC.<sup>7</sup> The Supreme Court went on to say that ss 20 and 21 prescribe a framework within which the Minister must operate when setting the TACC. The framework requires apportionment of the TAC by the Minister among the various interests and other mortality. The sequential nature of the method of allocation provided for in s 21 does not indicate that non-commercial fishing interests are to be given any substantive priority over commercial interests. In particular the allowance for recreational interests is to be made keeping commercial interests in mind.<sup>8</sup>
47. The Supreme Court further said that in the end, within the limits provided for by the Act, the Minister makes a policy decision as to what allocations are appropriate for non-commercial interests and other mortality and what is to be the TACC. These decisions are interdependent. The Act does not confer priority for any interests over the other. It leaves that to the judgment of the Minister.<sup>9</sup>
48. Under the customary fishing regulations [Fisheries (South Island Customary Fishing) Regulations 1999 and the Fisheries (Kaimoana Customary Fishing) Regulations 1998], customary take is regulated through the authorisation system which requires that all customary fishing is to be undertaken in accordance with tikanga and the overall sustainability of the fishery. This framework was put in place to give effect to legal obligations in the Settlement Act.<sup>10</sup>
49. When allowing for Māori customary non-commercial interests, the Minister must take into account:
- a) Any mātaihai reserve in the relevant quota management area; and
  - b) Any temporary area closure or temporary fishing method restriction or prohibition imposed in the area for the purposes of improving the availability or size of a species for customary fishing purposes or recognising a customary fishing practice in the area.

<sup>4</sup> *New Zealand Fishing Industry Association (Inc) v Minister of Fisheries* CA 82/97, 22 July 1997 (“Snapper 1”).

<sup>5</sup> *Snapper 1*, p 17.

<sup>6</sup> *New Zealand Recreational Fishing Council Inc v Sanford Limited* [2009] NZSC 54 (“Kahawai”)

<sup>7</sup> *Kahawai* [55]

<sup>8</sup> *Kahawai* [61]

<sup>9</sup> *Kahawai* [65]

<sup>10</sup> Where the customary regulations don't apply customary fishing is regulated under regulations 50-52 of the Fisheries (Amateur Fishing) Regulations 2013 and a similar authorisation system applies.

50. The intent is that the purposes of measures enacted to provide for customary fishing are not adversely affected or reasons for limited customary take are ignored when setting the customary allowance.
51. An allowance is to be made for all other mortality to a stock that results from fishing. This includes illegal catch, discards, and incidental mortality from fishing gear.

## **2.12 SECTION 23-PREFERENTIAL ALLOCATION RIGHTS (28N RIGHTS)**

52. Section 23 deals with preferential allocation rights (sometimes called 28N rights).
53. Where the TACC for a stock, that has 28N rights associated with it, is increased the quota shares of owners who do not have 28N rights are reduced and redistributed to the holders of 28N rights. This is done in accordance with formulas set out in section 23.
54. Some stocks in this Sustainability Round have 28N rights associated with them, namely:
  - TAR 2
  - PAU 5B
  - JDO 1
55. See discussion of 28N rights associated with these stocks in the individual stock papers below.

## **2.13 HAURAKI GULF MARINE PARK ACT 2000**

56. Section 11(2) of the Fisheries Act requires the Minister to have regard to sections 7 and 8 of the Hauraki Gulf Marine Park Act 2000 (HGMPA) when setting or varying a sustainability measure (such as a TAC).
57. Section 13 of the HGMPA says all persons exercising powers or carrying out functions for the Hauraki Gulf under various specified Acts, including the Fisheries Act, must, in addition to any other requirement specified in those Acts, have particular regard to sections 7 and 8 of the HGMPA. This would apply to the setting or varying of TACCs, and deemed values.
58. Section 7(1) of the HGMPA says the interrelationship between the Hauraki Gulf, its islands, and catchments and the ability of that interrelationship to sustain the life-supporting capacity of the environment of the Hauraki Gulf and its islands are matters of national significance.
59. Section 7(2) says the life-supporting capacity of the environment of the Gulf and its islands includes the capacity—
  - (a) to provide for—
    - (i) the historic, traditional, cultural, and spiritual relationship of the tangata whenua of the Gulf with the Gulf and its islands; and
    - (ii) the social, economic, recreational, and cultural well-being of people and communities:

- (b) to use the resources of the Gulf by the people and communities of the Gulf and New Zealand for economic activities and recreation:
  - (c) to maintain the soil, air, water, and ecosystems of the Gulf.
60. Section 8 says that to recognise the national significance of the Hauraki Gulf, its islands, and catchments, the objectives of management are:
- (a) the protection and, where appropriate, the enhancement of the life-supporting capacity of the environment of the Hauraki Gulf, its islands, and catchments:
  - (b) the protection and, where appropriate, the enhancement of the natural, historic, and physical resources of the Hauraki Gulf, its islands, and catchments:
  - (c) the protection and, where appropriate, the enhancement of those natural, historic, and physical resources (including kaimoana) of the Hauraki Gulf, its islands, and catchments with which tangata whenua have an historic, traditional, cultural, and spiritual relationship:
  - (d) the protection of the cultural and historic associations of people and communities in and around the Hauraki Gulf with its natural, historic, and physical resources:
  - (e) the maintenance and, where appropriate, the enhancement of the contribution of the natural, historic, and physical resources of the Hauraki Gulf, its islands, and catchments to the social and economic well-being of the people and communities of the Hauraki Gulf and New Zealand:
  - (f) the maintenance and, where appropriate, the enhancement of the natural, historic, and physical resources of the Hauraki Gulf, its islands, and catchments, which contribute to the recreation and enjoyment of the Hauraki Gulf for the people and communities of the Hauraki Gulf and New Zealand.
61. There are eight stocks in this sustainability round where the quota management area boundaries are within or partly within the boundaries of the Hauraki Gulf Marine Park, namely:
- FLA 1
  - JDO 1
  - LFE 20 and LFE 21
  - SFE 20 and SFE 21
  - STN 1
  - TAR 1

## 2.14 SECTION 75 – DEEMED VALUE RATES

62. Deemed values are charges commercial fishers must pay for every kilogram of QMS fish stocks landed in excess of their ACE holdings. The purpose of the deemed value

framework is to encourage commercial fishers to balance their catch with ACE while not discouraging them from landing and accurately reporting catch.

63. Under section 75 the Minister must set annual and interim deemed value rates for all stocks managed under the QMS and he or she may vary such rates. Any deemed value rate set or varied takes effect from the first day of the next fishing year for the stock concerned. The annual deemed value rate must be greater than the interim deemed value rate.
64. When setting deemed value rates the Minister must not have regard to the personal circumstances of any individual or class of persons liable to pay deemed values or set separate deemed values in individual cases.
65. The Minister may set differential deemed value rates for specific stocks. These are an escalating scale of rates as the percentage by which catch exceeds ACE increases. The Minister may also set different deemed value rates for fish landed in the Chatham Islands, reflecting the unique marketing conditions of those landings.
66. When setting deemed value rates, the Minister is required under section 75(2)(a) to take into account the need to provide an incentive for every commercial fisher to acquire or maintain sufficient ACE each fishing year that is not less than the total catch of the stock taken by that commercial fisher.
67. Section 75(2)(b) specifies additional matters that the Minister may have regard to when setting deemed value rates for a stock. These are:
  - the desirability of commercial fishers landing catch for which they do not have ACE;
  - the market value of ACE for the stock;
  - the market value of the stock;
  - the economic benefits obtained by the most efficient commercial fisher, licensed fish receiver, retailer, or any other person from the taking, processing, or sale of fish, aquatic life or seaweed;
  - the extent to which catch of that stock has exceeded or is likely to exceed the TACC for the stock in any year; and
  - any other matters that the Minister consider relevant.
68. Under section 75A the Minister must, if practicable, consult with stakeholders and tangata whenua that have an interest in the stock before setting or varying any deemed value rates.

## **2.15 DEEMED VALUE GUIDELINES**

69. In order to aid the application of the statutory criteria discussed above, a set of Deemed Value Guidelines has been developed. These Guidelines are summarised as follows:
  - deemed value rates must generally be set between the ACE price and the port price;
  - deemed value rates must generally exceed the ACE price by transaction costs;
  - deemed value rates must avoid creating incentives to misreport;

- deemed value rates for constraining bycatch species may be higher than for target species;
- deemed value rates must generally be set at twice the landed or port price for high value single species fisheries and species subject to international catch limits;
- deemed value rates for Chatham Island landings may be lower;
- interim deemed value rates must generally be set at 90% of the annual deemed value rate; and
- differential deemed value rates must generally be set.

70. The Guidelines do not bind the Minister. They serve only as a guide and do not preclude the Minister from taking into account relevant information on a case by case basis.

### **3. Other Matters**

#### **3.1 HARVEST STRATEGY STANDARD (HSS)**

71. The Harvest Strategy Standard (HSS) is a policy statement of best practice in relation to the setting of fishery and stock targets and limits for fishstocks in New Zealand's Quota Management System (QMS). It is intended to provide guidance on how fisheries law will be applied in practice, by establishing a consistent and transparent framework for decision-making to achieve the objective of providing for utilisation of New Zealand's QMS species while ensuring sustainability.
72. The HSS outlines the Ministry's approach to relevant sections of the Act and, as such, forms a core input to the Ministry's advice to the Minister on the management of fisheries, particularly the setting of TACs under sections 13 and 14.
73. The HSS is not however legally binding and the Minister is not obliged to choose options based upon it.