

SECTION 11: SUSTAINABILITY MEASURES

Summary

1 Section 11 of the Fisheries Act 1996 (FA 96) sets out the matters that the Minister of Fisheries must consider before setting, varying or implementing any sustainability measure under the Act. The need to set or vary a sustainability measure is to be determined in the context of ensuring sustainability (as defined in the purpose (s 8) of the Act), taking into account the obligations specified in ss 9 (environmental principles) and 10 (information principles). Section 11 therefore has a key role in managing the adverse impacts of fishing on the aquatic environment. Before doing anything under s 11, the Minister is required to consult in accordance with the provisions of s 12.

2 Only the Minister may set, vary or implement a statutory sustainability measure, but there are no restrictions on who may propose such a measure. Before setting or varying any sustainability measure, the Minister must take into account the matters specified in ss 11(1) and 11(2A) of the Act, and have regard to relevant provisions under s 11(2). Having met those obligations, the need for any proposed sustainability measure can be determined. The Minister may determine that there is no need to set a sustainability measure because the threat or opportunity to ensuring sustainability can be adequately managed without doing so.

3 If the Minister decides to set a sustainability measure, a non-limiting list of potential sustainability measures is outlined in s 11(3) of the Act. Only when these measures are implemented for the purpose of ensuring sustainability can they be regarded as sustainability measures set under Part III. It is entirely possible that such measures may also be set under the general provisions of s 297 (Part XIV), to address allocation or sector management issues.

4 For sustainability measures that take the form of catch limits, stocks managed under the Quota Management System (QMS) are differentiated from non-QMS stocks. In the case of QMS stocks, the Total Allowable Catch (TAC) is a sustainability measure. The equivalent measure for a non-QMS stock is a Total Catch Limit (TCL).

5 The specification of a Commercial Catch Limit (CCL) as a sustainability measure is an approach limited to a stock managed outside of the QMS. If and when managed within the QMS, the equivalent measure to a CCL is a Total Allowable Commercial Catch (TACC) set under s 20 (Part IV) of the FA 96.

6 The Minister may implement sustainability measures by notice in the *Gazette* or by recommending regulations. Catch limits for stocks managed under the QMS must be set by notice in the *Gazette*. It is MFish policy that gazettal of a catch limit is also necessary for a non-QMS stock. Other sustainability measures are usually implemented by regulation. However, where additional flexibility is required, notices in the *Gazette* may be used, subject to the usual consultation requirements of s 12.

7 In addition to providing for sustainability measures, the FA 96 provides for a range of mechanisms, such as permit conditions or reporting requirements, that may assist in ensuring the sustainability of a stock or stocks.

Purpose of this Policy Definition

8 The purpose of this FA 96 Policy Definition is to provide a basis for the formulation of policy advice to the Minister of Fisheries on the use of sustainability measures to meet the purpose of the Act. Guidance is provided on:

- when a sustainability measure should be set
- determining the best sustainability measure or mix of measures
- implementation of sustainability measures.

Background and scope of legislative provisions

9 The purpose of the FA 96 is to provide for the utilisation of fisheries resources while ensuring sustainability (s 8). The environmental (s 9) and information (s 10) principles impose obligations on all persons exercising or performing functions, duties, or powers under the Act. The overriding obligations mean that no utilisation is allowed where

- any undue adverse effects of fishing on the aquatic environment cannot be satisfactorily avoided, remedied or mitigated, or
- the potential of fisheries resources to meet the reasonably foreseeable needs of future generations cannot otherwise be maintained.

10 However, where these overriding qualifications can be met, the utilisation of fisheries resources must be provided for.

11 The process for determining the most appropriate course of action required to ensure sustainability in any given situation involves consultation with stakeholders, and input and participation from tangata whenua. This step is required through the provisions of s 12 of the FA 96.

Defining a sustainability measure

12 Section 11 of the FA 96 (reproduced as Appendix A) sets out the additional considerations required before the Minister sets or varies a sustainability measure. A sustainability measure is defined in Part I of the Act as meaning '*any measure set under Part III of the Act for the purpose of ensuring sustainability*'. This definition distinguishes sustainability measures from measures that authorise access to the resource, or the administration of the management framework.

13 In an operational context, a sustainability measure must be considered in light of the requirement to ensure sustainability as set out in the purpose (s 8) of the Act. “Ensuring sustainability,” means

- (a) Maintaining the potential of fisheries resources to meet the reasonably foreseeable needs of future generations; and
- (b) Avoiding remedying or mitigating any adverse effects of fishing on the aquatic environment.

14 Part III of the Act prescribes sustainability measures that may be set, or in some cases are required to be set, to ensure sustainability. Sustainability measures are set within the wider context of the purpose (s 8) of the Act.

15 A list of possible sustainability measures is set down in s 11(3). The specified options are only sustainability measures if they are required to ensure sustainability. In some circumstances the same form of measures (such as the setting of a season) may also be used under sections of the Act outside of Part III.

16 A management measure that is designed to give effect to an allocation decision made under ss 20 or 21 (such as the setting or varying of an amateur bag limit) is not a sustainability measure under Part III of the Act. The only exception to this principle, is the setting of a CCL for a non-QMS stock. Section 11(5) denotes that, in the absence of a more robust QMS framework, such limits are effectively sustainability measures.

Setting, varying and implementing sustainability measures

17 The Act is silent as to when a sustainability measure may need to be set or varied.

18 The structure of s 11 indicates, however, that following the identification of

- an adverse affect of fishing on the aquatic environment, or
- a threat or opportunity to the potential of fisheries resources to meet the reasonably foreseeable needs of future generations

(a ‘sustainability issue’), the threat to ensuring sustainability should be evaluated. Section 12 of the Act includes an obligation for the Minister to provide for the input and participation of tangata whenua and consultation with stakeholders with an interest in the stock or area concerned before setting or varying a sustainability measure. In combination, the provisions of ss 11 and 12 allow a range of management alternatives to be evaluated.

19 The policy interpretation of s 11 is that it, in association with the obligations for consultation under s 12, sets out a sequence of steps which allows for

- all management alternatives, and
- the impact of decisions regarding fisheries and conservation services, and
- the management framework set out in any relevant fisheries plan(s)

20 to be considered, before the Minister decides what sustainability measure, if any, needs to be set or varied.

21 Before confirming the choice of sustainability measure the Minister (and all persons exercising or performing functions, duties or powers to ensure sustainability under the FA 96) is required to act in a manner consistent with the overarching provisions of;

- s 5 (application of international and treaty settlement obligations),
- s 8 (purpose of the Act),
- s 9 (environmental principles), and,
- s 10 (information principles).

22 Having set or varied a sustainability measure, there are several implementation mechanisms. The most appropriate option will be dependent on the type of measure chosen and the timeframe required for its implementation. Sustainability measures may be given effect by:

a regulation under s 11(4)(b)(ii), or
a notice in the *Gazette* under:

- s 11(4)(a) (non-QMS catch limits),
- s 11(4)(b)(i), (other sustainability measures),
- s 13(1) (TACs),
- s 14(1) (alternative TACs) or
- s 14B(1) (bycatch TACs).

23 Sustainability measures may apply to persons utilising fisheries resources. If any group is excluded, the decision must show why the activities of the particular group do not contribute to the sustainability issue.

Catch limits

24 Policy definitions for ss 13 and 14 prescribe the steps to be undertaken following a decision made under s 11(3) to set or vary a TAC for a stock managed under the QMS. Further, the provisions of s 11 require that similar considerations apply to the setting or varying of catch limits for a non-QMS stock. For bycatch stocks managed within the QMS, sections 14A and 14B prescribe a series of considerations leading up to the determination of a TAC. TACs and non-QMS catch limits may be implemented by notice in the *Gazette*.

25 A limit on total removals from a stock is an important mechanism for providing for the utilisation of New Zealand's fishery resources while ensuring sustainability. The FA 96 requires that this limit be set at or above a level that will allow the stock to produce the 'Maximum Sustainable Yield' (MSY). The MSY is a biological reference point and the requirement for the stock to produce this yield is drawn from New Zealand's obligations under article 61 of UNCLOS¹.

¹ United Nations Convention on the Law of the Sea.

26 The MSY for a stock is not able to be uniquely defined, but will depend on the chosen harvest strategy. The harvest strategy provides a means of expressing management objectives such as:

- the specific application of the principles of the Act in the fishery,
- the acceptable level of risk, and
- whether a stable or fluctuating TAC is desired.

27 Having determined a harvesting strategy, the ‘target’ stock level that can produce the MSY can be modified upwards after having regard to the interdependence of stocks (s 13(2)), or after taking into account relevant matters provided for under the purpose (s 8) and principles (ss 9 and 10) of the FA 96.

28 The Act does allow for situations where MSY may not be the best criterion to achieve the purpose of the Act. If a stock is listed on the Third Schedule of the Act, then a catch limit that better meets the purpose of the Act (than required under s 13) may be set under s 14(1). Under s 14A and 14B, bycatch stocks listed in an Order in Council may be managed at a level other than that specified in s 13(2), as long as specified criteria can be met.

29 For stocks managed outside the QMS, s 11 provides for (but does not require) the setting and varying of a (total) Catch Limit (TCL) (the provisions of s 13(2) must be had regard to when determining the TCL). In addition, a Commercial Catch Limit (CCL) (both the provisions of s 13(2) and the allowances specified under s 21(1) must be had regard to when determining a CCL) may be set or varied.

Supporting measures

30 Section 11 also provides for the setting of sustainability measures other than catch limits. These supporting measures may also be derived from the chosen harvest strategy. They may be necessary to assist in maintaining or restoring a stock at, or to, a level that can produce the MSY, manage any adverse impact of fishing or provide the potential for fisheries resources to meet the reasonably foreseeable needs of future generations.

31 A range of possible supporting measures is specified in s 11(3), but the list of options is not limiting. These measures may be given effect under the regulation-making powers of s 298(a), or by notices in the *Gazette* under s 11(4)(b)(i).

32 Sustainability measures can also address fishing-related mortality of marine mammals or other protected marine wildlife. Such measures, once set or varied, may be given effect under the specific provisions of s 15, and in relation to regulatory issues, under s 298(b)-(d).

33 Emergency emergencies are expressly provided for by s 16. Such measures only apply to emergency situations and are implemented by notice in the *Gazette* directly through the provisions of s 16, without reference to s 11.

Discretion

34 Section 11(1) provides that the Minister may set or vary a sustainability measure. The

use of the word ‘may’ implies discretion. Sustainability measures may be set or varied from ‘time to time’, implying discretion also exists over the timing.

35 The process to meet the requirements in sections 11(1), 11(2) and 11(2A) ensures that all issues material to the decision are appropriately considered. The use of the terms ‘take into account’ and ‘have regard to’ imply there is discretion as to how these matters are factored into any decision.

36 When the Minister considers the setting or varying of a sustainability measure, there are a range of specified matters that must be ‘taken into account’ under s 11(1) and s 11(2A). The Minister must be able to demonstrate how those matters have influenced the decision.

37 Section 11(2A) requires the Minister to take into account existing decisions about fisheries and conservation services, and fisheries plans. This provides for case by case integration of decisions about fisheries management measures and implementation strategies. Implementation strategies will be reflected in the fisheries plans and decisions about fisheries and conservation services. Importantly s 11(2A) covers decisions to defer or not require particular services. This enables an explicit linkage to be made between a decision not to require a particular service, the reason for this decision, and the sustainability measures—including TACs—that are set. The information principles (s10) can then be brought to bear on the absence or presence of information, its effect on uncertainty, and its relevance to the need to change sustainability measures.

38 When the Minister considers setting or varying a sustainability measure, there are also a range of matters that he or she ‘shall have regard to’ under s 11(2) (and s 11(5) when setting a catch limit for a species not managed under the QMS). The Minister must be able to demonstrate that he/she has considered all relevant matters. Having done so, the Minister is entitled to incorporate these matters or conclude that they are not of sufficient significance, either alone or together with other matters, to outweigh contrary considerations.

39 Section 11(3) sets out a non-limiting range of sustainability measures that may be set or varied. The Minister has some discretion over which, if any, sustainability measure (or combination of measures) is (are) required to ensure sustainability in particular circumstances.

40 Having decided to set or vary a particular sustainability measure, the Minister may implement a catch limit decision by notice in the *Gazette*. In the case of other forms of management controls, the Minister may recommend the making of regulations under s 298 or use a notice in the *Gazette*.

Limitations on discretion

41 Any person is able to request the Minister to consider setting, varying and implementing specified sustainability measures. However, only the Minister may set or vary a sustainability measure, and the consideration of any matters by the Minister under s 11 remains subject to the consultative obligations of s 12.

42 The general provisions of Parts I, II and III of the FA 96 limit the discretion that exists over setting or varying sustainability measures. A sustainability measure must be consistent

with treaty and international obligations (s 5), fall within the scope of the purpose (s 8), take into account the principles (ss 9 and 10) and, where relevant, comply with the specific provisions contained within ss 13, 14, 14A, 14B or 15.

43 While section 11(1) and (3) imply that there is discretion over whether the Minister sets or varies any catch limit, ss 13(1), 14(1) and 14B(1) each require a TAC must be set for a stock introduced into the QMS. Further, in the case of stocks introduced into the QMS prior to 1996, s 13(10) requires TACs to be set as TACCs are varied. All TACs must be implemented by notice in the *Gazette*.

Legislative Intent

44 Part III of the FA 96 addresses the obligation to ensure the sustainability of stocks and manage the adverse effects of fishing on the aquatic environment. Part III (which includes ss 11 to 16) sets out environmental and biological standards for fisheries management. The remaining Parts of the Act deal with utilising fisheries resources within the sustainable limits set under Part III.

45 Management of any adverse effects of fishing and maintaining the potential for fisheries resources to meet the reasonably foreseeable needs of future generations are obligations arising under s 8. However no specific targets are set as to the extent to which the adverse effects of fishing should be avoided, remedied or mitigated or what the reasonably foreseeable needs of future generations are. These matters are to be determined on a case by case basis, and s 11 is the primary means to consider management options.

46 The sustainable catch limits provided for in Part III of the Act revolve around a biomass target that can produce MSY, as defined in Part I (modified as necessary to ensure the sustainability of interdependent stocks and the long term viability of associated or dependent species).

47 The QMS is intended to be the primary management mechanism for commercial fisheries. For each stock in the QMS, a TAC is required to be set and, after the Minister has made an allowance for non-commercial fishing interests and other sources of fishing related mortality affecting the stock, a TACC is set. While the role of the QMS and the associated TACs is central to the Act, there is a need for supporting management measures to manage any adverse impact of fishing on the aquatic environment.

48 Government has also recognised that arrangements are required for non-QMS stocks. Considerations for such measures should, as far as practicable, match those required for QMS stocks. In this regard, a TCL is to be subject to the same considerations as a TAC, and a CCL the same as for a TACC. Further, in some cases the CCL may be the only catch limit controlling a stock, so it is deemed to be a sustainability measure (whereas its QMS equivalent – a TACC – is not).

49 When reporting the Fisheries Bill back to the House in 1996, the Primary Production Select Committee noted that the considerations required to be undertaken before a sustainability measure was implemented were clearly set out. The term 'shall have regard to' was deemed to be a relatively strong requirement for decision-makers to adhere to. Further, legal interpretations suggest the term 'taking into account' may impose slightly greater obligations.

Relevant policy issues and proposed policy principles

50 The objective of this policy definition is to develop policy on:

- the interpretation and application of s 11(1);
- the interpretation and application of s 11(2);
- the interpretation and application of s 11(2A), when setting or varying a sustainability measure;
- choosing an appropriate sustainability measure under s 11(3) to address a sustainability issue;
- implementation options for sustainability measures; and
- specific matters the Minister should have regard to under s 11(5), when setting or varying a TCL or CCL for a stock that is not managed under the QMS;

51 Importantly, the policy principles should be applied within the context of the overarching obligations arising from related sections of the FA 96. These include ss 5, 8, 9, 10 and 12.

Interpretation and application of section 11(1)

52 Section 11(1) provides key considerations relating to all sustainability measures. A sustainability measure can only be set for the purpose of ensuring sustainability. The provisions of s 11(1) can assist in determining the true nature of the sustainability issue, and are applied prior to the Minister considering the (non-limiting) range of options for sustainability measures contained in s 11(3). A sustainability issue may take the form of a threat to, or an opportunity for, ensuring sustainability.

53 The provisions of s 11(1) must be taken into account before the Minister decides to set or vary a sustainability measure. Full consideration under of the obligations under s 11(1) can only occur following consultation carried out pursuant to s 12. This sequencing assists with ensuring that the best available information is provided to the Minister.

54 The considerations required by s 11(1) allow existing or proposed measures that currently, or potentially, manage any adverse effects of fishing to be taken into account before the need for a new sustainability measure is determined. Following such considerations, the need for new measures may be reduced or enhanced. This preliminary step in the process also allows any potential conflict between existing and potential measures to be identified.

Any effects of fishing on any stock and the aquatic environment

55 The policy interpretation of s 11(1)(a) is that it requires a specific context (within the overarching considerations of Part II of the Act) to be developed for any sustainability issue. The Minister is required to explicitly consider the nature of any effect (direct or indirect) of fishing that has led to the identification of a sustainability issue.

56 The need for a specific context to be established also provides an opportunity to consider all available options to avoid, remedy or mitigate any adverse effects of fishing on the aquatic environment. As part of this approach, consideration should also be given to the effect that any current or proposed management measure(s) has, or is likely to have, on any stock and the aquatic environment. In combination, these considerations should ensure that the risk of any negative effect of fishing is comprehensively evaluated, and any positive effects from existing or proposed practices are identified.

57 Under this policy interpretation, fulfilling the requirements of s 11(1)(a) may lead to a number of outcomes. In situations where the effects of fishing are identified as adverse, and are not likely to be adequately managed by other means, then a new sustainability measure will be required.

58 At the other end of the spectrum, the Minister may conclude that a sustainability measure does not need to be formally set. This conclusion may be made where other statutory (outside of Part III) or non-statutory ('alternative') measures are in place, or are proposed, to address the issue more effectively. In this case, the Minister would still face an obligation to ensure the necessary management measures are effective in managing the sustainability issue to the required standard.

59 Where 'alternative' options exist, the Minister should be advised on which option provided the most effective way of achieving the desired outcome. This policy recognises that the setting of a sustainability measure does not in itself manage any adverse effect.

60 Sustainability measures, once set, reflect a required standard of behaviour, but breaches of this standard must be established to the satisfaction of a court of law before a sanction can be imposed. The means by which compliance with a sustainability measure will be achieved (and measured) requires an assessment of the relative merits of voluntary compliance and enforcement. On occasions, voluntary compliance may be higher under a stakeholder ('alternative') management regime than under a statutory equivalent.

61 In situations where the Minister does endorse an 'alternative' management arrangement as a means of addressing a sustainability problem, no sustainability measure would need to be set and hence no sanctions for non-compliance would exist under the FA 96. Nevertheless, the Minister would need to be assured that an effective compliance regime was in place. This regime would need to provide for appropriate civil sanctions in the event that that a 'rule' was breached. Such an arrangement would demonstrate to the Minister that any alternative management regime was likely to be effective.

62 If an 'alternative' management regime had an unacceptably high probability of failure then the Minister should be advised against endorsing it. Similarly, if ongoing monitoring revealed that an alternative management regime was not adequately managing an adverse

effect of fishing, then consideration should be given to setting a sustainability measure or a range of such measures.

Any existing controls under this Act that apply to the stock or area concerned

63 The policy interpretation of s 11(1)(b) is that it requires the effect of existing statutory measures applying to the stock or area that the sustainability issue relates to, to be evaluated before other measures are considered. If an existing measure was effectively addressing the sustainability issue, then the Minister would not need to take, or recommend taking, further action. Conversely, if existing measures were found to be inadequate, then the Minister would consider setting higher compliance thresholds for an existing measure, varying an existing measure or setting a new measure. If the issue were not being addressed at all, then the Minister would consider setting a new sustainability measure.

64 If the problem associated with a sustainability issue was non-compliance with an existing measure and the Minister's decision was to require increased compliance, then an MFish response would need to follow. This possibility reinforces the need to establish expected compliance thresholds when a sustainability measure is set. An ongoing monitoring programme could measure performance against compliance targets.

65 The requirements of s 11(1)(b) should be interpreted as minimising the likelihood of duplicating measures, and of having conflicting or unnecessary measures. The check also provides an opportunity for redundant measures to be identified, so steps can be taken to update or remove such provisions.

The natural variability of the stock concerned

66 The policy interpretation of s 11(1)(c) is that the requirement to take into account the natural variability of the stock concerned recognises the inherent variability of biological systems. For example, stocks are, to a greater or lesser extent, prone to fluctuations in abundance. The biomass of a stock may naturally fluctuate around the level that can produce MSY, irrespective of the chosen harvest strategy. Management regimes are rarely going to be able to keep track of anything other than large-scale variations in biomass.

67 One instance where the natural variability in abundance could be applied would be in determining catch levels for stocks that are in a period of high abundance. In this case, consideration should be given to the flexibility of the management regime if abundance subsequently decreased. Sections 13(7) and 14(6) provide particular management options that apply to the year in question, before arrangements automatically revert to the status quo.

68 Where biomass indicators (relative or absolute) indicate a period of low stock abundance, the considerations of s 11(1)(c) mean that it would not necessarily follow that there needed to be a correspondingly large decrease in catch limit(s). If the stock was known to be highly variable, and the best available information suggested that the decrease in abundance was likely to be a short term event, then proportionally smaller scale reductions in catch limits may be appropriate. Section 13(2)(b) provides specific considerations that apply when setting the rebuild rate.

69 Natural variability may also be a relevant consideration when determining size limits for different components of a stock. This may lead to a need for differentials in size limits by

geographical location for a given stock.

70 A further example of where considerations over natural variability would be a relevant consideration would be where there is information to suggest that there is genetic variation within a stock management unit. This may necessitate sub-area catch limits to be established, in order to avoid the over-fishing of one component of the stock. Similarly, it may prevent the transfer of shellfish between geographical locations if there is a risk of one genetic strain being lost through interbreeding of sub-stocks.

71 A case by case assessment of the influence of natural variability on a decision concerning sustainability measures is required. What may be a relevant consideration for one particular stock may not be for another – depending on the particular biological characteristics of the stock in question.

Interpretation and application of Section 11(2)

72 Section 11(2) requires consideration of certain overlaps between the FA 96, and the Resource Management Act 1990 (RMA) and Conservation Act 1987 (CA 87). These acts provide the guiding principles for associated legislation as specified in Schedules, and hence create a linkage between the FA 96 and other statutes.

73 Section 11(2) requires the Minister, when considering whether or not it is appropriate to set a sustainability measure under Part III of the Act, to have regard to the content of the specified policies, strategies or plans. The Minister must also consider whether any matters provided for in those documents have any relevance to the decision he or she may make. Matters that may indicate relevancy include, whether a document applies to the area or stock in which it is proposed to impose a sustainability measure and if so, whether it controls the effects on the aquatic environment. Provisions in statements, strategies or plans that apply to land and not the marine area would not be relevant considerations. The Minister must have regard to the relevant provisions and consider how those matters affect his or her decision.

74 If any potential sustainability measure is inconsistent with a management measure imposed by a policy, strategy or plan, then the Minister may need to consider ways in which the sustainability measure may be able to be adapted. The aim would be for the provisions under either Act to work effectively—ideally to complement each other—and continue to achieve their purpose. The courts interpretation of ‘have regard to’ suggests the Minister is not obligated to set sustainability measures that are consistent with RMA or CA 87 documents. If the Minister were to set aside a relevant aspect of a statement, strategy or plan, then the decision would need to be justified as being fair, reasonable and lawful.

75 The evaluation required under s 11(2) might reveal that a proposed sustainability measure was similar to, or duplicated, an existing measure contained in a statement, strategy or plan under the RMA or CA 87. If the effect on the aquatic environment is, or could be, managed adequately, the Minister may decide that there is no need to set or vary a sustainability measure under the FA 96. This applies even if the purpose for which the RMA or CA 87 measure was imposed is different from the purpose for which the sustainability measure was proposed under the FA 96, provided the result of the measure is the same, and therefore adequate. However, specification of a sustainability measure under the FA 96 may be necessary in situations where adequate compliance with closely associated measures under

the RMA or CA 87 cannot be assured.

Interpretation and application of s 11(2A)

76 Section 11(2A) was added to Part III in 1999 to provide greater integration of decisions on fisheries management measures and the corresponding support services or implementation strategies.

77 Section 11(2A) imposes obligations on the Minister when making any decision or recommendation under the Act to regulate or control fishing. This extends well beyond Part III decisions. Section 11(2A) has been written in an open manner to ensure it covers the types of decisions to which it applies (rather than listing all the sections and risking inadvertent omissions from the list). In effect, these are any decisions or recommendations that regulate or control customary fishing, recreational or commercial fishing, including sustainability measures.

78 Section 11(2A) requires the Minister to take account of existing decisions about fisheries and conservation services, and any approved fisheries plan, relevant to the stock(s) or area that the fisheries management decision relates to. The objective of this consideration is for the Minister to be satisfied that the desired management outcome can be achieved. Existing decisions about services can be expected to have a direct impact on the effectiveness of, or risk associated with, particular options to manage a sustainability issue.

79 Absence of particular services would not preclude the Minister from adopting a sustainability measure, provided the reasons for the decision indicate how the measure will, in the near future, be made more effective. For instance, the Minister may indicate in his or her decision an intention to require a particular service or service strategy in the forthcoming year. As background to such a decision the policy advice should provide indicative costings for the new services and seek direction from the Minister as to any desired re-prioritisation to accommodate the cost of new services.

80 Section 11(2A)(c) specifically directs the Minister to take into account any decisions not to require particular conservation or fisheries services. This provision therefore allows an explicit link to be drawn between the level of services provided in a fishery and the degree of risk associated with a particular management strategy or measure. All other things being equal, the fewer the services provided, the more precautionary the Minister must be. However, it is entirely possible that a reduction in services may be justifiable without creating any consequential risk to ensuring sustainability.

81 For example, a decision to reduce research or compliance services in a particular fishery should be reflected in a decision to reduce the catch limit, unless the implied reduction in information about the state of the fishery is of no material consequence to current fisheries management.

82 When taking account of the services provided in a fishery the Minister can, and should, consider services provided directly by stakeholders, in the same way he or she would for MFish-managed service provision. The quality of the service provided will be a key factor in determining the weight to be attributed to such services. If the Minister has decided not to require a particular fisheries service because he or she is satisfied that stakeholders will

provide, or are providing, a service which meets the government's fisheries management needs, these service should be taken into account. The statutory link here is to section 11(2A)(c) and the reasons for not requiring particular fisheries services.

83 Section 11(2A)(b) requires the Minister to take into account any existing fisheries plan approved under s 11A. A fisheries plan should specify medium to long-term management objectives that contribute to meeting the purpose and principles of the FA 96, and the corresponding implementation strategies to achieve the objectives. In doing so, a fisheries plan is likely to specify a combination of management measures to achieve a desired stock level and manage any adverse effects of fishing on the environment.

84 Any proposed sustainability measures should be consistent with a fisheries plan. Ideally fisheries plans will contain management objectives and implementation strategies that reflect foreseeable changes in environmental circumstances. The Minister's decisions about sustainability measures should then follow directly from the fisheries plans. For instance, the plan may indicate a harvest strategy supported by a particular stock assessment method. The TAC would then be varied in accordance with a pre-set formula consistent with the plan.

85 The Minister's decisions to regulate or control fishing are required to take account of, rather than comply with, fisheries plans. Where the Minister has good reasons, decisions can be made which are not consistent with, or contemplated by, the plan. Such a situation could arise when a sustainability issue emerges for which the plan has no contingency strategy. For instance, the discovery of a new fishing ground in an area which coincides with Hector's dolphin habitat may require new measures to avoid bycatch. In such a case, there should be a consequential amendment to the plan to reflect the new information.

86 The existence of a fisheries plan does, nevertheless, put an obligation on the Minister to consider the impact of new sustainability measures on the overall effectiveness of the plan, and to seek to achieve a resolution to the sustainability issue consistent with the management philosophy of the fisheries plan. Where a new sustainability measure requires changes in the implementation strategies in the fisheries plan, the Minister's decision to implement the sustainability measure should trigger a decision to review and amend the fisheries plan.

Choosing the best option under section 11(3)

87 Under the policy interpretation as set out above, the completion of the steps enabled under s 11(1), (2) and (2A) will have assisted in clarifying the full nature of the issue, and may have identified a range of options for addressing any sustainability issue. The Minister needs to be advised on the full range of implications arising from each possible approach, together with the level of compliance required for the measure to realistically manage any effect.

88 These steps will assist with ensuring that the most effective measures are chosen to address a particular sustainability issue. Policy advice to the Minister in relation to the choice of sustainability measure(s) should be supported by an analysis of the viable options (including status quo and, if relevant, seeking a non-statutory resolution) to achieve the desired outcome.

89 This approach will ensure that, before adopting a preferred response, the Minister is

able to take into account the short and long-term consequences of the implementation option (particularly in respect of achieving compliance and the desired environmental outcome).

90 After meeting the consultative obligations of s 12, and after considering the requirements of s 11(1), (2) and (2A), the Minister may conclude that it is not necessary to set or vary any sustainability measure because there is no material threat to sustainability. Alternatively, the Minister may decide to set or vary a sustainability measure, and s 11(3) provides a non-limiting range of options for the Minister to choose from.

91 The most appropriate sustainability measure to be set or varied will depend on the precise nature of the issue being addressed. The process of meeting the consultative requirements of s 12 and the obligations of s 11(1), (2) and (2A) should have provided some guidance to the Minister as to the most appropriate choice.

92 All decisions on sustainability measures need to be recorded, along with the rationale that supported their choice. All representative persons involved in the consultation process over the sustainability measure should be advised of the Minister's decision in writing, in accordance with the requirements of s 12.

Implementation options

93 Under the policy definition the preceding steps will have assisted the Minister in determining whether a sustainability measure needs to be set. The MFish policy is that if a sustainability measure is set, it will be implemented in accordance with the options set out in s 11(4).

94 The Minister has some discretion over how sustainability measures should be implemented under s 11(4). The Minister is able to implement sustainability measures through a notice in the *Gazette* or by recommending the making of regulations under s 298. The choice of implementation options does not apply to the setting TACs in accordance with s 13, s 14, or 14B, where a notice in the *Gazette* must be issued. It is MFish policy that non-QMS catch limits (in the form of a TCL or CCL) be similarly notified by notice in the *Gazette*.

95 Sustainability measures other than catch limits will normally be implemented by regulation. The role of the Minister is to recommend the making of such regulations to Cabinet.

96 The 1999 amendments to the Fisheries Act 1996 included provision for the Minister to set sustainability measures such as method and area restrictions by notice in the *Gazette*. Use of *Gazette* notices rather than regulations enables more responsive and timely management by Government. Use of such notices remains subject to the s 12 consultation requirements.

97 *Gazette* notices may be used for sustainability measures other than catch limits where this is more effective than regulations. It is expected that use of *Gazette* notices rather than regulations will be limited to the following circumstances:

- there is need for a timely and flexible response to particular situations (making regulations cumbersome or ineffective);
- tangata whenua and other interested parties have been consulted on the conditions under which *Gazette* notices will be used for sustainability measures in a particular fishery or area, and their views have been taken into account.

98 In essence, the second situation reflects that gazettal of sustainability measures other than catch limits may be used as a contingency where certain outcomes occur or where stakeholders fail to deliver on particular initiatives. The situations ('triggering condition') in which a sustainability measure will be set and implemented by a notice in the *Gazette* should be clearly spelled out when consulting on the package of management measures. In this case, there would be no need to re-consult when the triggering conditions are met.

Interpretation of section 11(5)

99 Section 11(5) sets out the considerations that must be undertaken before setting a catch limit for a non-QMS stock. This may be in the form of a (total) catch limit (TCL) if it applies to all removals, or a commercial catch limit (CCL) if it is only to apply to the commercial catch.

100 When determining a TCL for a non-QMS stock, the Minister shall have regard to the matters outlined in s 13(2), which specifies the considerations for the setting of a TAC. This has the effect of requiring the target stock level to be at or above that which can produce the MSY for non-QMS, as well as QMS, stocks unless there are good reasons not to do so. As for QMS stocks, the target stock level may be modified (upwards only) if necessary to ensure the sustainability of a stock, or of an interdependent stock.

101 When determining a CCL, the Minister shall also have regard to the matters outlined in s 21(1), which specifies the considerations for the setting of a TACC. This has the effect of requiring an allowance to be made for non-commercial fishing interests and for all other mortality to that stock that is caused by fishing, unless there are good reasons not to do so. These allowances should be subtracted from the TCL to derive the CCL.

102 Once the Minister has determined a TCL or CCL, he or she has the option of implementing the catch limit by notice in the *Gazette* in accordance with s 11(4)(a). It is MFish policy that such limits, once set or varied, be notified in the *Gazette*.

Links to other parts of the Fisheries Act

103 All policies for s 11 of the FA 96 must be consistent with the overriding principles clarified in policies for s 5 (Application of international obligations and Treaty of Waitangi (Fisheries Claims) Settlement Act 1992) and within the scope of s 8 (purpose).

104 Section 11 prescribes steps for the setting and varying of sustainability measures. A

sustainability measure is defined under the Act as any measure set or varied under Part III of the Act for the purpose of ensuring sustainability. This reinforces direct and strong linkages between this definition, and the policy definition of s 8 as it relates to interpreting the requirement for ‘ensuring sustainability’.

105 Before doing anything under s 11, the Minister must consult in accordance with the provisions of s 12. Following consultation and after evaluating the options provided under s 11, the Minister’s decisions must take into account the requirements of s 9 (environmental principles) and s 10 (information principles). These obligations create strong linkages with ss 9, 10 and 12.

106 Fisheries plans may be approved under s 11A. The Minister must take into account the provisions of any approved plan when deciding whether to set or vary a sustainability measure. Fisheries plans may also be a relevant consideration when determining how to implement a measure. In essence fisheries plans have the capacity to provide an overall management framework which guides the decisions on sustainability measures and their implementation.

107 Section 11(2A) imposes obligations on the Minister when making *any* decision or recommendation under the Act to *regulate or control fishing*. This extends well beyond Part III decisions, including—but not limited to—decisions on TACCs, dispute resolution (s 123), establishment of taiapure, customary regulations, rahui closures (s186A), recreational fishing areas (s 311), and a range of regulations under s 297 to regulate and control customary, recreational, and commercial fishing.

Application of Section 11

108 Section 11 should be interpreted as a ‘gateway’ to deliver the sustainability measures provided for under Part III of the Act. Sustainability measures are to be set or varied in order to ensure sustainability (as defined under s 8). The requirements of s 11 are to be considered within the context of the obligations on decision-makers contained in ss 5, 8, 9,10 and 12.

109 The stimulus for invoking the provisions of s 11 comes from the identification of a sustainability issue. The Minister of Fisheries, the Chief Executive of MFish, tangata whenua or any other person could make the identification.

110 Following the identification of a sustainability issue, the Minister must then make a decision to consult, and following consultation, but before deciding to set or vary a sustainability measure, comply with the obligations of s 11(1), (2) and (2A). The initial focus for the Minister is to fully scope the nature of the problem, and evaluate all available options to ensure sustainability. The costs and benefits of each approach should be evaluated, so that the most effective outcome can be identified.

111 The Minister may conclude that the threat to, or opportunity for, ensuring sustainability can be adequately managed without setting or varying a sustainability measure. If the Minister is satisfied that a sustainability measure is required to be set to ensure sustainability, the reasons for its choice should be documented.

112 The Minister has two implementation options available. The specified options are by

way of a notice in the *Gazette* and the recommending of regulations. *Gazette* notices must be used for all QMS catch limits and it is MFish policy that they should be used for all non-QMS catch limits.

113 In most situations sustainability measures other than catch limits need to be implemented by regulation. The Minister's role is to recommend the making of such regulations. However such measures may also be implemented by the Minister directly through a notice in the *Gazette*. The potential for this arises when there is a matter of urgency, or when an 'alternative' regime has failed and the setting of a sustainability measure has been previously signaled as a likely response to such an event during consultation.

Appendix: A

11. Sustainability measures -

- (1) The Minister may, from time to time, set or vary any sustainability measure for one or more stocks or areas, after taking into account -
- (a) Any effects of fishing on any stock and the aquatic environment; and
 - (b) Any existing controls under this Act that apply to the stock or area concerned; and
 - (c) The natural variability of the stock concerned.
- (2) Before setting or varying any sustainability measure under subsection (1) of this section, the Minister shall have regard to any provisions of -
- (a) Any regional policy statement, regional plan, or proposed regional plan under the Resource Management Act 1991; and
 - (b) Any management strategy or management plan under the Conservation Act 1987 that apply to the coastal marine area and are considered by the Minister to be relevant.
- (2A) Before setting or varying any sustainability measure under this Part or making any decision or recommendation under this Act to regulate or control fishing, the Minister must take into account -
- (a) Any conservation services or fisheries services; and
 - (b) Any relevant fisheries plan approved under this Part; and
 - (c) Any decisions not to require conservation services or fisheries services.
- (3) Without limiting the generality of subsection (1) of this section, sustainability measures may relate to -
- (a) The catch limit (including a commercial catch limit) for any stock or, in the case of a quota management stock that is subject to section 13 or section 14 of this Act, any total allowable catch for that stock;
 - (b) The size, sex, or biological state of any fish, aquatic life, or seaweed of any stock that may be taken;
 - (c) The areas from which any fish, aquatic life, or seaweed of any stock may be taken;
 - (d) The fishing methods by which any fish, aquatic life, or seaweed of any stock may be taken or that may be used in any area;
 - (e) The fishing season for any stock, area, fishing method, or fishing vessels.
- (4) The Minister may, -
- (a) By notice in the Gazette, set or vary the catch limit (including the commercial catch limit) for any stock not within the quota management system;
 - (b) Implement any sustainability measure or variation of any sustainability measure, as set or varied under subsection (1),-
 - (i) By notice in the Gazette; or
 - (ii) By recommending the making of regulations under section 298.
- (5) Without limiting subsection (4)(a) of this section, when setting or varying a catch limit (including a commercial catch limit) for any stock not within the quota management system, the Minister shall have regard to the matters referred to in section 13(2) or section 21(1) [or both those sections], as the case may require.

~~11. Sustainability measures (1) The Minister may, from time to time, set or vary any sustainability measure for one or more stocks or areas, after taking into account-~~

~~—(a) Any effects of fishing on any stock and the aquatic environment; and~~
~~—(b) Any existing controls under this Act that apply to the stock or area concerned; and~~
~~—(c) The natural variability of the stock concerned.~~
~~—(2) Before setting or varying any sustainability measure under subsection (1) of this section, the Minister shall have regard to any provisions of—~~
~~—(a) Any regional policy statement, regional plan, or proposed regional plan under the Resource Management Act 1991; and~~
~~—(b) Any management strategy or management plan under the Conservation Act 1987 that apply to the coastal marine area and are considered by the Minister to be relevant.~~
~~—(3) Without limiting the generality of subsection (1) of this section, sustainability measures may relate to—~~
~~—(a) The catch limit (including a commercial catch limit) for any stock or, in the case of a quota management stock that is subject to section 13 or section 14 of this Act, any total allowable catch for that stock;~~
~~—(b) The size, sex, or biological state of any fish, aquatic life, or seaweed of any stock that may be taken;~~
~~—(c) The areas from which any fish, aquatic life, or seaweed of any stock may be taken;~~
~~—(d) The fishing methods by which any fish, aquatic life, or seaweed of any stock may be taken or that may be used in any area;~~
~~—(e) The fishing season for any stock, area, fishing method, or fishing vessels.~~
~~—(4) The Minister may,—~~
~~—(a) By notice in the Gazette, set or vary the catch limit (including the commercial catch limit) for any stock not within the quota management system;~~
~~—(b) Recommend the making of such regulations under section 298 of this Act as he or she considers necessary or expedient for the purpose of implementing sustainability measures, as set or varied under subsection (1) of this section.~~
~~—(5) Without limiting subsection (4)(a) of this section, when setting or varying a catch limit (including a commercial catch limit) for any stock not within the quota management system, the Minister shall have regard to the matters referred to in section 13(2) or section 21(1) of this Act, as the case may require.~~