

November 30, 2016

# CREATING MODERN SAFEGUARDS IN THE *FISHERIES ACT* TO REBUILD FISH STOCKS IN CANADA

Presentation to the House of Commons Standing Committee on Fisheries and Oceans



## ABOUT OCEANA CANADA

Oceana Canada was established in 2015 as an independent charity and is part of the largest international group focused solely on ocean conservation. We believe that the oceans can help feed the nine billion people projected to be on earth by 2050 and that Canada has a significant role to play in making this possible. By restoring Canada's oceans, we can strengthen our communities, reap greater economic and nutritional benefits, and protect our future.

## SUMMARY OF RECOMMENDATIONS

1. Oceana Canada is asking the House of Commons Standing Committee on Fisheries and Oceans to recommend that the *Fisheries Act* be amended to mandate rebuilding fish stocks when they have fallen below healthy levels.
2. Oceana Canada also asks the Committee to recommend that the Minister of Fisheries, Oceans and the Canadian Coast Guard be required to report annually to Parliament on the status of Canada's fish stocks and on management decisions made for stocks in the critical zone.

While there are a number of changes that could be made to the *Fisheries Act* to incorporate modern safeguards, the obligation to rebuild depleted stocks is a central tenet of modern fisheries management around the world. Currently, the *Fisheries Act* affords the Minister largely unfettered discretion in meeting this obligation. Oceana Canada argues that there is no single recommendation that The House of Commons Standing Committee on Fisheries and Oceans could make that would contribute more to effectively rebuilding Canada's depleted stocks than amending the *Fisheries Act* to include a duty to rebuild depleted fisheries.

Additionally, Oceana Canada supports the commitment to restore lost protections to the *Fisheries Act*, consistent with the Mandate Letter from the Prime Minister to the Minister of Fisheries, Oceans and the Canadian Coast Guard.

## RATIONALE

### 1. Canada's fisheries are in decline

Oceana Canada's 2016 report, *Canada's Marine Fisheries: Status, Recovery Potential and Pathways to Success*,<sup>1</sup> highlighted a significant problem: Canada's marine fish populations have declined by 55 per cent since 1970<sup>2</sup> and only 24 per cent of our fish stocks could be confidently considered healthy.

Canada has focused little effort on rebuilding overfished stocks, many of which have been in a state of collapse for decades. The *Sustainable Fisheries Report*, released by the Auditor General in October 2016,<sup>3</sup>

---

<sup>1</sup> Report available at: <http://www.oceana.ca/en/publications/reports/canadas-marine-fisheries-status-recovery-potential-and-pathways-success>. Summary report available at: <http://www.oceana.ca/HeresTheCatch>.

<sup>2</sup> Hutchings, J.A., Côté, I.M., Dodson, J.J., Fleming, I.A., Jennings, S., Mantua, N.J., Peterman, R.M., Riddell, B.E., Weaver, A.J., and D.L. VanderZwaag. 2012. Sustaining Canadian marine biodiversity: responding to the challenges posed by climate change, fisheries, and aquaculture. Expert panel report prepared for the Royal Society of Canada, Ottawa page 216.

<sup>3</sup> Office of the Auditor General. 2016. Report 2 – Sustaining Canada's Major Fish Stocks – Fisheries and Oceans Canada. Available at: [http://www.oag-bvg.gc.ca/internet/English/parl\\_cesd\\_201610\\_02\\_e\\_41672.html#p19](http://www.oag-bvg.gc.ca/internet/English/parl_cesd_201610_02_e_41672.html#p19) [OAG][bvg.gc.ca/internet/English/parl\\_cesd\\_201610\\_02\\_e\\_41672.html](http://www.oag-bvg.gc.ca/internet/English/parl_cesd_201610_02_e_41672.html)

found that: “For 12 of the 15 major fish stocks that were in the critical zone and required rebuilding plans, [Fisheries and Oceans Canada] had neither plans nor timelines for developing them.”

The House of Commons Standing Committee on Fisheries and Oceans’ own recent study on Northern cod found that after a 24 year moratorium, the stock has still not rebounded, and that there is still no rebuilding plan in place. Additionally, in cases such as Northern cod and redfish, Fisheries and Oceans Canada continues to allow directed fisheries for stocks in the critical zone, with no rebuilding plan and no reference points for managers to use to identify a healthy stock.

Oceana Canada asserts that Fisheries and Oceans Canada has not developed rebuilding plans for depleted fisheries because, unlike in many other countries, they are not legally required to do so. Around the world, the catalyst for fisheries recovery – and the social, cultural and economic benefits that come along with it – has been a legally binding requirement to rebuild stocks.

## 2. Canada has made international commitments on overfishing and rebuilding

Canada has made international commitments to maintain and rebuild fish stocks above levels that can produce Maximum Sustainable Yield (MSY). For instance, Canada is a signatory to The United Nations Agreement on Straddling and Highly Migratory Fish Stocks (UNFA),<sup>4</sup> and the Food and Agriculture Organization (FAO)’s Code of Conduct for Responsible Fisheries.<sup>5</sup> Both agreements include several references to maintaining and restoring fish stocks, although the most relevant instances are the following:

UNFA Article 5 b) states that nations will “ensure that [fishery management] measures are based on the best scientific evidence available and are designed to maintain or restore stocks at levels capable of producing maximum sustainable yield.”<sup>6</sup>

The FAO Code of Conduct, in section 7.2.1, states that nations should “adopt appropriate measures, based on the best scientific evidence available, which are designed to maintain or restore stocks at levels capable of producing maximum sustainable yield as qualified by relevant environmental and economic factors, including the special requirements of developing countries.”<sup>7</sup>

Canada also participated in the 2002 World Summit on Sustainable Development,<sup>8</sup> which outlined that maintaining and restoring stock levels at MSY should be accomplished no later than 2015 to achieve sustainable fisheries.

## 3. Fisheries and Oceans Canada policy commits to rebuilding depleted stocks

Fisheries and Oceans Canada has developed clear policy commitments to implement rebuilding plans for depleted stocks in the Sustainable Fisheries Framework.<sup>9</sup> The policy leaves little room for interpretation:

*“When a stock has reached the critical zone, a rebuilding plan must be in place with the aim of having a high probability of the stock growing out of the critical zone within a reasonable timeframe. This plan must be associated with an appropriate monitoring and assessment of the condition of the stock to confirm the*

<sup>4</sup> [http://www.un.org/Depts/los/convention\\_agreements/convention\\_overview\\_fish\\_stocks.htm](http://www.un.org/Depts/los/convention_agreements/convention_overview_fish_stocks.htm)

<sup>5</sup> UNFAO Cod for Responsible Fisheries. Available at: <http://www.fao.org/docrep/005/v9878e/v9878e00.htm>

<sup>6</sup> [http://www.un.org/depts/los/convention\\_agreements/texts/fish\\_stocks\\_agreement/CONF164\\_37.htm](http://www.un.org/depts/los/convention_agreements/texts/fish_stocks_agreement/CONF164_37.htm)

<sup>7</sup> <http://www.fao.org/docrep/005/v9878e/v9878e00.htm#72>

<sup>8</sup> UN. 2002. Report of the World Summit on Sustainable Development. Johannesburg, South Africa. Available at: [http://www.unmillenniumproject.org/documents/131302\\_wssd\\_report\\_reissued.pdf](http://www.unmillenniumproject.org/documents/131302_wssd_report_reissued.pdf)

<sup>9</sup> DFO. Sustainable Fisheries Framework. Available at: <http://www.dfo-mpo.gc.ca/fm-gp/peches-fisheries/fish-ren-peche/sff-cpd/overview-cadre-eng.htm>

success of rebuilding. The plan must also include additional restrictions on catches, and a provision that application of the measures is mandatory if the evaluation fails to find clear evidence that rebuilding is occurring.”<sup>10</sup>

The policy also makes clear that rebuilding plans should be developed before the stock crosses the critical threshold:

*“The development of a rebuilding plan should be initiated enough in advance to ensure the plan is ready to come into effect at the boundary of the critical and cautious zones if a stock has declined and reached the [lower reference point]. Developing a rebuilding plan may take considerable time and this should be taken into account in deciding when to initiate the process. In some cases, a plan could be initiated when the stock declined past the mid-point of the cautious zone. If a stock is already in the critical zone, a rebuilding plan must be developed and implemented on a priority basis.”*

Fisheries and Oceans Canada’s policy commitments to rebuilding depleted stocks are specific and unequivocal. Clearly, its lack of action in developing rebuilding plans does not stem from a policy deficiency.

A binding legal requirement to develop and implement rebuilding plans would ensure that Canada adheres to these policies, meets its international commitments, and moves toward more sustainable fisheries management.

#### **4. The Fisheries Act does not address overfishing or rebuilding**

Canada has made international commitments to rebuilding fish stocks and has developed clear policy guidance on the requirement to establish rebuilding plans. The lack of progress toward establishing rebuilding plans in spite of these commitments demonstrates the importance of a legally binding requirement. In fact, the Sustainable Fisheries Frameworks was developed specifically to address this gap and explicitly states that: *“The Fisheries Act does not specify rebuilding requirements and there is no national guidance for rebuilding stocks managed under the Fisheries Act.”*<sup>11</sup>

Rather than providing direction about rebuilding or other aspects of fisheries management, the *Fisheries Act* includes only the following about fisheries management decisions, in Section 7:

*“The Minister may, in his absolute discretion, wherever the exclusive right of fishing does not already exist by law, issue or authorize to be issued leases and licences for fisheries or fishing, wherever situated or carried on.”*

The Supreme Court of Canada has defined the Minister’s duty under the *Fisheries Act* as a duty to manage, conserve and develop the fishery on behalf of Canadians in the public interest.<sup>12</sup> But the law puts no parameters around the Minister’s discretion in how best to meet this obligation or how best to manage fisheries.

The problem was recognized by the Royal Society of Canada’s 2012 Expert Panel on Marine Biodiversity, which recommended that:

---

<sup>10</sup> DFO. Guidance for the Development of Rebuilding Plans under the Precautionary Approach Framework: Growing Stocks out of the Critical Zone. Available at: <http://www.dfo-mpo.gc.ca/fm-gp/peches-fisheries/fish-ren-peche/sff-cpd/precautionary-precaution-eng.htm>

<sup>11</sup> DFO. Nd. Guidance for the Development of Rebuilding Plans under the Precautionary Approach Framework: Growing Stocks out of the Critical Zone. Available at: <http://www.dfo-mpo.gc.ca/fm-gp/peches-fisheries/fish-ren-peche/sff-cpd/precautionary-precaution-eng.htm>

<sup>12</sup> Comeau’s, *supra* note 48.

*The Government of Canada should enact prescriptive legislation containing primary objectives to: (i) prevent overfishing; (ii) rebuild depleted fish stocks; (iii) formalize the explicit use of reference points and harvest control rules; and (iv) ensure transparency and accountability in fisheries management plans, including those relating to aquaculture.*<sup>13</sup>

A statutory grant of unfettered discretion to the Minister in charge of making fisheries management decisions is highly unusual (and to our knowledge, unique) in fisheries management law around the world.<sup>14</sup> It provides “czar-like powers to the Minister in managing fisheries<sup>15</sup> and, coupled with the lack of direction in the statute, allows for uneven and inconsistent management decisions.

## 5. Other jurisdictions provide legal direction on rebuilding

In *Appendix I*, Oceana Canada provides a substantive comparison of laws in six countries (Australia, the European Union, Iceland, New Zealand, Norway and the United States) to Canada’s *Fisheries Act*. In sharp contrast to Canada, fisheries legislation in, for example, the European Union, the United States and New Zealand each include provisions that fisheries “shall” or “must” be managed to rebuild depleted stocks.

These mandatory rebuilding provisions have been very successful. For example, in 1996, the United States amended the law governing federal management of fisheries, the *Magnuson-Stevens Fisheries Conservation and Management Act* (MSA), to include a requirement that plans be developed and implemented to rebuild all overfished stocks within 10 years.

The Natural Resources Defense Council published a report in 2013<sup>16</sup> that evaluated 44 overfished stocks for which rebuilding plans had been prepared. The report found that 28 (or 64 per cent) were either fully rebuilt or were showing significant progress. The report found that the positive trends were “generally associated with the several years following the MSA in 1996, during which its requirements became widely implemented around the country.” It concluded that managers are most effective at recovering fisheries when rebuilding plans are mandated by the law.

Similarly, in the 2015 United States Fisheries Report to Congress,<sup>17</sup> the National Marine Fisheries Service noted that 39 fish stocks had been rebuilt since 2000. Most of the successes took place after the 2006 reauthorization of the *Magnuson-Stevens Act*.

## RECOMMENDATION: IMPLEMENTING A DUTY TO RECOVER

Oceana Canada supports the government’s stated intention – and the recommendations of many Canadian environmental groups – to restore lost protections to the *Fisheries Act*.

---

<sup>13</sup> Hutchings, J.A., Côté, I.M., Dodson, J.J., Fleming, I.A., Jennings, S., Mantua, N.J., Peterman, R.M., Riddell, B.E., Weaver, A.J., and D.L. VanderZwaag. 2012. Sustaining Canadian marine biodiversity: responding to the challenges posed by climate change, fisheries, and aquaculture. Ottawa page 219.

<sup>14</sup> Bernard, R.L., Van Tuyn, P. 2016. Limiting Discretion in Fisheries Management: A Comparison of Legal Regimes. Included in document as Appendix I.

<sup>15</sup> Hutchings, J.A., Côté, I.M., Dodson, J.J., Fleming, I.A., Jennings, S., Mantua, N.J., Peterman, R.M., Riddell, B.E., Weaver, A.J., and D.L. VanderZwaag. 2012. Sustaining Canadian marine biodiversity: responding to the challenges posed by climate change, fisheries, and aquaculture. Expert panel report prepared for the Royal Society of Canada, Ottawa page 216.

<sup>16</sup> NRDC. Bringing back the Fish. Available at: <https://www.nrdc.org/sites/default/files/rebuilding-fisheries-report.pdf>

<sup>17</sup> NOAA. Status of Stocks 2015. Available at: [http://www.nmfs.noaa.gov/sfa/publications/feature\\_stories/2016/status\\_of\\_stocks\\_2015.html](http://www.nmfs.noaa.gov/sfa/publications/feature_stories/2016/status_of_stocks_2015.html)

**Oceana is asking the committee to recommend that the *Fisheries Act* be further amended to mandate the rebuilding of fish stocks when they have fallen below healthy levels** in order to provide appropriate guidance to support implementing existing Fisheries and Oceans Canada policies, fulfill Canada's global fisheries commitments, and help bring the *Fisheries Act* in line with modern fisheries management legislation.

In addition, Oceana Canada also asks the Committee to recommend that the Minister of Fisheries, Oceans, and the Canadian Coast Guard be required to report annually to Parliament on the status of Canada's fish stocks and on management decisions made for stocks in the critical zone.

A substantive review of the statutes from other jurisdictions summarized in *Appendix I* may provide guidance in drafting amendments to the *Fisheries Act*. For example, the European Union, the United States and New Zealand each, through various statutes, mandate government to take action to maintain or rebuild stocks. Laws in Australia, the European Union, New Zealand, Norway and the United States all include requirements that prevent overfishing.

## CONCLUSION

The House of Commons Standing Committee on Fisheries and Oceans has the obligation and opportunity to help Canada regain its leadership as a thriving fishing nation. By enshrining a duty to recover fisheries into law, as has been done by other leading fishing nations, we can reverse the trend toward depleted resources and create a new legacy of ocean abundance for the long-term benefit of our communities, regional economies, and the industries that rely on them.

Experience from around the world demonstrates that fisheries are more likely to recover, more quickly, when there is a legal mandate to rebuild stocks.

The need has never been greater: our fisheries remain depleted decades after collapse, and we are left in the vulnerable position of being dependent on only a handful of species to prop up the industry. We have gone from being the seventh largest producer of wild fish by weight in the 1950s to 21<sup>st</sup> place today. Of the 15 stocks in the critical zone, we have only managed to develop rebuilding plans for three stocks in the past three decades.

Oceana Canada urges the Committee to join other leading nations by recommending the incorporation a duty to rebuild depleted fisheries into the *Fisheries Act*, as a central component of managing, conserving and developing our fishery on behalf of Canadians and the public interest.

## APPENDIX I: WHITE PAPER

# Limiting Discretion in Fisheries Management: A Comparison of Legal Regimes

REBECCA L. BERNARD<sup>18</sup> AND PETER VAN TUYN<sup>19</sup>

November 15, 2016

### INTRODUCTION

Canadian fisheries law contains a provision granting the fisheries minister the “absolute discretion” to authorize fishing, without any legislated limits to that discretion.<sup>20</sup> As far as we are aware, this provision is unique among the legal regimes of countries that are considered leaders in fisheries management and conservation. The legal regimes of other countries contain binding requirements that guide and limit the discretion of fisheries managers. Canadian law lacks any such binding requirements.

To provide context for Canada’s provision, this paper describes some of the more common ways in which the legal regimes in other countries limit managers’ discretion. For this comparison, we chose the legal regimes in Australia, the European Union, Iceland, New Zealand, Norway, and the United States.<sup>21</sup> These countries generally have legal structures similar to Canada’s and have large commercial fisheries that are important to the economic, social, and cultural well-being of the populace.

---

<sup>18</sup> Bernard is Of Counsel with Besseney & Van Tuyn, L.L.C., an Anchorage, Alaska, law firm providing legal counsel and representation on environmental matters. During her 20-year career, Ms. Bernard has provided legal counsel and representation to Alaska Native corporations and villages, conservation organizations, community groups, and others on a wide range of matters under the major federal environmental laws as well as Alaska and California state law. Ms. Bernard’s substantive expertise spans the major environmental laws—including the Magnuson-Stevens Fishery Conservation & Management Act, Alaska National Interest Lands Act, National Environmental Policy Act, Clean Water Act, Clean Air Act, Surface Mining Control & Reclamation Act, and Coastal Zone Management Act—as well as Alaska state laws governing state lands, mining, water and air quality, and coastal zone management.

<sup>19</sup> Van Tuyn is Managing Partner with Besseney & Van Tuyn, L.L.C. Mr. Van Tuyn represents and counsels conservation groups, Alaska Native corporations, tribes and villages, local communities and individuals concerning the full spectrum of environmental issues in Alaska, including marine conservation, clean air and water, public lands, alternative energy and oil and gas. With respect to marine fisheries he represents clients before the judicial and executive branches of the U.S. government on marine fisheries issues and has been part of successful efforts to amend U.S. Fishery conservation and management laws in the representative branch. He developed and taught a marine fisheries course in Vermont Law School’s environmental law program, and was a trial attorney with the U.S. Department of Justice in the Wildlife and Marine Resources Section of the Environmental and Natural Resources Division. He has also commercial fished (salmon and halibut) in North Pacific and Bering Sea waters.

<sup>20</sup> *Fisheries Act*, RSC 1985, c F-14, s 7(1).

<sup>21</sup> Some of these countries have state- or territory-managed fisheries as well, but this paper examines only the federal fisheries.

Rather than providing unlimited discretion to managers, the legal regimes in those countries describe binding, substantive direction for management. In this paper, we include some of the more common—and important—of those provisions. Specifically, the five principles and measures that we discuss:

- (1) Preventing overfishing (sometimes referred to as “sustainable fisheries”);
- (2) Rebuilding depleted fish stocks;
- (3) Basing management decisions on the best available science;
- (4) Reducing bycatch; and
- (5) Managing according to fishery management plans.

Fisheries and Oceans Canada has actually adopted policies utilizing most of these management objectives, but these policies are not legally required or binding, and in practice they are unevenly implemented.

## DISCUSSION

### 1. Preventing Overfishing (Sustainable Fisheries)

Most of the legal regimes we examined have binding requirements for preventing overfishing.<sup>22</sup> Some articulate sustainability and prevention of over-exploitation of fish stock as objectives of the law (Norway); others go further and state that the fisheries management agency must pursue these objectives in managing the fisheries (Australia), sometimes explicitly through the fishery management plans (European Union) or in setting allowable catch levels (New Zealand).

The United States’ law is the most detailed. It identifies the prevention of overfishing as a central tenet with which fishery management plans and implementing regulations must be consistent.<sup>23</sup> The fishery management plans are required to specify criteria for determining when a fishery is overfished, and, when a fishery is approaching or is in that condition, contain measures to prevent overfishing or end overfishing and rebuild the fishery.<sup>24</sup> Plans must “establish a mechanism for specifying annual catch limits in the plan (including a multiyear plan), implementing regulations, or annual specifications, at a level such that overfishing does not occur in the fishery, including measures to ensure accountability.”<sup>25</sup> The law also identifies the prevention of overfishing as the first of ten national standards intended to guide management and conservation.<sup>26</sup>

Canadian law does not include a binding requirement to prevent overfishing. In 2009, however, Fisheries and Oceans Canada developed a Sustainable Fisheries Framework that incorporates policies for precautionary and ecosystem approaches to fishery management.<sup>27</sup> The Framework and its policies are implemented through Integrated Fisheries Management Plans (IFMP) developed for individual fisheries.<sup>28</sup> Neither the Framework nor its implementation are grounded in binding legal requirements.

---

<sup>22</sup> Iceland is the sole exception, but its fisheries law has a similar objective to promote “conservation and efficient utilisation” of exploitable fishing stocks. See The Fisheries Management Act, art. 1.

<sup>23</sup> Magnuson-Stevens Fishery Conservation & Management Act § 301(a)(1).

<sup>24</sup> *Id.* § 303(a)(10).

<sup>25</sup> *Id.* § 303(a)(15).

<sup>26</sup> Magnuson-Stevens Fishery Conservation & Management Act § 301(a)(1).

<sup>27</sup> See Fisheries & Oceans Canada (DFO), “Sustainable Fisheries Framework” (25 October 2016), online: DFO <<http://www.dfo-mpo.gc.ca/fm-gp/peches-fisheries/fish-ren-peche/sff-cpd/overview-cadre-eng.htm>>.

<sup>28</sup> See DFO “Application of the sustainable fisheries framework through the integrated fisheries management planning process” (23 March 2009), online: DFO <<http://www.dfo-mpo.gc.ca/fm-gp/peches-fisheries/fish-ren-peche/sff-cpd/ifmp-pgip-back-fiche-eng.htm>>.



## 2. Rebuilding Depleted Fish Stocks

Of the legal regimes we examined, the European Union, New Zealand, and the United States include binding requirements to rebuild depleted fish stocks. The Common Fisheries Policy (CFP) of the European Union aims to ensure “restor[ation] and maint[enance]” of harvest species above levels that can produce the maximum sustainable yield, and it does this by specifically requiring that multiannual plans contain conservation measures to achieve restoration and maintenance.<sup>29</sup>

The New Zealand fisheries law requires the fisheries minister to set total allowable catch (TAC) at levels that will allow for restoration of stocks.<sup>30</sup> In the United States, the law requires that fishery management plans include the conservation and management measures necessary “to prevent overfishing and rebuild overfished stocks[.]”<sup>31</sup> U.S. law also requires that fishery management plans specify criteria for determining when a fishery is overfished, and, when a fishery is approaching or is in that condition, contain measures to prevent overfishing or end overfishing and rebuild the fishery.<sup>32</sup>

The Canadian fisheries law does not require rebuilding of depleted fish stocks. One key policy of the Sustainable Fisheries Framework – A Fisheries Decision-Making Framework Incorporating the Precautionary Approach – *requires that* “when a stock has reached the Critical Zone, a rebuilding plan must be in place with the aim of having a high probability of the stock growing out of the Critical Zone within a reasonable timeframe.”<sup>33</sup> **Like the other Canadian policies, however, this requirement is not binding.**

## 3. Best Available Science

Fisheries laws in the European Union, New Zealand,<sup>34</sup> and the United States require that fisheries management decisions be based on the best available science. In the CFP, for example, the European Union states that management is to be guided by principles of good governance that include “the establishment of measures in accordance with the best available scientific advice[.]”<sup>35</sup> Further, in adopting conservation measures, the European Commission must consult with advisory and scientific bodies and take their advice into account.<sup>36</sup>

United States law requires that fishery management plans be consistent with the national standards for fishery management and conservation, including the following: “Conservation and management measures shall be based upon the best scientific information available.”<sup>37</sup> Further, each regional fishery management council shall “develop annual catch limits for each of its managed fisheries that may not exceed the fishing level recommendations of its scientific and statistical committee . . . .”<sup>38</sup>

The Icelandic fisheries law does not explicitly require the use of best available science, but it does require that the Fisheries Minister obtain scientific recommendations before setting catch limits.<sup>39</sup>

---

<sup>29</sup> CFP, art. 2(2), art. 9(1).

<sup>30</sup> *Fisheries Act 1996* § 13(2)(b)(i).

<sup>31</sup> *Magnuson-Stevens Fishery Conservation & Management Act* § 303(a)(1)(A).

<sup>32</sup> *Id.* § 303(a)(10).

<sup>33</sup> DFO, “Guidance for the Development of Rebuilding Plans under the Precautionary Approach Framework: Growing Stocks out of the Critical Zone” (8 January 2013), online: DFO <[http://www.dfo-mpo.gc.ca/fm-gp/peches-fisheries/fish-ren-peche/sff-cpd/precautionary-precaution-eng.htm#toc\\_1](http://www.dfo-mpo.gc.ca/fm-gp/peches-fisheries/fish-ren-peche/sff-cpd/precautionary-precaution-eng.htm#toc_1)>.

<sup>34</sup> *Fisheries Act 1996* § 10 (decisions should be made based on “best available information.”).

<sup>35</sup> CFP, art. 3(c).

<sup>36</sup> *Id.*, art. 6(2); see also *id.*, art. 26 (“The Commission shall consult appropriate scientific bodies.”).

<sup>37</sup> *Magnuson-Stevens Fishery Conservation & Management Act* § 301(a)(2).

<sup>38</sup> *Id.* § 302(h)(6).

<sup>39</sup> *The Fisheries Management Act*, art. 3.

Canadian fisheries law does not require the use of best available science, but Fisheries and Oceans Canada asserts on its website that it develops IFMPs based on the best available science on a species and industry data on capacity and methods for harvesting that species.<sup>40</sup>

#### 4. Bycatch reduction measures

Of the legal regimes we reviewed, all but New Zealand either require or authorize the fisheries management agency to adopt measures to reduce bycatch. Australia's provision is typical: "A plan of management for a fishery must contain measures directed at reducing to a minimum: (a) the incidental catch of fish not taken under and in accordance with that plan; and (b) the incidental catch of other species."<sup>41</sup>

The Canadian fisheries law does not require measures to reduce bycatch. One of the policies that comprise the Sustainable Fisheries Framework – the Policy for Managing Bycatch – states as an objective "to ensure that Canadian fisheries are managed in a manner that supports the sustainable harvesting of aquatic species and that minimizes the risk of fisheries causing serious or irreversible harm to bycatch species."<sup>42</sup>

#### 5. Fishery management plans

Of the legal regimes we examined, Australia, the European Union, and the United States require that fishery management plans be developed to guide the management of specific fisheries.

Under Australian law, plan contents are largely discretionary<sup>43</sup> (except for the required bycatch reduction measures), but when a management plan is in place for a fishery, "AFMA must perform its functions, and exercise its powers, under this Act in relation to the fishery in accordance with the plan of management."<sup>44</sup> Multiannual plans under the European Union's CFP must include objectives that are consistent with the objectives of the CFP,<sup>45</sup> and they must be "based on scientific, technical and economic advice, and shall contain conservation measures to restore and maintain fish stocks above levels capable of producing maximum sustainable yield in accordance with Article 2(2)."<sup>46</sup>

Under United States law, the regional fishery management councils must prepare fishery management plans for each of their managed fisheries,<sup>47</sup> and the plans must include specific required measures and be consistent with the ten national standards for fishery management and conservation.<sup>48</sup>

---

<sup>40</sup> See DFO, "Integrated Fisheries Management Plans" (18 August 2016), online: DFO <<http://www.dfo-mpo.gc.ca/fm-gp/peches-fisheries/ifmp-gmp/index-eng.htm>>. Australia makes a similar assertion on its fisheries management website. See Australian Fisheries Management Authority (AFMA), *Science & Research*, <<http://www.afma.gov.au/research/>> ("Keeping our fish stocks sustainable means we must base our decisions on the most trustworthy information. That information comes from extensive and accurate scientific research assessments from marine environment experts.").

<sup>41</sup> *Fisheries Management Act 1991* (Cth) s 17(6D). See also CFP art. 10(1)(f) (multiannual plans must include measures "designed to avoid and reduce, as far as possible, unwanted catches.") (European Union); The Fisheries Management Act, art. 7 ("The Minister shall . . . set rules on allowable by-catch.") (Iceland); Marine Resources Act § 16 (fisheries ministry may adopt regulation on permitted bycatches) (Norway); Magnuson Stevens Act § 303(a)(11) (fishery management plans must include a standardized bycatch reporting methodology and measures to minimize bycatch and bycatch mortality) (United States).

<sup>42</sup> DFO, "Policy for Managing Bycatch" (8 January 2013), online: DFO <<http://www.dfo-mpo.gc.ca/fm-gp/peches-fisheries/fish-ren-peche/sff-cpd/bycatch-policy-prise-access-eng.htm>>.

<sup>43</sup> *Fisheries Management Act 1991* (Cth) s 17(5)-(6).

<sup>44</sup> *Fisheries Management Act 1991* (Cth) s 17(10).

<sup>45</sup> CFP, art. 10(1)(b).

<sup>46</sup> *Id.*, art. 9(1).

<sup>47</sup> *Magnuson-Stevens Fishery Conservation & Management Act* § 302(h)(1).

<sup>48</sup> *Id.* § 303(a).

Canadian fisheries law does not require the adoption of fishery management plans. DFO sometimes uses IFMPs “to guide the conservation and sustainable use of marine resources.”<sup>49</sup>

## CONCLUSION

The unlimited discretion afforded the Fisheries Minister in Canada is an outlier among fishery management regimes around the world. Other countries limit discretion by requiring that managers prevent overfishing, rebuild depleted fish stocks, base decisions on the best available science, reduce bycatch, and adopt fishery management plans. Canada’s management choices often reflect these principles, but its legal regime does not require their application.

---

<sup>49</sup> DFO, “Integrated Fisheries Management Plans” (18 August 2016), online: DFO <<http://www.dfo-mpo.gc.ca/fm-gp/peches-fisheries/ifmp-gmp/index-eng.htm>>.

Table of Conservation Principles in Fisheries Management Laws

	Prevent Overfishing	Rebuild Depleted Fish Stocks	Best Available Science	Reduce Bycatch	Fishery Mgmt. Plans
<b>Australia</b>	In managing the fisheries, AFMA must pursue the objective of ensuring that exploitation of marine resources is conducted in a manner consistent with principle of ecologically sustainable development.			Fishery management plans must include measures to reduce bycatch.	Plans are required though their contents are mostly discretionary.
<b>European Union</b>	The objectives of the CFP include ensuring sustainable fisheries, and the required multiannual plans must be consistent with the CFP objectives.	The CFP aims to ensure that fish stocks are maintained and restored above the maximum sustainable yield (MSY) level, and fishery management plans must contain conservation measures to maintain and restore stocks to levels above MSY.	The CFP is guided by good governance principles, including basing decisions on the best available science, and in adopting conservation measures the Commission must consult with and take into account the advice of scientific bodies.	The required multiannual plans must include measures to avoid and reduce unwanted catches.	Adoption of multiannual plans is a priority, and they must include objectives that are consistent with the objectives of the CFP.
<b>Iceland</b>	The objective of the Fisheries Management Act is to promote “conservation and efficient utilisation” of exploitable marine stocks.		The Fisheries Minister must obtain the recommendations of the Marine Research Institute before issuing a regulation determining the total allowable catch (TAC).	The Fisheries Minister must set rules on allowable bycatch.	
<b>New Zealand</b>	The purpose of the Fisheries Act is to provide for utilisation of	The Fisheries Minister must set a TAC that enables the	Decisions should be made based on the best available information.		Plans are

	fishery resources while ensuring sustainability, and the Fisheries Minister must set total allowable catch (TAC) that maintains the stock at or above a level that can produce the maximum sustainable yield.	restoration of depleted stocks to a level that can produce the maximum sustainable yield.			
<b>Norway</b>	The purpose of the marine resource law is to ensure sustainable and economically profitable management of wild living marine resources.			The fisheries ministry may adopt regulations on permitted bycatch.	
<b>United States</b>	Fishery management plans and conservation measures must be consistent with national standards, including that of preventing overfishing, and must prevent overfishing.	Fishery management plans must, when necessary, include measures to rebuild fish stocks.	Fishery management plans must be consistent with the national standards, including that requiring that conservation measures be based on the best available science. TACs may not be set at a level above that recommended by the scientific and statistical committee.	Fishery management plans must include a standardized bycatch reporting methodology and measures to minimize bycatch and bycatch mortality.	Regional fishery management councils must prepare fishery management plans for each of their managed fisheries, and the plans must be consistent with the ten national standards for fishery management and conservation as well as include specific required measures.

## Statutory Excerpts

### 1. Preventing Overfishing / Sustainable Fisheries

#### Australia:

“The following objectives must be pursued by the Minister in the administration of this Act and by AFMA in the performance of its functions: . . . ensuring that the exploitation of fisheries resources and the carrying on of any related activities are conducted in a manner consistent with the principles of ecologically sustainable development (which include the exercise of the precautionary principle), in particular the need to have regard to the impact of fishing activities on non-target species and the long term sustainability of the marine environment[.]”<sup>50</sup>

“In addition to the objectives mentioned in subsection (1) . . . the Minister, AFMA and Joint Authorities [between the federal and state or territorial governments] are to have regard to the objectives of: . . . ensuring, through proper conservation and management measures, that the living resources of the [Australian fishing zone] are not endangered by over-exploitation[.]”<sup>51</sup>

#### European Union:

“The CFP shall ensure that fishing and aquaculture activities are environmentally sustainable in the long-term and are managed in a way that is consistent with the objectives of achieving economic, social and employment benefits, and of contributing to the availability of food supplies.”<sup>52</sup> The required multiannual plans (below) must be consistent with these objectives.

“The CFP shall apply the precautionary approach to fisheries management, and shall aim to ensure that exploitation of living marine biological resources restores and maintains populations of harvested species above levels which can produce the maximum sustainable yield.”<sup>53</sup>

“Multiannual plans shall be adopted as a priority, based on scientific, technical and economic advice, and shall contain conservation measures to restore and maintain fish stocks above levels capable of producing maximum sustainable yield in accordance with Article 2(2).”<sup>54</sup>

#### Iceland:

“The exploitable marine stocks of the Icelandic fishing banks are the common property of the Icelandic nation. The objective of this Act is to promote their conservation and efficient utilisation, thereby ensuring stable employment and settlement throughout Iceland.”<sup>55</sup>

#### New Zealand:

“The purpose of this Act is to provide for the utilisation of fishery resources while ensuring sustainability.”<sup>56</sup>

---

<sup>50</sup> *Fisheries Management Act 1991* § 3(1)(b).

<sup>51</sup> *Id.* § 3(2)(a).

<sup>52</sup> Common Fisheries Policy (CFP), arts. 2(1), 2(2).

<sup>53</sup> *Id.*, art. 2(2).

<sup>54</sup> *Id.*, art. 9(1).

<sup>55</sup> *The Fisheries Management Act*, Art. 1.

<sup>56</sup> *Fisheries Act 1996* § 8(1).

“The Minister shall set a total allowable catch that “maintains the stock at or above a level that can produce the maximum sustainable yield, having regard to the interdependence of stocks[.]”<sup>57</sup>

**Norway:**

“The purpose of this Act is to ensure sustainable and economically profitable management of wild living marine resources and genetic material derived from them[.]”<sup>58</sup>

**United States:**

“Any fishery management plan prepared, and any regulation promulgated to implement any such plan, pursuant to this title shall be consistent with the following national standards for fishery conservation and management: . . . “Conservation and management measures shall prevent overfishing while achieving, on a continuing basis, the optimum yield from each fishery for the United States fishing industry.”<sup>59</sup>

“Any fishery management plan which is prepared by any Council, or by the Secretary, with respect to any fishery, shall— . . . specify objective and measurable criteria for identifying when the fishery to which the plan applies is overfished (with an analysis of how the criteria were determined and the relationship of the criteria to the reproductive potential of stocks of fish in that fishery) and, in the case of a fishery which the Council or the Secretary has determined is approaching an overfished condition or is overfished, contain conservation and management measures to prevent overfishing or end overfishing and rebuild the fishery[.]”<sup>60</sup>

“Any fishery management plan which is prepared by any Council, or by the Secretary, with respect to any fishery, shall— . . . establish a mechanism for specifying annual catch limits in the plan (including a multiyear plan), implementing regulations, or annual specifications, at a level such that overfishing does not occur in the fishery, including measures to ensure accountability.”<sup>61</sup>

## 2. Rebuilding Depleted Fish Stocks

**European Union:**

“The CFP shall apply the precautionary approach to fisheries management, and shall aim to ensure that exploitation of living marine biological resources restores and maintains populations of harvested species above levels which can produce the maximum sustainable yield.”<sup>62</sup>

“Multiannual plans . . . shall contain conservation measures to restore and maintain fish stocks above levels capable of producing maximum sustainable yield in accordance with Article 2(2).”<sup>63</sup>

**New Zealand:**

“The Minister shall set a total allowable catch that . . . enables the level of any stock whose current level is below that which can produce the maximum sustainable yield to be altered – in a way and at a rate that will result in the stock being restored to or above a level that can produce the maximum sustainable yield, having regard to the interdependence of stocks[.]”<sup>64</sup>

---

<sup>57</sup> *Id.* § 13(2)(a).

<sup>58</sup> *Marine Resources Act* § 1 (2009).

<sup>59</sup> *Magnuson-Stevens Fishery Conservation & Management Act* § 301(a)(1).

<sup>60</sup> *Id.* § 303(a)(10).

<sup>61</sup> *Id.* § 303(a)(15).

<sup>62</sup> CFP, art. 2(2).

<sup>63</sup> *Id.*, art. 9(1).

<sup>64</sup> *Fisheries Act 1996* § 13(2)(b)(i).

**United States:**

“Any fishery management plan which is prepared by any Council, or by the Secretary, with respect to any fishery, shall . . . contain the conservation and management measures, applicable to foreign fishing and fishing by vessels of the United States, which are . . . necessary and appropriate for the conservation and management of the fishery to prevent overfishing and rebuild overfished stocks, and to protect, restore, and promote the long-term health and stability of the fishery[.]”<sup>65</sup>

“Any fishery management plan which is prepared by any Council, or by the Secretary, with respect to any fishery, shall . . . specify objective and measurable criteria for identifying when the fishery to which the plan applies is overfished (with an analysis of how the criteria were determined and the relationship of the criteria to the reproductive potential of stocks of fish in that fishery) and, in the case of a fishery which the Council or the Secretary has determined is approaching an overfished condition or is overfished, contain conservation and management measures to prevent overfishing or end overfishing and rebuild the fishery[.]”<sup>66</sup>

**3. Best Available Science****European Union:**

“The CFP shall be guided by the following principles of good governance: . . . the establishment of measures in accordance with the best available scientific advice[.]”<sup>67</sup>

“When applying this Regulation, the Commission shall consult the relevant advisory bodies and the relevant scientific bodies. Conservation measures shall be adopted taking into account available scientific, technical and economic advice, including, where relevant, reports drawn up by STECF and other advisory bodies, advice received from Advisory Councils and joint recommendations made by Member States pursuant to Article 18.”<sup>68</sup>

**Iceland:**

“The Minister of Fisheries, having obtained the recommendations of the Marine Research Institute, shall issue a regulation determining the total allowable catch (TAC) to be caught for a designated period or fishing season from the individual exploitable marine stocks in Icelandic waters for which it is deemed necessary to limit the catch.”<sup>69</sup>

**New Zealand:**

“All persons exercising or performing functions, duties, or powers under this Act, in relation to the utilisation of fisheries resources or ensuring sustainability, shall take into account the following information principles: decisions should be based on the “best available information.”<sup>70</sup>

**United States:**

“Any fishery management plan prepared, and any regulation promulgated to implement any such plan, pursuant to this title shall be consistent with the following national standards for fishery conservation and

---

<sup>65</sup> *Magnuson-Stevens Act* § 303(a)(1)(A).

<sup>66</sup> *Id.* § 303(a)(10).

<sup>67</sup> CFP, art. 3(c).

<sup>68</sup> *Id.*, art. 6(2).

<sup>69</sup> *The Fisheries Management Act*, art. 3.

<sup>70</sup> *Fisheries Act 1996* § 10.



management: . . . Conservation and management measures shall be based upon the best scientific information available[.]”<sup>71</sup>

“Each Council shall, in accordance with the provisions of this Act . . . develop annual catch limits for each of its managed fisheries that may not exceed the fishing level recommendations of its scientific and statistical committee . . . .”<sup>72</sup>

#### 4. Bycatch Reduction Measures

##### Australia:

“A plan of management for a fishery must contain measures directed at reducing to a minimum: (a) the incidental catch of fish not taken under and in accordance with that plan; and (b) the incidental catch of other species.”<sup>73</sup>

##### European Union:

“As appropriate and without prejudice to the respective competences under the Treaty, a multiannual plan shall include: . . . measures designed to avoid and reduce, as far as possible, unwanted catches.”<sup>74</sup>

##### Iceland:

“The Minister shall . . . set rules on allowable by-catch.”<sup>75</sup>

##### Norway:

“The Ministry may adopt regulations on the conduct of harvesting operations, including provisions on the following: . . . permitted bycatches[.]”<sup>76</sup>

##### United States:

“Any fishery management plan which is prepared by any Council, or by the Secretary, with respect to any fishery, shall . . . establish a standardized reporting methodology to assess the amount and type of bycatch occurring in the fishery, and include conservation and management measures that, to the extent practicable and in the following priority— (A) minimize bycatch; and (B) minimize the mortality of bycatch which cannot be avoided[.]”<sup>77</sup>

#### 5. Fishery Management Plans

##### Australia:

“Subject to subsection (1A), AFMA must, in writing, after consultation with such persons engaged in fishing as appear to AFMA to be appropriate . . . determine plans of management for all fisheries.”<sup>78</sup>

---

<sup>71</sup> *Magnuson-Stevens Act* § 301(a)(2).

<sup>72</sup> *Id.* § 302(h)(6).

<sup>73</sup> *Fisheries Management Act 1991* § 17(6D).

<sup>74</sup> CFP art. 10(1)(f).

<sup>75</sup> *The Fisheries Management Act*, art. 7.

<sup>76</sup> *Marine Resources Act* § 16.

<sup>77</sup> *Magnuson Stevens Act* § 303(a)(11).

<sup>78</sup> *Fisheries Management Act 1991* § 17(1).

“If, in all the circumstances, AFMA is of the view that a plan of management is not warranted for a particular fishery, AFMA may make a determination accordingly, including in the determination its reasons for making the determination. While a determination under this subsection is in force, AFMA is not required to determine a plan of management for a fishery.”<sup>79</sup>

“While a plan of management is in force for a fishery, AFMA must perform its functions, and exercise its powers, under this Act in relation to the fishery in accordance with the plan of management.”<sup>80</sup>

#### **European Union:**

“Multiannual plans shall be adopted as a priority, based on scientific, technical and economic advice, and shall contain conservation measures to restore and maintain fish stocks above levels capable of producing maximum sustainable yield in accordance with Article 2(2).”<sup>81</sup>

“As appropriate and without prejudice to the respective competences under the Treaty, a multiannual plan shall include: . . . objectives that are consistent with the objectives set out in Article 2 . . . .”<sup>82</sup>

#### **New Zealand:**

“The Minister may from time to time approve, amend, or revoke a fisheries plan.”<sup>83</sup>

#### **United States:**

“Each Council shall, in accordance with the provisions of this Act—(1) for each fishery under its authority that requires conservation and management, prepare and submit to the Secretary (A) a fishery management plan, and (B) amendments to each such plan that are necessary from time to time (and promptly whenever changes in conservation and management measures in another fishery substantially affect the fishery for which such plan was developed).”<sup>84</sup>

“Any fishery management plan which is prepared by any Council, or by the Secretary, with respect to any fishery, shall—(1) contain the conservation and management measures, applicable to foreign fishing and fishing by vessels of the United States, which are—(A) necessary and appropriate for the conservation and management of the fishery to prevent overfishing and rebuild overfished stocks, and to protect, restore, and promote the long-term health and stability of the fishery; (B) described in this subsection or subsection (b), or both; and (C) consistent with the national standards, the other provisions of this Act, regulations implementing recommendations by international organizations in which the United States participates (including but not limited to closed areas, quotas, and size limits), and any other applicable law[.]”<sup>85</sup>

---

<sup>79</sup> *Id.* § 17(1A).

<sup>80</sup> *Id.* § 17(10).

<sup>81</sup> CFP, art. 9(1).

<sup>82</sup> *Id.*, art. 10(1)(b).

<sup>83</sup> *Fisheries Act 1996* § 11A.

<sup>84</sup> *Magnuson-Stevens Act* § 302(h)(1).

<sup>85</sup> *Id.* § 303(a).