

**I MUA I TE KOOTI TAIAO O AOTEAROA ENV-2019-AKL-117
TĀMAKI MAKAU RAU**

**BEFORE THE ENVIRONMENT COURT
AUCKLAND REGISTRY**

UNDER the Resource Management Act 1991 ("RMA")
AND
IN THE MATTER of an appeal under clause 14(1), Schedule 1 of the
RMA
AND
IN THE MATTER of section 274 of the RMA

BETWEEN **BAY OF ISLANDS MARITIME PARK
INCORPORATED**
ENV-2019-AKL-117
**THE ROYAL FOREST AND BIRD PROTECTION
SOCIETY INCORPORATED**
ENV-2019-1KL-127
Appellants
AND **NORTHLAND REGIONAL COUNCIL**
Respondent

UPDATED BRIEF OF EVIDENCE OF DR PHILIP HUNTER MITCHELL
~~21 MAY 2021~~ 22 JUNE 2021



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INTRODUCTION

1. My full name is Dr Philip Hunter Mitchell.
2. I have prepared this statement of evidence at the request of Te Ohu Kai Moana (**Te Ohu**), Te Rūnanga A Iwi o Ngāpuhi (**TRAION**), and the Ngātiwai Trust Board (**Ngātiwai**), collectively referred to as "**the Māori Fishing Interest Parties**"; and the New Zealand Rock Lobster Industry Council (**NZRLIC**) and Fisheries Inshore New Zealand (**FINZ**), collectively referred to as "**the Fishing Industry Parties**".
3. The changes to my evidence, shown in blue¹ are confined to:
 - (a) Amending the descriptions of the proposed marine protection areas that were amended by Ngāti Kuta ki te Rawhiti Hapū, Bay of Islands Maritime Park Inc and the Royal Forest and Bird Protection Society of New Zealand Inc. on 8 June 2021; and
 - (b) Amending Appendices A and B to reflect the amended relief sought and to align area descriptions with those contained in the Joint Witness Statement – Ecology dated 10 June 2021.
4. I also confirm that I am a signatory to the Joint Witness Statement – Planning dated 21 June 2021.

Qualifications and Experience

5. I hold the degrees of Bachelor of Engineering (Hons) and Doctor of Philosophy, both from the University of Canterbury.
6. I am a founding Partner of Mitchell Daysh Limited, an environmental consultancy practice with offices in Auckland, Hamilton, Napier and Dunedin, which was established in October

¹ Any consequential changes to paragraph numbering are not shown in blue text.

2016. Previously I was a founding Director of Mitchell Partnerships Limited, which I established in July 1997, and prior to that I was the Managing Director of Kingett Mitchell & Associates Ltd, a firm that I cofounded in 1987.

7. I am a past president and a founding executive committee member of the Resource Management Law Association, a full member of the New Zealand Planning Institute and in 2015 was a recipient of the New Zealand Planning Institute's Distinguished Service Award.
8. I have practised in the field of resource management for over 30 years and, my firm and I have had a lead resource management role in many significant projects throughout New Zealand during that time, including a number of projects based in the marine environment.
9. My principal areas of practice are providing resource management advice to the private and public sectors, facilitating public consultation processes, undertaking planning analyses, managing resource consent acquisition projects and developing resource consent conditions. I also act as a Hearings Commissioner and am accredited as a Hearing Chair.
10. I have acted as a Hearings Commissioner on some 70 occasions, many in the role of Hearing Chair. In that regard, I am currently chairing the hearing of submissions on the proposed Waikato District Plan.
11. Previously, I was appointed jointly by the Minister for Canterbury Earthquake Recovery and the Christchurch City Council as a Hearings Commissioner for the replacement of the Christchurch City District Plan (the district plan that is intended to facilitate the rebuilding of Christchurch).
12. I have had extensive coastal planning experience throughout New Zealand.

Code of Conduct

13. I confirm that I have read the Code of Conduct for Expert Witnesses as contained in the Environment Court Practice Note dated 1 December 2014. I agree to comply with this Code. This evidence is within my area of expertise, except where I state that I am relying upon the specified evidence of another person. I have not omitted to consider material facts known to me that might alter or detract from the opinions that I express.

EXECUTIVE SUMMARY

14. The proposed marine protection areas include rules that would prohibit fishing and impact on the Māori Fishing Interest Parties' and the Fishing Industry Parties' activities in those areas. In my opinion, the extent of those effects on the Māori customary (non-commercial and commercial) fishing and commercial and fishers, could not reasonably have been foreseen at the time of the Northland Regional Council Hearing Panel's decision on the Proposed Regional Plan (**PRP**) or at the time of lodgement of appeals by Bay of Islands Marine Park Incorporated (**BOIMP**) and Royal Forest and Bird Protection Society of New Zealand (**Forest and Bird**) (collectively referred to as **the appellants**). As a result, the process that has been followed falls significantly short as:
- (a) the changes were not part of the notified plan and so therefore the usual Schedule 1 process was not followed;
 - (b) the changes were not considered and pursued by the Council as part of the section 42A reporting and the Hearing Panel's recommendations; and
 - (c) the specific relief sought has only become clear late in the course of the appeal process.
15. All of this relates to giving effect to the New Zealand Coastal Policy Statement (**NZCPS**) particularly in respect of identification of, and consultation with, stakeholders, including, but not confined to tangata whenua.

16. Given the role of the Māori Fishing Interest Parties in managing the fishing interests transferred to them through Treaty redress and the relationship of tangata whenua and their culture and traditions with their ancestral lands, water, sites, waahi tapu and other taonga the proposal does not accord with sections 5, 6(e),7(a) and 8 of the RMA, including as articulated in the relevant planning documents.
17. The section 32AA evaluation prepared by the appellants has also fallen short in its examination of a number of critical planning matters and has not provided a sufficiently fulsome consideration of alternatives, costs and benefits, efficient process and consultation with tangata whenua and interested / affected parties.
18. In my opinion, the current proceedings raise two very important contextual and factual matters not covered in the Court of Appeal decision *Attorney-General v The Trustees of the Mōtītī Rohe Moana Trust & Ors*², namely:
 - (a) The extent and effects of the proposal in terms of the guiding indicators of the Mōtītī Case; and
 - (b) The significant impacts on Māori customary (non-commercial and commercial) and recreational fishing activities.

SCOPE OF EVIDENCE

19. In my evidence I will:
 - (a) Outline my understanding of the parties' respective positions;
 - (b) Address scope issues;

² *Attorney-General v The Trustees of the Mōtītī Rohe Moana Trust & Ors* [2019] NZCA 535 [4 November 2019].

- (c) Assess the relevant statutory provisions including the RMA, the NZCPS, the Regional Policy Statement (**RPS**) and the Proposed Regional Plan for Northland (**PRP**);
 - (d) Address the section 32AA assessment undertaken; and
 - (e) Outline my planning conclusions.
20. In preparing my evidence I have read the following statements of evidence:
- (a) The Māori Fishing Interest Parties (Te Ohu, TRAION and Ngātiwai), and the Fisheries Industries Parties (NZRLIC and FINZ) prepared by:
 - i. Sir Tīpene O'Regan
 - ii. Ms Lisa Te Heuheu;
 - iii. Mr Whaimutu Dewes;
 - iv. Mr Kim Drummond;
 - v. Mr Wane Wharerau;
 - vi. Mr Paul Knight;
 - vii. Mr Hugh Te Kiri Rihari;
 - viii. Mr Keir Volkerling
 - ix. Mr Aperahama Edwards;
 - x. Mr Thomas Clark;
 - xi. Mr Mark Ngata;
 - xii. Mr Mark Semmens; and
 - xiii. Mr Graeme Bailey.

- (b) BOIMP, Forest and Bird, the hapū of Ngāti Kuta ki Te Rawhiti (**Ngāti Kuta**) and Northland Regional Council prepared by:
- i. Mr Peter Reaburn (planning);
 - ii. Dr Vicky Froude (natural character and ecology);
 - iii. Dr Nicholas Shears (ecology);
 - iv. Dr Mark Morrison (ecology);
 - v. Dr Rebecca Stirnemann (ecology);
 - vi. Dr Timothy Denne (economic);
 - vii. Matutaera te Nana Clendon, Robert Sydney Willoughby and George Frederick Riley (on behalf of themselves and Ngāti Kuta); and
 - viii. Mr Jeroen Jongejans, Ms Julia Riddle, Mr Craig Johnston (dive tourism business owners).
- (c) The hapū Te Uri o Hikihiki (**Te Uri of Hikihiki**) prepared by:
- i. Dr Mark Bellingham (planning and ecology);
 - ii. Mr Vince Kerr (ecology);
 - iii. Ms Diane Lucas (landscape);
 - iv. Mr Carmen Hetaraka (cultural); and
 - v. Ms Vania Keefe (cultural).
- (d) The Northland Regional Council prepared by:
- i. Mr James Griffin (planning); and
 - ii. Dr Phil Ross (ecology).

POSITIONS OF THE PARTIES

The position of the Māori Fishing Interest Parties, and the Fisheries Industry Parties

21. Te Ohu is a representative organisation established through the passage of the Māori Fisheries Settlement 1992³, between Māori and the Crown, and is a national representative organisation guided by the 58 mandated iwi organisations (**MIO**)⁴ recognised under the Māori Fisheries Act. Te Ohu's role is to protect and enhance the interests of iwi and Māori in the marine environment, particularly in relation to customary and commercial fisheries. Te Ohu consider that the introduction of the marine protection areas with rules that prohibited fishing, impact on the interests of Te Ohu and undermine the principles of the Māori Fisheries Settlement Deed, the Māori Fisheries Act 2004 and the Te Tiriti o Waitangi.
22. TRAION is a mandated iwi organisation⁵ for Ngāpuhi who represent the interests and aspirations of more than 125,000 people who identify themselves as Ngāpuhi. In his evidence, Mr Wharerau⁶ explains that TRAION is concerned that the marine protected areas proposed have the potential to affect its fishing interests and as set out above, undermine the principles of the Māori Fisheries Settlement Deed 1992, the Māori Fisheries Act 2004 and the Te Tiriti o Waitangi. As explained in the section 274 notice⁷ TRAION did not consider when the PRP was notified that it might be amended in such a way that it could effectively regulate its fishing activities including significant impacts on Māori customary (non-commercial and commercial) and recreational fishing activities and create marine protection mechanisms without its involvement

³ The Fisheries Settlement was a settlement of fisheries claims under Te Tiriti o Waitangi. It was enshrined in the Deed Settlement, signed in 1992 and implemented through the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992, the Fisheries Act 1996 and the Māori Fisheries Act 2004.

⁴ MIO as referred to in the Māori Fisheries Act 2004.

⁵ MIO as referred to in the Māori Fisheries Act 2004.

⁶ Evidence of Mr Wharerau.

⁷ Section 274 Notice by Te Rūnanga a Iwi o Ngāpuhi 20 July 2020.

potentially across large areas of the Northland Coastal Marine Area (**CMA**).

23. Ngātiwai is a mandated iwi organisation⁸. As explained in the Memorandum of Counsel in support of the section 274 notice, when the PRP was notified Ngātiwai⁹ did not consider that it might be amended in such a way that it could effectively regulate its fishing activities including significant impacts on Māori customary (non-commercial and commercial) and recreational fishing activities and create marine protection mechanisms without its involvement potentially across large areas of the Northland CMA. Ngātiwai is also of the view that the proposed marine protection areas have the potential to undermine the principles of the Māori Fisheries Settlement Deed, the Māori Fisheries Act 2004 and the Te Tiriti o Waitangi.
24. Together, the Māori Fishing Interest Parties are concerned that the proposed marine protection areas have not adequately involved consultation and collaboration with all parties that will be affected by the rules which will prohibit fishing or require resource consents, in the case of the Te Uri o Hikihiki marine protection areas.
25. The Fishing Industry Parties are Sector Representative Entities. As I understand it, they are non-profit organisations that were established by quota owners, Annual Catch Entitlement (**ACE**) holders and fishers to work together to advance their interests in inshore finfish, pelagic and tuna fisheries (in the case of FINZ) and the rock lobster fishery (in the case of NZRLIC).
26. As explained in the section 274 notice, the Fishing Industry Parties are also concerned that the proposed marine protection areas and introduction of the prohibited activity for fishing has not been appropriately considered as part of the PRP process and that there are a number of other groups and individual operators that may be interested and/or affected by these provisions that have not had

⁸ MIO as referred to in the Māori Fisheries Act 2004.

⁹ Section 274 Notice of Ngātiwai Trust Board 9 September 2020.

the opportunity to participate in the development of the marine spatial planning provisions.

BOIMP and Forest & Bird

27. The appellants, BOIMP and Forest and Bird seek to introduce a form of spatial marine management through marine protected area controls to manage the adverse effects of fishing activities on indigenous biodiversity. The effect of the proposed objectives, policies and rules is to introduce marine protection provisions in the PRP for Northland which would prohibit fishing activities within these areas.
28. The relief sought by appellants is outlined in the evidence of Mr Reaburn¹⁰ and seeks to introduce new objectives to the PRP. Mr Reaburn states at paragraph 3.1 *"the provisions are an update of those circulated in the relief sought by the appellants."*
29. My understanding is that Mr Reaburn's proposed objective F.1.x Te Hā o Tangaroa Protection Areas is based on a spatial layer, the intention of which is for it to apply to the areas identified in the appeal, and that the same layer could also potentially apply in any appropriate location within the Northland CMA.
30. Objective 2 recognises the need to investigate other areas that may qualify as Te Hā o Tangaroa Protection Areas.
31. New policies are also proposed to manage adverse effects and identify possible further areas for marine protection.
32. The sub-areas within Te Hā o Tangaroa Protection Area Rakaumangamanga- Ipipiri (as amended on 8 June 2021) include:
 - (a) ~~Sub-Area A – Maunganui – Oke Bay Rahui Tapu;~~
 - (b) ~~Sub-Area A Buffer – Maunganui – Oke Bay Rahui Tapu Buffer Area;~~

¹⁰ Evidence of Mr Reaburn dated 20 March 2021.

- ~~(c) Sub Area B Ipipiri Benthic Protection Area; and~~
- ~~(d) Sub Area C Ipipiri Rakaumangamanga Protection Area.~~
- (a) Maunganui-Oke Bay Rahui Tapu (Area A);
- (b) Ipipiri moana mara tipu rohe (Area B); and
- (c) Rakaumangmanga moana mara tipu rohe (Area C)

33. New permitted and prohibited activities are proposed within each Sub-Area. In both *Sub-Area A* all fishing (aside from gathering of kina and other fishing for research, monitoring or conservation purposes) is a prohibited activity, and a range of fishing activities are prohibited in *Sub Area B and C*. Attached in Appendix A is a table setting out the proposed rules for the various Sub Areas. [Following the Planning Witness Conferencing on 21 June 2021 amended provisions are to be provided by Mr Reaburn.](#) Accordingly, Appendix A is likely to require further amendment.

Te Uri o Hikihiki Hapu

34. The marine protection areas of Te Uri o Hikihiki Hapu extend beyond the Sub Areas outlined above, to include the areas set out in the evidence of Dr Bellingham and Ms Lucas¹¹. These provisions introduce an objective for the protection of Te Mana o Tangaroa Protection Areas and an objective promoting the investigation of further Te Mana o Tangaroa Protection Areas. New policies are proposed relating to managing adverse effects in Te Mana o Tangaroa Protection Areas and investigating further marine spatial planning mechanism. [Following the Planning Witness Conferencing on 21 June 2021 amended provisions are to be provided by Dr Bellingham.](#) Accordingly, Appendix B is likely to require further amendment.
35. Te Uri of Hikihiki Hapu propose permitted, discretionary and prohibited activity rules, which I set out in Appendix B. The rules

¹¹ Evidence of Dr Bellingham – paragraphs 2.1-2.18 and evidence of Ms Lucas - paragraphs 9-10.

also propose the development of management plans, non-compliance with which would change the activity status of that particular activity¹². In my understanding that approach is not lawful.

Northland Regional Council

36. Based on the evidence of Mr Griffin¹³ and Dr Ross I understand that the position of the Northland Regional Council (**the Council**) is as follows:

- (a) The Council supports the introduction of the Te Hā o Tangaroa Protection Area: Rakaumangamanga-Ipipiri stating it will efficiently and effectively achieve the objective of the proposal as it prohibits fishing activities that are likely to result in adverse effects on the characteristics, qualities, and values of interest¹⁴. The Council accepts that Objective F.1.x is appropriate but does not support the second objective proposed which promotes the investigation of areas that may qualify as further Te Hā o Tangaroa Protection Areas;
- (b) Mr Griffin on behalf of the Council supports the proposed approach to the Sub Areas and their associated rules;
- (c) The Council does not support the proposed rules of Te Mana o Tangaroa because it introduces additional complexity in terms of introducing management plans; and
- (d) The Council recommends the provisions proposed in Te Hā o Tangaroa Protection Areas.

SCOPE ISSUES

37. I have been asked by Te Ohu, on behalf of the Māori Fishing Interest Parties and the Fishing Industry Parties to evaluate, from

¹² Proposed Rule C.1.9.3 4.and 5.

¹³ Evidence of Mr Griffin – paragraphs 75-96 and Evidence of Dr Ross – paragraphs 94-98.

¹⁴ Evidence of James Griffin– paragraph 72.

a planning perspective, whether any scope issues arise from the BOIMP and Forest and Bird proposals, given that they were not part of the notified Northland PRP.

38. As set out in the evidence of Mr Griffin¹⁵ the Council's section 42A report prepared as part of the hearing on the submissions and further submissions to the PRP relating to the introduction of marine protection areas concluded *"we do not have enough information to inform the setting of rules on this. This would require significant analysis through a s32 evaluation that is not currently available, and a sufficient level of supporting information/evidence is not provided in the submission"*.
39. The evidence of Mr Griffin¹⁶ states that the recommendation of the PRP Hearing Panel adopted the approach that where the PRP Hearing Panel agreed with and adopted the discussion and recommendations of the section 42A report no further specific recommendations were provided. The recommendations¹⁷ did not specifically address the inclusion of marine protection areas or any provisions restricting fishing activities within these areas, and therefore the section 42A report's recommendations¹⁸ were adopted.
40. I have reviewed the Council's section 42A report, and the Hearing Panel's recommendations report and I note the following recommendation of the section 42A report in response to the submission of BOIMP stated:

"Include objectives and policies in the regional plan that manage adverse effects on natural character. (Refer key issues - request for new objectives and policies to protect natural character, outstanding natural landscapes,

¹⁵ Evidence of Mr James Griffin – paragraph 21.

¹⁶ Evidence of Mr James Griffin – paragraph 24.

¹⁷ Report and Recommendations of the Hearing Commissioners – Proposed Regional Plan for Northland April 2019.

¹⁸ Significant natural and historic heritage – Recommendations in response to submissions on the Proposed Regional Plan for Northland – Section 42A hearing report 3/07/2018.

historic heritage, outstanding natural features and significant indigenous biodiversity). But do not recommend including policies and methods to manage the effects of fishing on significant ecological areas.”

41. The evidence presented at the Council hearing of submissions on the PRP by Dr Froude¹⁹ on behalf of BOIMP included the following recommended policy:

“What is being proposed for Northland is consistent with the Environment Court’s decision in the Bay of Plenty. An appropriate policy for Northland could be:

“To identify through marine spatial planning and establish through plan overlays, coastal marine localities where the removal of indigenous flora and fauna is (generally) prohibited so as to protect and restore natural character, protect indigenous biodiversity/ecosystems, and restore kaitiakitanga.”

42. The submissions of Forest and Bird on the PRP requested a new policy and rule regime to control the effects of fishing on the values of significant ecological areas.
43. There appears to be no further discussion in the Hearing Panel’s decision about the inclusion of a policy and rule regime to control the effects of fishing.
44. The BOIMP²⁰ appeal included the request for the inclusion of policies and rules to provide for the protection of ecological and/or cultural values but did not include reference to all fishing being prohibited, stating:

¹⁹ Statement of Primary Evidence of Victoria Froude on behalf of Bay of Islands Maritime Park Inc Hearing Topic Protection of marine biodiversity, ecosystems and natural character 2018 paragraph 6.5.

²⁰ Notice of Appeal by the Bay of Islands Maritime Park Incorporated 17 June 2019 - Paragraph 24.5.

"5. For those areas that are agreed by tangata whenua as needing a higher level of protection/restoration; the damage, destruction, removal of marine flora and fauna shall generally be prohibited so as to protect and restore natural character, protect indigenous biodiversity/ecosystems, and restore kaitiakitanga. An example of such an area would be the area encompassed by the current 1996 Fisheries Act s186. A temporary closure for Maunganui Bay in the Bay of Islands. In this specific case kina or sea urchins (*Evechinus chloroticus*) can be taken.

6. Impose controls more generally for areas of high or outstanding natural character and/or significant ecological value, in relation to fishing methods that may damage the benthic environment or where they may impact particularly on sea birds or marine mammals. An example of such control could be a prohibition or non-complying status/or dredging purse-seining Danish seining, bottom trawling, set netting and variations to these methods). The Proposed Regional Plan - Decisions Version online maps of natural character have not been completed for parts of the open coast and so additional areas may be identified through future assessments.

45. The Forest and Bird²¹ appeal also requested:

"In reliance on the High Court decision, Forest & Bird is seeking policies and rules to provide for the protection of ecological and/or cultural values, including in relation to:

a. The following areas:

i. Te Paki Stream in the west around the top of the North Island including Parengarenga Harbour,

²¹ Notice of Appeal by the Royal Forest and Bird Protection Society of New Zealand Incorporated - Paragraph 8.

including the southern head of this harbour to the east, all out to 12 NM limit.

ii. Oruaiti river in the north to the Takou river in the south and out to the 12 NM limit.

iii. Tapeka Point to Nine Pin across to Motukokako. Including Motukokako and Rakaumangamanga in the north to Taupiri Nui in the south including all the islands in between and out to the 12 nm mile limit.

iv. Mokau in the north to Titi Island in the south and out to the 12 NM limit.

b. Rocky reefs from the adverse effects associated with kina barrens created where fishing removes large lobster and snapper, the natural predators of kina, resulting in kina thriving and out-competing other species.

c. To protect indigenous species threatened or at-risk species and give effect to Policy 11 of the NZCPS.”

46. In December 2020, the appellants updated the relief sought to include rules that sought to prohibit fishing. Those provisions and maps in relation to the appellants appeal have been further updated and attached to Mr Reaburn’s evidence as Appendix A²².

47. Dr Denne²³ has provided a table outlining the extent of the proposed marine protected areas, which, [following the amended relief dated 8 June 2021, I now understand](#) cover an area of [approximately 1,070 ~~up to 1,200~~km²](#) ²⁴ [\(but with some areas overlapping\)](#) within the combined Te Hā o Tangaroa and Te Au o Morunga Protection Areas. As set out in his Table 3,²⁵ this area is larger than the existing Poor Knights, Whangarei Harbour

²² Refer to the evidence of Mr Reaburn Appendix A.

²³ Evidence of Dr Denne – paragraph 16 Table 2 Summary of the Proposed Marine Protection Areas.

²⁴ [Joint Witness Statement – Ecology paragraph 4.](#)

²⁵ Evidence of Dr Denne – paragraph 40.

(Motukaroro) and Whangarei Harbour (Waikaraka) marine reserves areas established under the Marine Reserves Act 1971, in Northland. The proposed marine protected areas are also significantly larger than the areas proposed within the Mōtītī Marine Protection Area which has been the subject of extensive legal proceedings including the Court of Appeal decision²⁶ ("**Mōtītī**") released on 4 November 2019, and which total approximately 30 km².

48. While the submissions on the PRP by BOIMP²⁷ and Forest and Bird²⁸ sought new policies and rules, the controls on fishing (including prohibiting fishing as now proposed) were not anticipated by the Māori Fishing Interest Parties and Fishing Industry Parties. As a result, the Māori Fishing Interest Parties, the Fishing Industry Parties and anyone else had no opportunity to address those issues at the Council hearing. In addition, the section 42A report and Hearing Panel did not address the possible inclusion of rules prohibiting fishing and types of fishing within the Sub-Areas of the marine protection areas.
49. More importantly, there has been no public process nor input of the type and scope envisaged by Schedule 1 of the RMA, including in particular the provisions that require consultation with tangata whenua (section 4A Schedule 1).
50. One directly comparable example relates to the hearing of submissions on the Waikato PDP, where I am Chair of the Independent Hearing Panel. An issue we were faced with related to extensive rezoning proposals at Ohinewai that were not notified with the Proposed District Plan and which arose by way of submissions. We were concerned that interested / affected parties might not have been aware of the proposals and/or may not be aware if they may be impacted by large scale industrial and residential development in a rural area. Accordingly, we directed

²⁶ Attorney-General v The Trustees of the Mōtītī Rohe Moana Trust & Ors CA408/2017[2019] NZCA 532

²⁷ BOIMP Submission on the PRP, 12 November 2017 – page 4.

²⁸ Forest & Bird Submission on the PRP, 15 November 2017 – page 64.

that the proposed rezoning should be re-notified to provide the wider Ohinewai community, iwi and other interested parties the opportunity to ascertain the extent to which they may be affected by the proposed rezoning and lodge submissions on it. The process also required the proponents of the rezoning to provide all the technical reports and supporting documents, including section 32AA assessments to the Council, submitters and further submitters prior to the section 42A report preparation. We also directed a timetable for the exchange of evidence and rebuttal evidence before the hearings of the proposal.

51. The similarities with this current situation are self-explanatory, and in my opinion, a more appropriate process here would have been for the submissions of BOIMP and Forest & Bird requesting new policies and rules for the proposed marine protection areas in the PRP to be fully in the public realm.
52. If the process required by Schedule 1 (including consultation) had been undertaken here, the Māori Fishing Interest Parties, the Fishing Industry Parties, the various individuals and entities they represent and anyone else would have had the opportunity to be involved from an early stage. Additionally, the Council would have been able to work collaboratively with tangata whenua and the community, including both the environmental and the various fishing groups, to establish controls on fishing rather than imposing the provisions as proposed through an appeal process with very limited prior opportunity for public participation.
53. The recent late notice from Ngāti Rēhia to join these proceedings, is to me, a specific example of how it is not possible to give full effect to Objective 3 and Policy 2 of the NZCPS through this appeal. As stated in Ngāti Rēhia's memorandum of Counsel²⁹ they want to be involved in the decision-making process and yet they have only just become aware of the proceedings. I discuss this further below.

²⁹ Memorandum of Counsel on behalf of Te Rūnanga o Ngāti Rēhia dated 13 May 2021.

PLANNING ANALYSIS

Background

54. Turning more broadly to the planning matters, particularly in relation to the Council's responsibilities to consult with tangata whenua as part of the plan making process, Mr Griffin³⁰ sets out the consultation undertaken with tangata whenua as part of the PRP development (notably this did not include any proposed marine protection areas). In summary a number of hui were held in 2016 and 2017 and advice from iwi authorities was incorporated in the Draft Regional Plan in 2017. Mr Griffin³¹ concludes *"the fact that Te Uri o Hikihiki feels that consultation was not sufficient indicates that further progress is required in this space."*
55. From a planning perspective and having reviewed the Council's section 42A reports and the Hearing Panel recommendation report it is my opinion that the consultation with tangata whenua, fishing interest parties and the wider community and interested / affected parties has not been undertaken in relation to the proposed introduction of the marine protection areas introducing rules prohibiting fishing as it was "fully formed" without such consultation. I return to the matter of consultation later.
56. As set out above, the Māori Fishing Interest Parties have been mandated to protect and enhance the fishing interests of iwi and Māori across the Northland CMA. The Māori Fishing Interest Parties are concerned that the proposal to introduce rules prohibiting fishing within the marine protection areas as part of the appeal process is contrary to the requirement for the Council to develop the PRP, including the evaluation of the matters addressed in sections 5, 6(e), 6(f), 6(g), 7 (a) and 8 of the RMA. I return to these matters later.

³⁰ Evidence of Mr Griffin – paragraphs 97-100.

³¹ Evidence of Mr Griffin – paragraph 100.

57. In preparing my evidence, I have reviewed what I consider to be the key objectives, and policies of the NZCPS, the RPS and the PRP, as set out below.

New Zealand Coastal Policy Statement

58. In my opinion, key objectives and policies are Objective 1, 2, 3, 4, 6 and 7 and Policies 2, 3, 4, 5, 6, 7, 11, 12, 13, 14 and 15 presented in full in **Appendix C**, while some general “flavour” is provided in the following:

Objective 3 *To take account of the principles of the Treaty of Waitangi, recognise the role of tangata whenua as kaitiaki and provide for tangata whenua involvement in management of the coastal environment.*

Objective 6 *To enable people and communities to provide for their social, economic, and cultural wellbeing and their health and safety, through subdivision, use, and development.*

Policy 2 *The Treaty of Waitangi, tangata whenua and Māori heritage:*

In taking account of the principles of the Treaty of Waitangi (Te Tiriti o Waitangi), and kaitiakitanga, in relation to the coastal environment:

(a) *recognise that tangata whenua have traditional and continuing cultural relationships with areas of the coastal environment, including places where they have lived and fished for generations;*

(b) ***involve iwi authorities or hapū on behalf of tangata whenua in the***

preparation of regional policy statements, and plans, by undertaking effective consultation with tangata whenua; with such consultation to be early, meaningful, and as far as practicable in accordance with tikanga Māori;

...

- (d) *provide opportunities in appropriate circumstances for Māori involvement in decision making ...;*
- (e) *take into account any relevant iwi resource management plan and any other relevant planning document recognised by the appropriate iwi authority or hapū and lodged with the council, to the extent that its content has a bearing on resource management issues in the region or district; and*
 - (i) *where appropriate incorporate references to, or material from, iwi resource management plans in regional policy statements and in plans...;*
- (f) *provide for opportunities for tangata whenua to exercise kaitiakitanga over waters, forests, lands, and fisheries in the coastal environment through such measures as:*
 - (i) *bringing cultural understanding to monitoring of natural resources;*
 - (ii) *providing appropriate methods for the management, maintenance and*

protection of the taonga of tangata whenua;

- (iii) having regard to regulations, rules or bylaws relating to ensuring sustainability of fisheries resources such as taiāpure, mahinga mātaītai or other non-commercial Māori customary fishing; and*

Policy 4 *Provide for the integrated management of natural and physical resources in the coastal environment, and activities in the coastal environment.*

Policy 5 *Land or waters managed or held under other Acts.*

...

Policy 7 *Strategic planning*

- (1) In preparing regional policy statements, and plans:*
 - (a) consider where, how and when to provide for future residential, rural residential, settlement, urban development and other activities in the coastal environment at a regional and district level, and:*
 - (b) identify areas of the coastal environment where particular activities and forms of subdivision, use and development:*
 - (i) are inappropriate; and*
 - (ii) may be inappropriate without the consideration of effects through a resource consent application, notice*

*of requirement for designation or
Schedule 1 of the Act process;*

*and provide protection from inappropriate
subdivision, use, and development in these
areas through objectives, policies and rules.*

- (2) *Identify in regional policy statements, and
plans, coastal processes, resources or values
that are under threat or at significant risk
from adverse cumulative effects. Include
provisions in plans to manage these effects.
Where practicable, in plans, set thresholds
(including zones, standards or targets), or
specify acceptable limits to change, to assist
in determining when activities causing
adverse cumulative effects are to be avoided.*

Policy 11 *Indigenous biological diversity (biodiversity)*

*To protect indigenous biological diversity in the
coastal environment:*

11(a) avoiding adverse effects of activities ...; and

*11(b) avoiding significant adverse effects and
avoid, remedy or mitigate other adverse effects of
activities on....*

...

Policy 13 *To preserve the natural character of the coastal
environment and to protect it from inappropriate
subdivision, use and development.*

Policy 14 *Promote restoration and rehabilitation of the
natural character of the coastal environment.*

59. Regional plans must “give effect to the NZCPS” and it is clear to me from the above that this requires a considerably wider lens than just considering policies 11, 12 and 13 as focused on by Mr Reaburn and Dr Bellingham in particular because the NZCPS makes it clear that tangata whenua are to have a key role in that plan making process. Recognition of tangata whenua as part of the plan making process has clearly not happened here, as the proposal was “fully formed” and before the Court before any opportunity was provided for any participation. Even then, the participation has been to react to that fully formed proposal, rather than being participatory.
60. With regard to Policy 11 specifically, it has been discussed in the evidence of Mr Reaburn³² and I generally agree with the analysis in those statements, as far as it goes.
61. However, I have seen no analysis in the evidence that demonstrates (or nor do I consider that) ‘giving effect to’ this Policy inevitably leads to Marine Protection Areas needing to be created in the Northland Regional Plan. In other words, I consider that there are other ways in which this Policy could be given effect to.
62. In respect of Policy 2 of the NZCPS, the evidence of Mr Rihari³³, Mr Wharerau³⁴ and others explain the traditions of customary fishing and how kaitiakitanga is provided for through the Fisheries Act 1996, mechanisms which they consider are more effective and appropriate than the RMA.
63. In that regard, Sir Tipene O’Regan explores the concept of kaitiakitanga in considerable detail and explains that it embraces not just environmental, but also social, cultural and spiritual dimensions, concluding:

“Of all values or concepts, kaitiakitaka is one which has found common currency among New Zealanders. Current usage of the term ‘kaitiakitaka’ tends to emphasise

³² Evidence of Mr Reaburn – 5.8-5.26.

³³ Evidence of Hugh Rihari – paragraph 6.18.

³⁴ Evidence of Wane Wharerau – paragraph 11.9.

conservation and protection. However, in a similar way to that in which the meaning of 'conservation' has been co-opted to become a synonym for 'prohibition', so too has 'kaitiakitaka' tended to be co-opted in a similar manner, from its original meaning. However, kaitiakitaka embraces not just environmental, but social, cultural and spiritual dimensions. Indeed, kaitiakitaka weaves together threads of identity, purpose and practice. Moreover, kaitiakitaka is a fundamental means by which survival, in spiritual, economic and political terms, is ensured.

Thus the concept of sustainable and wise use is a critical feature of kaitiakitaka. It is also about putting the use, development or protection of resources in context. This means considering the relevance of ancestral association with lands, waters and resources, and thus the rights and responsibilities we are required to uphold as Māori ..."

64. Detail aside, consideration of those alternative mechanisms is relevant to the evaluation under section 32AA and have not been addressed by the appellant.

Regional Policy Statement for Northland

65. The Northland RPS was made partially operative in May 2016 and fully operative in June 2018. It gives effect to the NZCPS.
66. The RPS includes a range of key issues, objectives, policies and methods that set direction in relation to the management of coastal areas of Northland including the key role of tangata whenua (set out in full in my **Appendix D**).
67. Mr Griffin³⁵ and Mr Reaburn³⁶ describe what they consider to be the key provisions of the RPS, I also consider the following to be particularly pertinent:

³⁵ Evidence of Mr Griffin – paragraphs 35 – 37.

³⁶ Evidence of Mr Reaburn- paragraphs 4.19-4.33.

- (a) Issue 2.5 –identifies participation of tangata whenua in resource management including early and effective participation in resource management decision making, recognition of Māori land and returned Treaty settlement assets;
- (b) Issue 2.6 identifies the issues significant to tangata whenua;
- (c) Objective 3.4 seeks to maintain the extent and diversity of indigenous ecosystems and habitats through a combination of protection and enhancement activities and processes;
- (d) Object 3.5 addresses economic wellbeing, and the way the natural and physical resources are important for the Northland communities and managed through regulation;
- (e) Objective 3.12 recognises tangata whenua’s kaitiaki role in decision-making;
- (f) Objective 3.14 identifies the qualities and characteristics that make up the natural character, outstanding natural features, landscapes and historic heritage;
- (g) Policies 4.4.1 and 4.4.2 seek to protect important indigenous ecosystems and habitats and maintain the diversity of indigenous species reflecting Policy 11 of the NZCPS;
- (h) Policies 4.5.1 - 4.5.3 reflect the objectives relevant to the identification of coastal environment, natural character, outstanding natural features, outstanding natural landscapes and historic heritage resources;
- (i) Policies 4.7.1 – 4.7.3 promote active management including supporting iwi, hapū and community efforts that occur outside of the RMA; and
- (j) Policies 8.1.1 - 8.1.4 recognise and provide for tangata whenua participation including recognising Mātaruranga

Māori in decision making processes and incorporating Māori concepts, values and practices.

68. In my opinion, and mirroring my comments regarding the NZCPS, active participation of tangata whenua is required to give effect to the RPS.

Proposed Regional Plan

69. The evidence, prepared on behalf of the appellants and Council, has outlined the key objectives and policies of the PRP relating to natural character, ecology, indigenous biodiversity, tangata whenua, economic wellbeing and adverse effects. I adopt that evidence, insofar as it identifies those provisions and I do not repeat them. I do though note the following:

- (a) The PRP recognises tangata whenua's kaitiaki role in decision making³⁷; and
- (b) There is a gap in the PRP, which does not currently recognise in a spatial way how particular areas of marine environment can be managed to reflect a combination of ecology, natural character and iwi / hapu values.³⁸

70. Mr Reaburn³⁹ proposes the following two objectives as the most appropriate way to achieve the purpose of the Act:

"Protect from inappropriate use, disturbance and development the characteristics, qualities and values that make up Te Hā o Tangaroa Protection Areas.

Investigate areas that may qualify as further Te Hā o Tangaroa Protection Areas and implement measures for those areas that will protect them from inappropriate disturbance, use and development."

³⁷ Evidence of Mr Griffin – paragraphs 39-40.

³⁸ Evidence of Mr Reaburn – paragraphs 6.7 -6.11.

³⁹ Evidence of Mr Reaburn – paragraphs 6.1-6.13.

71. He also states that he supports the new policies and provisions as proposed⁴⁰.

72. Dr Bellingham also states⁴¹:

"A review of the PRP objectives, policies and methods identified that the plan fails to address NZCPS and RPS objectives and policies and fails to implement these with appropriate methods.

There are no policies and methods in the PRP to manage the adverse effects of fishing activities cultural and natural values and attributes of Te Ha o Tangaroa MAs identified by Te Uri o Hikihiki and its expert. It is appropriate to provide policies and methods to achieve the objectives and to avoid adverse effects of fishing activities on the outstanding qualities of the area and to avoid significant adverse effect on the values and attributes of these areas of high and very high natural character."

73. Section 30 of the RMA sets out the function of regional councils which section 30(2) states excludes functions under the Fisheries Act 1996 relating to the taking, allocation or enhancement of fisheries resources for the purpose of fishing and fisheries resources. As counsel have set out in detail, the relationship between the RMA and Fisheries Act has been clarified in the recent *Mōtītī* decision.⁴²

74. The approach I have taken in considering the relationship between sections 30 and 30(2) in respect of indigenous biodiversity issues and natural values, is to assess them alongside the effects of imposing rules (such as those proposed by the appellants) particularly the effect on Māori customary (non-commercial and commercial) and recreational fishing interests. In that regard, I understand that the fishing interests that have been transferred to

⁴⁰ Evidence of Mr Reaburn – paragraphs 7.6-7.12.

⁴¹ Evidence of Dr Bellingham – paragraphs 4.11-4.12.

⁴² *Attorney-General v The Trustees of the Mōtītī Rohe Moana Trust & Ors* [2019] NZCA 535 [4 November 2019].

tangata whenua and managed by the Māori Fishing Interest Parties are a direct result of a Treaty settlement. In that regard Sir Tipene O'Regan⁴³ concludes as follow:

That our Treaty right to fish has been hard-fought should by now be clear. A fundamental assumption of the settlement was that there would be no further erosion of Māori fisheries rights (giving effect to the rakatirataka in Article II of the Treaty), and that their regulation would be managed through the fisheries management framework arising under the Fisheries Act and its associated regulations (giving effect to the kāwanataka in Art I).

To that end, I consider that protecting the marine environment is not lost in the sophistication of the Fisheries Act and Settlement. Importantly, consistent with our rakatirataka and kaitiakitaka, Māori were guaranteed a statutory role in any necessary regulation.

In my view, if the Māori right to fish is dealt with under processes other than the fisheries management framework, then those opportunities are lost. The Treaty right is divorced from its modern home, and there is a breach of the Treaty and its principles, leaving in tatters the Māori rights that we have struggled for so many generations to recover.

75. It would therefore seem perverse to “give with one hand” for Treaty redress purposes under the fisheries legislation and to “take with the other hand” under the RMA, especially absent any Schedule 1 process. Doing so would seem to me to be at odds with the Treaty principles of redress, reciprocity, mutual benefit and consultation which are directly relevant under section 8 of the RMA. Further, prohibiting fishing would not recognise and provide for the relationship of Māori and their culture and traditions with their

⁴³ Evidence of Sir Tipene O'Regan – paragraphs 53-55.

ancestral lands, water, sites, waahi tapu and other taonga, as required by section 6(e) of the RMA).

76. Also directly relevant is section 66(2A) of the RMA which requires consideration of planning documents recognised by an iwi authority or prepared by a customary marine title group under section 85 of the Marine and Coastal Area (Takutai Moana) Act 2011 (**MACA**).
77. I understand that MACA establishes a process for conferring customary rights and title over the foreshore and seabed. That is, in effect, a form of ownership. Whilst not settled, there are numerous MACA applications (approximately 161 in the Northland region) and to make decisions on indigenous biodiversity factors now without any participation by those seeking customary title would serve to prevent input from those potential “landowners”.
78. Turning to consideration of the effects on the Fishing Industry Parties, and as explained by Mr Clark,⁴⁴ there are many regulatory controls under the Fisheries Act 1996 which apply to commercial fishing in the Bay of Islands, Mimiwhangata, and surrounding areas (including the inner and outer Bay of Islands areas identified within the appeals). Additionally, Mr Drummond comments⁴⁵ that the current approach is a “one dimensional” view that does not reflect all the options. I discuss this further below.

COMPARISON WITH THE “MŌTĪTĪ CASE”

79. The “Mōtītī Case” created three protection areas around Mōtītī Island which have been subject to scrutiny in the Environment Court, High Court and Court of Appeal⁴⁶.

⁴⁴ Evidence of Mr Clark – paragraphs 22-48.

⁴⁵ Evidence of Mr Drummond – paragraphs 123-125.

⁴⁶ *Attorney General v The Trustees of the Mōtītī Rohe Moana Trust & Ors* [2019] NZCA 532, *Mōtītī Rohe Moanan Trust & Ors v Bay of Plenty Regional Council* [2018] NZEnv C 067 and [2020] NZEnvC 050.

80. The Court of Appeal set out five indicators to provide guidance to determine if a control in a regional coastal plan would contravene section 30(2)⁴⁷, as follows:

"(a) **Necessity**: means whether the objective of the control is already being met through measures implemented under the Fisheries Act;

(b) **Type**: refers to the type of control. Controls that set catch limits or allocate fisheries resources among fishing sectors or establish sustainability measures for fish stocks would likely amount to fisheries management;

(c) **Scope**: a control aimed at indigenous biodiversity is likely not to discriminate among forms or species;

(d) **Scale**: the larger the scale of the control the more likely it is to amount to fisheries management;

(e) **Location**: the more specific the location and the more significant its biodiversity values, the less likely it is that a control will contravene s 30(2)."

81. In my opinion, there are a number of distinguishing factual differences between the Mōtītī Case and this one including:

(a) Measures implemented under the Fisheries Act 1996 are already in place within the proposed marine protection areas⁴⁸;

(b) This proposal involves the inclusion of a rule regime for different types of fishing;

⁴⁷ Attorney General v The Trustees of the Mōtītī Rohe Moana Trust & Ors [64].

⁴⁸ Evidence of Mr Clark – paragraphs 55 – 63.

- (c) The scale of the area proposed is not comparable with the area protected in Mōtiti only being 30 km² compared to the expansive areas proposed by the appellants and Te Uri o Hikihiki stretching hundreds of km²;
 - (d) The areas to be protected in this proposal do not all have the same level of importance in terms of outstanding natural character, outstanding natural landscapes or significant ecological areas; and
 - (e) The scale of the effects on Māori customary (non-commercial and commercial) and recreation fishing.
82. I would have expected a robust planning assessment to have addressed each of the five indicia and the effectiveness of other protection measures under the Fisheries Act 1996 including mātaihai, taiapure and rahui. No such evaluation has been undertaken.

THE SECTION 32AA ASSESSMENT

83. Section 32AA requires this proposal to be evaluated in section 32 terms at a level of detail that corresponds to the scale and significance of the changes proposed. The section 32AA assessment undertaken in support of these proposals⁴⁹ makes no mention at all of the scale of the proposed marine protection areas, and the potential effects on the customary, commercial and recreational Māori fishing interests and commercial fishing.
84. As currently drafted, the Te Hā o Tangaroa Protection Areas and Te Mana o Tangaroa Management Areas rely solely on regulation under the RMA and no consideration has been given to how other methods, including those available in other legislation might protect indigenous biodiversity within the marine protection areas. Nor has there been any engagement with tangata whenua, other than with those hapū who support the proposal.

⁴⁹ Evidence of Mr Reaburn – paragraphs 7.1 – 7.12.

85. The evidence filed by the appellants⁵⁰ and the Council⁵¹ conclude that alternative measures under other legislation are not in place, cannot manage effects appropriately and are not an outcome the Court can consider. I do not agree and consider that, for example, section 66 (2)(iii) of the RMA and Policy 2(f)(iii) of the NZCPS are relevant.
86. In that regard, the evidence of the Māori Fishing Interest Parties⁵² and Ms McKinnon⁵³ set out the mechanisms available in the Fisheries Act 1996 and the Marine Reserves Act 1971 to protect biodiversity values. One such example explained by Mr Clark⁵⁴ is various existing fisheries regulations that impose closures and protection under section 186A of the Fisheries Act 1996 and which overlap with the proposed marine protection areas. Mr Drummond⁵⁵ also mentions the role of mātaihai, rahui and taiapure.
87. I would have expected these options to be assessed as part of a robust section 32 analysis.
88. Section 32(2)(b) of the RMA requires the benefits and costs of the proposed provisions to be assessed, if practicable. As part of his evidence, Dr Denne⁵⁶ contemplates commercial fishers moving to another area or changing fishing methods when impacted by this proposal. No analysis of the efficiency or effectiveness of this is provided. Nor is there any analysis in terms of quantifying the costs or the impact that may have on customary, recreational or commercial fishing, as contemplated by section 32. As explained in the evidence of Mr Wharerau and others⁵⁷, fishing is often undertaken by tangata whenua to put “food on the table” – while

⁵⁰ Evidence of Mr Reaburn – paragraphs 7.17 – 7.31 and Evidence of Dr Bellingham – paragraph 5.2.

⁵¹ Evidence of Mr Griffin – paragraph 70.

⁵² Evidence in Chief – Mr Rihari, Wharerau, Edwards, Knight, Volkerling, Drummond.

⁵³ Evidence in Chief – Ms McKinnon 14 May 2021.

⁵⁴ Evidence of Mr Clark – paragraphs 22 – 48.

⁵⁵ Evidence of Mr Drummond – paragraphs 80-104.

⁵⁶ Evidence of Dr Denne.

⁵⁷ Evidence of Mr Wharea, Mr Wharerau, Mr Rihari, Mr Volkerling, Mr Knight and Mr Drummond.

in legal terms this is undertaken in reliance on the Amateur Fishing Regs and is therefore classified to as 'recreational' fishing (rather than customary non-commercial fishing), my understanding is that it is not considered to be recreational by those doing the fishing (or the eating) Accordingly restrictions on "recreational" fishing is not just an effect on recreational activities, but an effect on food gathering and supply. Mr Clark⁵⁸ and Mr Drummond⁵⁹ further outline the potential impacts on current and future fishing activities including the value of fish caught, and benefit to the local economy.

89. These are all matters that I would have expected to have been included in a robust section 32 assessment.
90. Dr Bellingham⁶⁰ also recommends a range of additional policies. I consider that his section 32AA assessment also falls short of what is required to support a proposal of the scale and significance of that proposed for the Te Hā o Tangaroa Management Areas, particularly given the impact on the Fishing Industry Parties and Māori Fishing Interest Parties and other potential interested parties.

CONCLUSION

91. My overall conclusions are as follows:
 - (a) The provisions proposed by the appellants and Te Uri o Hikihiki were not evident at the time of the Hearing Panel's decision on the Northland PRP. As a result, the process followed falls significantly short of what would be achieved if a Schedule 1 process had been followed;
 - (b) Given the interests of the Māori Fishing Interest Parties and their role as kaitiaki in managing the fishing interests provided to them through Treaty redress and the relationship of tangata whenua with their ancestral lands, water, sites, waahi tapu and other taonga, the proposal

⁵⁸ Evidence of Mr Clark – paragraphs 123 – 149.

⁵⁹ Evidence of Mr Drummond – paragraphs 113 – 118.

⁶⁰ Evidence of Dr Bellingham.

does not accord with sections 6(e),7(a) and 8 of the RMA including as articulated in the NZCPS and RPS.;

- (c) The proposal does not give effect to the NZCPS or the RPS. It has focussed exclusively on protecting biodiversity / natural values and has not considered the obligations to engage with tangata whenua and to incorporate a "Maori world view".
- (d) The section 32AA evaluation has not provided a sufficiently fulsome consideration of alternatives, costs and benefits, efficient process and consultation with tangata whenua and interested / affected parties.
- (e) Overall, I consider that the proposed objectives, policies and rules proposed in Te Hā o Tangaroa Protection Areas and Te Ha o Tangaroa Management Areas have not been sufficiently justified and that a number of important considerations have been overlooked.



P H Mitchell
~~21 May 2021~~
22 June 2021

APPENDIX A

FISHING RESTRICTIONS PROPOSED BY THE APPELLANTS

APPENDIX A

FISHING RESTRICTIONS PROPOSED BY THE APPELLANTS			
AREA	PERMITTED ACTIVITIES	PROHIBITED ACTIVITIES	Existing Fishing Restrictions in Place
All marine protection areas	<p>Rule C.1.9.1 Temporary or permanent minor damage or destruction or removal of fish, aquatic life, or seaweed in a Te Hā o Tangaroa Protection Area.</p> <p>(a) All Sub-Areas (Sub-Area A, Sub-Area A buffer zone Sub-Area Band Sub-Area C) -i - vii</p> <p>The following activities are permitted:</p> <ul style="list-style-type: none"> - Kina/ sea urchin harvest - Resource consent monitoring undertaken in accordance with resource consent conditions - Marine biosecurity incursion investigation and/or response - Wildlife rescue - Monitoring and enforcement carried out by a regulatory agency - Mooring, anchoring, and hauling small vessels ashore - Scientific research, conservation activities and monitoring undertaken by, under the supervision of, or on behalf of, the following entities: 	See particular restrictions applying to each area below	<p>Drift netting is entirely prohibited</p> <p>No trawlers in excess of 46m in length</p> <p>For any trawl nets a minimum codend mesh size of at least 100mm, unless otherwise authorised (this exemption provision was introduced to allow for the use of the nets developed by the Precision Harvesting initiative).</p> <p>Prohibition on the use of wire traces in any form of longlining.</p> <p>Minimum length and minimum net mesh size are specified for a number of finfish species.</p> <p>Prohibition of shark finning.</p> <p>Specification for the size, soak times and setting of setnets.</p> <p>Commercial fishing in the appeal areas is subject to the Fisheries (Auckland and</p>

FISHING RESTRICTIONS PROPOSED BY THE APPELLANTS			
AREA	PERMITTED ACTIVITIES	PROHIBITED ACTIVITIES	Existing Fishing Restrictions in Place
	<ul style="list-style-type: none"> I. Crown research institutes II. Recognised Māori research entities III. Tertiary education providers IV. Regional Councils V. Department of Conservation VI. Ministry for Primary Industries VII. An incorporated society having as one if its objectives the scientific study of marine life or natural history. 		<p>Kermadec Areas Commercial Fishing) Regulations 1986⁶¹.</p> <p>All bottom longlining (BLL) in New Zealand waters is subject to the fisher operating seabird mitigation in accordance with the Fisheries (Seabird Mitigation Measures – Bottom Longlines) Circular 2020 14 (<i>BLL Circular</i>).⁶²</p> <p>All surface longlining is subject to fisher operating seabird mitigation in accordance with the Fisheries (Seabird Mitigation Measures – Bottom Longlines) Circular 2019 (<i>SLL Circular</i>).⁶³</p> <p>Kina harvest is regulated.</p>
<p>Maunganui Bay—Oke Bay Rāhui Tapu (Sub-Area A)</p> <p>6.25Km²</p>	<p>Rule C.1.9.1 (a)</p> <p>Permitted activities as above (kina, research, etc)</p>	<p>Rule C.1.9.2 (a)</p> <p>All types of fishing are prohibited (except for the list as permitted above)</p>	<p>Maunganui Bay is closed to all fishing (except kina). The</p>

⁶¹ EIC- Mr Clark pages 15-18.

⁶² Fisheries (Seabird Mitigation Measures – Bottom Longlines) Circular 2020 (Notice No. MPI 1174).

⁶³ Fisheries (Seabird Mitigation Measures—Surface Longlines) Circular 2019 (Notice No. MPI 1104).

FISHING RESTRICTIONS PROPOSED BY THE APPELLANTS			
AREA	PERMITTED ACTIVITIES	PROHIBITED ACTIVITIES	Existing Fishing Restrictions in Place
Maunganui - Oke Bay Rahui Tapu (Area A)			current closure expires on 13 October 2022 ⁶⁴ . No commercial take of scallops Trawling and danish seining is prohibited. Commercial and recreational set netting around Twins Rocks.
Maunganui Bay — Oke Bay Bay Rāhui Tapu Buffer Area (Sub-Area A buffer) 4.34km ²	Rule C.1.9.1 in addition to (a) above (b) (i) and (ii) Permitted activities as above (kina, research, etc) (b)(i) Hand fishing with one line and one hook per person is permitted. (b)(ii) Hand gathering of fish that does not involve the use of scuba equipment or any implement (such as a knife, hook, or spear).	Rule C.1.9.2 (b) All other types of fishing (except those listed as permitted above).	Trawling and danish seining is prohibited. No commercial take of scallops. Bottom lining is subject to the seabird migration requirements. Commercial and recreational set netting around Twins Rocks. Specific fishing restrictions around Kohangaatara Point.

⁶⁴ EIC – Mr Clark pages 15-18.

FISHING RESTRICTIONS PROPOSED BY THE APPELLANTS			
AREA	PERMITTED ACTIVITIES	PROHIBITED ACTIVITIES	Existing Fishing Restrictions in Place
<p>Ipipiri Benthic Protection Area (Sub Area B) 50km² Ipipiri moana mara tipu rohe (Area B)</p>	<p>Rule C.1.9.1(c) In addition to (a) above Any activity involving the temporary or permanent damage or destruction or removal of fish, aquatic life or seaweed that is not a prohibited activity.</p>	<p>C.1.9.2 (c) Fishing by the following methods:</p> <ul style="list-style-type: none"> - Bottom trawling - Bottom pair trawling - Danish seining - Purse seining - Longlining without the use of approved seabird mitigation devices - Drift netting - Scallop or other dredging 	<p>No fishing may be undertaken between 1 October – 30 April except for rock lobster. Trawling and danish seining is prohibited within parts of Sub - Area B and C⁶⁵. No commercial scallop takes. No commercial and recreational set netting around Whale Rock .</p>
<p>Ipipiri- Rakaumangamanga Protection Area (Sub Area C) 500km² Rakaumangmanga moana mara tipu rohe (Area C)</p>	<p>Rule C.1.9.1(d) In addition to (a) above Any activity involving the temporary or permanent damage or destruction or removal of fish, aquatic life or seaweed that is not a prohibited activity.</p>	<p>C.1.9.2 (d) Fishing by the following methods:</p> <ul style="list-style-type: none"> - Bottom trawling - Bottom pair trawling - Danish seining - Purse seining 	<p>The areas of Sub-Area C that is within the inner Bay of Islands has the same restrictions as set out for Sub-Area B above including: No commercial scallop take in the inner waters of Sub-Area C.</p>

⁶⁵ EIC Mr Clark page 16-18.

FISHING RESTRICTIONS PROPOSED BY THE APPELLANTS			
AREA	PERMITTED ACTIVITIES	PROHIBITED ACTIVITIES	Existing Fishing Restrictions in Place
		<ul style="list-style-type: none"> - Longlining without the use of approved seabird mitigation devices - Drift netting 	<p>No use of any commercial or recreational net around Cape Brett, Ninepin or Bird Rock.</p> <p>No commercial and recreational set netting around Cape Wiwiki, Twins Rock, Whale Rock.</p>

APPENDIX B

FISHING RESTRICTIONS PROPOSED BY TE URI O HIKIHIKI

APPENDIX B

FISHING RESTRICTIONS PROPOSED BY TE URI O HIKIHIKI				
	PERMITTED ACTIVITIES	RESOURCE CONSENT REQUIRED DISCRETIONARY/ NON-COMPLYING	PROHIBITED ACTIVITIES	Existing Restrictions in Place
All marine protection areas	<p>Rule C.1.9.1 Temporary or permanent minor damage or destruction or removal of plants or animals in a Te Mana o Tangaroa Protection Area.</p> <p>The following activities are permitted in Te Hā o Tangaroa / Te Mana o Tangaroa Protection Area:</p> <ul style="list-style-type: none"> - Kina management - Customary marine management by hapū, whanau or marae as provided for in an Area B management plan - Resource consent monitoring undertaken in accordance with resource consent conditions - Marine biosecurity incursion investigation and/or response - Wildlife rescue 	See particular restrictions applying to each area below.	See particular restrictions applying to each area below	<p>Drift netting is entirely prohibited</p> <p>No trawlers in excess of 46m in length</p> <p>For any trawl nets a minimum codend mesh size of at least 100mm, unless otherwise authorised (this exemption provision was introduced to allow for the use of the nets developed by the Precision Harvesting initiative).</p> <p>Prohibition on the use of wire traces in any form of longlining.</p> <p>Minimum length and minimum net mesh size are specified for a number of finfish species.</p>

FISHING RESTRICTIONS PROPOSED BY TE URI O HIKIHIKI				
	PERMITTED ACTIVITIES	RESOURCE CONSENT REQUIRED DISCRETIONARY/ NON- COMPLYING	PROHIBITED ACTIVITIES	Existing Restrictions in Place
	<ul style="list-style-type: none"> - Monitoring and enforcement carried out by a regulatory agency - Mooring, anchoring and hauling small vessels ashore - Scientific research, conservation activities and monitoring undertaken by, under the supervision of, or on behalf of, the following entities: <ol style="list-style-type: none"> I. Crown research institutes II. Recognised Māori research entities III. Tertiary education providers IV. Regional Councils V. Department of Conservation 			<p>Prohibition of shark finning.</p> <p>Specification for the size, soak times and setting of setnets.</p> <p>Kina harvest is regulated.</p> <p>Commercial fishing in the appeal areas is subject to the Fisheries (Auckland and Kermadec Areas Commercial Fishing) Regulations 1986.⁶⁶</p> <p>All bottom longlining (BLL) in New Zealand waters is subject to the fisher operating seabird mitigation in accordance with the Fisheries (Seabird Mitigation Measures – Bottom Longlines) Circular 2020 14 (<i>BLL Circular</i>).⁶⁷</p>

⁶⁶ EIC Mr Clark – pages 15-18

⁶⁷ Fisheries (Seabird Mitigation Measures – Bottom Longlines) Circular 2020 (Notice No. MPI 1174).

FISHING RESTRICTIONS PROPOSED BY TE URI O HIKIHIKI				
	PERMITTED ACTIVITIES	RESOURCE CONSENT REQUIRED DISCRETIONARY/ NON- COMPLYING	PROHIBITED ACTIVITIES	Existing Restrictions in Place
	<p>VI. Ministry for Primary Industries</p> <p>VIII. An incorporated society or trust having as one of its objectives the scientific study of marine life or natural history, or the maintenance of mātauranga Māori</p>			All surface longlining is subject to fisher operating seabird mitigation in accordance with the Fisheries (Seabird Mitigation Measures – Bottom Longlines) Circular 2019 (<i>SLL Circular</i>). ⁶⁸
<p>Mimiwhangata Rāhui Tapu Protection Area (Sub Area A)</p> <p>Increasing from 19km² to 47km²</p> <p>Mimiwhangata Rāhui Tapu (Area A)</p>	Rule C.1.9.1. Permitted activities as above (kina, research, etc)		<p>Rule C.1.9.2.1 Temporary or permanent damage of the seabed or destruction or removal of fish, aquatic life or seaweed that is not permitted above.</p> <p>Rule C.1.9.2.2 Fishing of the following species of shark: mangō</p>	<p>Commercial fishing or seaweed take from Mimiwhangata Peninsula Reserve is prohibited.⁶⁹</p> <p>Limits on commercial scallop take.</p>

⁶⁸ Fisheries (Seabird Mitigation Measures—Surface Longlines) Circular 2019 (Notice No. MPI 1104).

⁶⁹ EIC Mr Clark page 15-18.

FISHING RESTRICTIONS PROPOSED BY TE URI O HIKIHIKI				
	PERMITTED ACTIVITIES	RESOURCE CONSENT REQUIRED DISCRETIONARY/ NON- COMPLYING	PROHIBITED ACTIVIIES	Existing Restrictions in Place
			taniwha/ great white, mako, thresher, blue, ururoa/ hammerhead, and bronze whaler.	
Mimiwhangata Rāhui Tapu Buffer Area West 3.36km² East 6.47km² Mimiwhangata Rāhui Tapu Buffer Area	Permitted activities as above (kina, research, etc)	<p>C.1.9.3.3 Any activity involving the temporary or permanent damage of the seabed or destruction or removal of fish, aquatic life or seaweed that is not a permitted activity and is not a prohibited activity in is a discretionary activity.</p> <p>C.1.9.3.4 Fishing not provided for in the management plan for Mimiwhangata Buffer Area West and East will be non-complying.</p> <p>Rule C.1.9.3.5 The Management Plan(s) will</p>	<p>C.1.9.3.1 Temporary or permanent damage or destruction or removal of plants or animals in a Te Mana o Tangaroa Protection Area- Areas other than Sub-Area A</p> <p>Fishing by the following methods:</p> <ul style="list-style-type: none"> - Bottom trawling - Bottom pair trawling - Danish seining - Purse seining - Longlining without the use 	<p>Limits on commercial scallop take.</p> <p>Within part of the buffer area commercial fishing or seaweed take prohibited.⁷⁰</p>

⁷⁰ EIC Mr Clark – page 18.

FISHING RESTRICTIONS PROPOSED BY TE URI O HIKIHIKI				
	PERMITTED ACTIVITIES	RESOURCE CONSENT REQUIRED DISCRETIONARY/ NON-COMPLYING	PROHIBITED ACTIVITIES	Existing Restrictions in Place
		provide site specific rules for the matters in Rule C.1.9.1(a-i).	<p>of approved seabird mitigation devices, other technology to avoid seabird capture, and on-board monitoring cameras and devices</p> <ul style="list-style-type: none"> - Scallop dredging - Removal of aquatic life and seaweed. 	
<p>Te Au o Morunga (Sub Area B) 620km²</p>	<p>C.1.9.3.1 Permitted activities as above (kina, research, etc)</p>	<p>Resource consent required for all types of fishing except for certain methods (see Prohibited column) – discretionary.</p>	<p>Fishing by the following methods:</p> <ul style="list-style-type: none"> - Bottom trawling 	<p>Limit on commercial scallop take.⁷¹</p>

⁷¹ EIC Mr Clark pages 17-18.

FISHING RESTRICTIONS PROPOSED BY TE URI O HIKIHIKI				
	PERMITTED ACTIVITIES	RESOURCE CONSENT REQUIRED DISCRETIONARY/ NON- COMPLYING	PROHIBITED ACTIVITIES	Existing Restrictions in Place
Te Au o Morunga Protection Area (Area C)			<ul style="list-style-type: none"> - Bottom pair trawling - Danish seining - Purse seining - Longlining without the use of approved seabird mitigation devices, other technology to avoid seabird capture, and on-board monitoring cameras and devices - Scallop Dredging 	<p>Use of any commercial or recreational net around Bird Rock.</p> <p>All commercial set netting is prohibited within 1 nautical mile radius from the eastern most point of Cape Wikik and Te Nunuhe Rock and Motutara.</p> <p>Commercial scallop take is prohibited in Whangaruru Harbour.</p> <p>No commercial fisher can use a box or teichi net, purse seine net, Danish siene net, trawl net or lampara net or set nets of a total length exceeding 1000metres within Whangaruru Harbour.</p>

APPENDIX C

**RELEVANT PROVISIONS OF THE NEW ZEALAND COASTAL POLICY
STATEMENT**

APPENDIX C

EXTRACT FROM THE NEW ZEALAND COASTAL POLICY STATEMENT 2010

OBJECTIVE 1

To safeguard the integrity, form, functioning and resilience of the coastal environment and sustain its ecosystems, including marine and intertidal areas, estuaries, dunes and land, by:

- maintaining or enhancing natural biological and physical processes in the coastal environment and recognising their dynamic, complex and interdependent nature;
- protecting representative or significant natural ecosystems and sites of biological importance and maintaining the diversity of New Zealand's indigenous coastal flora and fauna; and
- maintaining coastal water quality, and enhancing it where it has deteriorated from what would otherwise be its natural condition, with significant adverse effects on ecology and habitat, because of discharges associated with human activity.

OBJECTIVE 2

To preserve the natural character of the coastal environment and protect natural features and landscape values through:

- recognising the characteristics and qualities that contribute to natural character, natural features and landscape values and their location and distribution;
- identifying those areas where various forms of subdivision, use, and development would be inappropriate and protecting them from such activities; and
- encouraging restoration of the coastal environment.

OBJECTIVE 3

To take account of the principles of the Treaty of Waitangi, recognise the role of tangata whenua as kaitiaki and provide for tangata whenua involvement in management of the coastal environment by:

- recognising the ongoing and enduring relationship of tangata whenua over their lands, rohe and resources;
- promoting meaningful relationships and interactions between tangata whenua and persons exercising functions and powers under the Act;

- incorporating mātauranga Māori into sustainable management practices; and
- recognising and protecting characteristics of the coastal environment that are of special value to tangata whenua.

OBJECTIVE 4

To maintain and enhance the public open space qualities and recreation opportunities of the coastal environment by:

- recognising that the coastal marine area is an extensive area of public space for the public to use and enjoy;
- maintaining and enhancing public walking access to and along the coastal marine area without charge, and where there are exceptional reasons that mean this is not practicable providing alternative linking access close to the coastal marine area; and
- recognising the potential for coastal processes, including those likely to be affected by climate change, to restrict access to the coastal environment and the need to ensure that public access is maintained even when the coastal marine area advances inland.

OBJECTIVE 6

To enable people and communities to provide for their social, economic, and cultural wellbeing and their health and safety, through subdivision, use, and development, recognising that:

- the protection of the values of the coastal environment does not preclude use and development in appropriate places and forms, and within appropriate limits;
- some uses and developments which depend upon the use of natural and physical resources in the coastal environment are important to the social, economic and cultural wellbeing of people and communities;
- functionally some uses and developments can only be located on the coast or in the coastal marine area;
- the coastal environment contains renewable energy resources of significant value;
- the protection of habitats of living marine resources contributes to the social, economic and cultural wellbeing of people and communities;
- the potential to protect, use, and develop natural and physical resources in the coastal marine area should not be compromised by activities on land;
- the proportion of the coastal marine area under any formal protection is small and therefore management under the Act is an important means by

which the natural resources of the coastal marine area can be protected;
and

- historic heritage in the coastal environment is extensive but not fully known, and vulnerable to loss or damage from inappropriate subdivision, use, and development.

OBJECTIVE 7

To ensure that management of the coastal environment recognises and provides for New Zealand's international obligations regarding the coastal environment, including the coastal marine area.

POLICY 2: THE TREATY OF WAITANGI, TANGATA WHENUA AND MĀORI HERITAGE

In taking account of the principles of the Treaty of Waitangi (Te Tiriti o Waitangi), and kaitiakitanga, in relation to the coastal environment:

- (a) recognise that tangata whenua have traditional and continuing cultural relationships with areas of the coastal environment, including places where they have lived and fished for generations;
- (b) involve iwi authorities or hapū on behalf of tangata whenua in the preparation of regional policy statements, and plans, by undertaking effective consultation with tangata whenua; with such consultation to be early, meaningful, and as far as practicable in accordance with tikanga Māori;
- (c) with the consent of tangata whenua and as far as practicable in accordance with tikanga Māori, incorporate mātauranga Māori¹ in regional policy statements, in plans, and in the consideration of applications for resource consents, notices of requirement for designation and private plan changes;
- (d) provide opportunities in appropriate circumstances for Māori involvement in decision making, for example when a consent application or notice of requirement is dealing with cultural localities or issues of cultural significance, and Māori experts, including pūkenga², may have knowledge not otherwise available;
- (e) take into account any relevant iwi resource management plan and any other relevant planning document recognised by the appropriate iwi authority or hapū and lodged with the council, to the extent that its content has a bearing on resource management issues in the region or district; and
 - (i) where appropriate incorporate references to, or material from, iwi resource management plans in regional policy statements and in plans; and
 - (ii) consider providing practical assistance to iwi or hapū who have indicated a wish to develop iwi resource management plans;

- (f) provide for opportunities for tangata whenua to exercise kaitiakitanga over waters, forests, lands, and fisheries in the coastal environment through such measures as:
 - (i) bringing cultural understanding to monitoring of natural resources;
 - (ii) providing appropriate methods for the management, maintenance and protection of the taonga of tangata whenua;
 - (iii) having regard to regulations, rules or bylaws relating to ensuring sustainability of fisheries resources such as taiāpure, mahinga mātaimai or other non commercial Māori customary fishing; and
- (g) in consultation and collaboration with tangata whenua, working as far as practicable in accordance with tikanga Māori, and recognising that tangata whenua have the right to choose not to identify places or values of historic, cultural or spiritual significance or special value:
 - (i) recognise the importance of Māori cultural and heritage values through such methods as historic heritage, landscape and cultural impact assessments; and
 - (ii) provide for the identification, assessment, protection and management of areas or sites of significance or special value to Māori, including by historic analysis and archaeological survey and the development of methods such as alert layers and predictive methodologies for identifying areas of high potential for undiscovered Māori heritage, for example coastal pā or fishing villages.

POLICY 3: PRECAUTIONARY APPROACH

- (1) Adopt a precautionary approach towards proposed activities whose effects on the coastal environment are uncertain, unknown, or little understood, but potentially significantly adverse.
- (2) In particular, adopt a precautionary approach to use and management of coastal resources potentially vulnerable to effects from climate change, so that:
 - (a) avoidable social and economic loss and harm to communities does not occur;
 - (b) natural adjustments for coastal processes, natural defences, ecosystems, habitat and species are allowed to occur; and
 - (c) the natural character, public access, amenity and other values of the coastal environment meet the needs of future generations.

POLICY 4: INTEGRATION

Provide for the integrated management of natural and physical resources in the coastal environment, and activities that affect the coastal environment. This requires:

- (a) co-ordinated management or control of activities within the coastal environment, and which could cross administrative boundaries, particularly:
 - (i) the local authority boundary between the coastal marine area and land;
 - (ii) local authority boundaries within the coastal environment, both within the coastal marine area and on land; and
 - (iii) where hapū or iwi boundaries or rohe cross local authority boundaries;
- (b) working collaboratively with other bodies and agencies with responsibilities and functions relevant to resource management, such as where land or waters are held or managed for conservation purposes; and
- (c) particular consideration of situations where:
 - (i) subdivision, use, or development and its effects above or below the line of mean high water springs will require, or is likely to result in, associated use or development that crosses the line of mean high water springs; or
 - (ii) public use and enjoyment of public space in the coastal environment is affected, or is likely to be affected; or
 - (iii) development or land management practices may be affected by physical changes to the coastal environment or potential inundation from coastal hazards, including as a result of climate change; or
 - (iv) land use activities affect, or are likely to affect, water quality in the coastal environment and marine ecosystems through increasing sedimentation; or
 - (v) significant adverse cumulative effects are occurring, or can be anticipated.

POLICY 5: LAND OR WATERS MANAGED OR HELD UNDER OTHER ACTS

- (1) Consider effects on land or waters in the coastal environment held or managed under:
 - (a) the Conservation Act 1987 and any Act listed in the 1st Schedule to that Act; or
 - (b) other Acts for conservation or protection purposes; and, having regard to the purposes for which the land or waters are held or managed:
 - (c) avoid adverse effects of activities that are significant in relation to those purposes; and

- (d) otherwise avoid, remedy or mitigate adverse effects of activities in relation to those purposes.
- (2) Have regard to publicly notified proposals for statutory protection of land or waters in the coastal environment and the adverse effects of activities on the purposes of that proposed statutory protection.

POLICY 6: ACTIVITIES IN THE COASTAL ENVIRONMENT

- (1) In relation to the coastal environment:
 - (a) Recognise that the provision of infrastructure, the supply and transport of energy including the generation and transmission of electricity, and the extraction of minerals are activities important to the social, economic and cultural well-being of people and communities;
 - (b) consider the rate at which built development and the associated public infrastructure should be enabled to provide for the reasonably foreseeable needs of population growth without compromising the other values of the coastal environment;
 - (c) encourage the consolidation of existing coastal settlements and urban areas where this will contribute to the avoidance or mitigation of sprawling or sporadic patterns of settlement and urban growth;
 - (d) recognise tangata whenua needs for papakāinga³, marae and associated developments and make appropriate provision for them;
 - (e) consider where and how built development on land should be controlled so that it does not compromise activities of national or regional importance that have a functional need to locate and operate in the coastal marine area;
 - (f) consider where development that maintains the character of the existing built environment should be encouraged, and where development resulting in a change in character would be acceptable;
 - (g) take into account the potential of renewable resources in the coastal environment, such as energy from wind, waves, currents and tides, to meet the reasonably foreseeable needs of future generations;
 - (h) consider how adverse visual impacts of development can be avoided in areas sensitive to such effects, such as headlands and prominent ridgelines, and as far as practicable and reasonable apply controls or conditions to avoid those effects;
 - (i) set back development from the coastal marine area and other water bodies, where practicable and reasonable, to protect the natural character, open space, public access and amenity values of the coastal environment; and

- (j) where appropriate, buffer areas and sites of significant indigenous biological diversity, or historic heritage value.
- (2) Additionally, in relation to the coastal marine area:
- (a) recognise potential contributions to the social, economic and cultural wellbeing of people and communities from use and development of the coastal marine area, including the potential for renewable marine energy to contribute to meeting the energy needs of future generations;
 - (b) recognise the need to maintain and enhance the public open space and recreation qualities and values of the coastal marine area;
 - (c) recognise that there are activities that have a functional need to be located in the coastal marine area, and provide for those activities in appropriate places;
 - (d) recognise that activities that do not have a functional need for location in the coastal marine area generally should not be located there; and
 - (e) promote the efficient use of occupied space, including by:
 - (i) requiring that structures be made available for public or multiple use wherever reasonable and practicable;
 - (ii) requiring the removal of any abandoned or redundant structure that has no heritage, amenity or reuse value; and
 - (iii) considering whether consent conditions should be applied to ensure that space occupied for an activity is used for that purpose effectively and without unreasonable delay.

POLICY 7: STRATEGIC PLANNING

- (1) In preparing regional policy statements, and plans:
- (a) consider where, how and when to provide for future residential, rural residential, settlement, urban development and other activities in the coastal environment at a regional and district level, and:
 - (b) identify areas of the coastal environment where particular activities and forms of subdivision, use and development:
 - (i) are inappropriate; and
 - (ii) may be inappropriate without the consideration of effects through a resource consent application, notice of requirement for designation or Schedule 1 of the Act process;
 and provide protection from inappropriate subdivision, use, and development in these areas through objectives, policies and rules.
- (2) Identify in regional policy statements, and plans, coastal processes, resources or values that are under threat or at significant risk from adverse cumulative effects. Include provisions in plans to manage these effects.

Where practicable, in plans, set thresholds (including zones, standards or targets), or specify acceptable limits to change, to assist in determining when activities causing adverse cumulative effects are to be avoided.

POLICY 11: INDIGENOUS BIOLOGICAL DIVERSITY (BIODIVERSITY)

To protect indigenous biological diversity in the coastal environment:

- (a) avoid adverse effects of activities on:
 - (i) indigenous taxa⁷² that are listed as threatened⁷³ or at risk in the New Zealand Threat Classification System lists;
 - (ii) taxa that are listed by the International Union for Conservation of Nature and Natural Resources as threatened;
 - (iii) indigenous ecosystems and vegetation types that are threatened in the coastal environment, or are naturally rare⁷⁴;
 - (iv) habitats of indigenous species where the species are at the limit of their natural range, or are naturally rare;
 - (v) areas containing nationally significant examples of indigenous community types; and
 - (vi) areas set aside for full or partial protection of indigenous biological diversity under other legislation; and
- (b) avoid significant adverse effects and avoid, remedy or mitigate other adverse effects of activities on:
 - (i) areas of predominantly indigenous vegetation in the coastal environment;
 - (ii) habitats in the coastal environment that are important during the vulnerable life stages of indigenous species;
 - (iii) indigenous ecosystems and habitats that are only found in the coastal environment and are particularly vulnerable to modification, including estuaries, lagoons, coastal wetlands, dunelands, intertidal zones, rocky reef systems, eelgrass and saltmarsh;
 - (iv) habitats of indigenous species in the coastal environment that are important for recreational, commercial, traditional or cultural purposes;
 - (v) habitats, including areas and routes, important to migratory species; and
 - (vi) ecological corridors, and areas important for linking or maintaining biological values identified under this policy.

⁷² Taxa: as defined in the Glossary.

⁷³ Examples of taxa listed as threatened are: Maui's dolphin, Hector's dolphin, New Zealand fairy tern, Southern New Zealand dotterel.

⁷⁴ Naturally rare: as defined in the Glossary.

POLICY 12: HARMFUL AQUATIC ORGANISMS

- (1) Provide in regional policy statements and in plans, as far as practicable, for the control of activities in or near the coastal marine area that could have adverse effects on the coastal environment by causing harmful aquatic organisms⁷⁵ to be released or otherwise spread, and include conditions in resource consents, where relevant, to assist with managing the risk of such effects occurring.
- (2) Recognise that activities relevant to (1) include:
- (a) the introduction of structures likely to be contaminated with harmful aquatic organisms;
 - (b) the discharge or disposal of organic material from dredging, or from vessels and structures, whether during maintenance, cleaning or otherwise; and whether in the coastal marine area or on land;
 - (c) the provision and ongoing maintenance of moorings, marina berths, jetties and wharves; and
 - (d) the establishment and relocation of equipment and stock required for or associated with aquaculture.

POLICY 13: PRESERVATION OF NATURAL CHARACTER

- (1) To preserve the natural character of the coastal environment and to protect it from inappropriate subdivision, use, and development:
- (a) avoid adverse effects of activities on natural character in areas of the coastal environment with outstanding natural character; and
 - (b) avoid significant adverse effects and avoid, remedy or mitigate other adverse effects of activities on natural character in all other areas of the coastal environment;
 - including by:
 - (c) assessing the natural character of the coastal environment of the region or district, by mapping or otherwise identifying at least areas of high natural character; and
 - (d) ensuring that regional policy statements, and plans, identify areas where preserving natural character requires objectives, policies and rules, and include those provisions.
- (2) Recognise that natural character is not the same as natural features and landscapes or amenity values and may include matters such as:
- (a) natural elements, processes and patterns;
 - (b) biophysical, ecological, geological and geomorphological aspects;
 - (c) natural landforms such as headlands, peninsulas, cliffs, dunes, wetlands, reefs, freshwater springs and surf breaks;

⁷⁵ Harmful aquatic organisms: as defined in the Glossary.

- (d) the natural movement of water and sediment;
- (e) the natural darkness of the night sky;
- (f) places or areas that are wild or scenic;
- (g) a range of natural character from pristine to modified; and
- (h) experiential attributes, including the sounds and smell of the sea; and their context or setting.

POLICY 14: RESTORATION OF NATURAL CHARACTER

Promote restoration or rehabilitation of the natural character of the coastal environment, including by:

- (a) identifying areas and opportunities for restoration or rehabilitation;
- (b) providing policies, rules and other methods directed at restoration or rehabilitation in regional policy statements, and plans;
- (c) where practicable, imposing or reviewing restoration or rehabilitation conditions on resource consents and designations, including for the continuation of activities; and recognising that where degraded areas of the coastal environment require restoration or rehabilitation, possible approaches include:
 - (i) restoring indigenous habitats and ecosystems, using local genetic stock where practicable; or
 - (ii) encouraging natural regeneration of indigenous species, recognising the need for effective weed and animal pest management; or
 - (iii) creating or enhancing habitat for indigenous species; or
 - (iv) rehabilitating dunes and other natural coastal features or processes, including saline wetlands and intertidal saltmarsh; or
 - (v) restoring and protecting riparian and intertidal margins; or
 - (vi) reducing or eliminating discharges of contaminants; or
 - (vii) removing redundant structures and materials that have been assessed to have minimal heritage or amenity values and when the removal is authorised by required permits, including an archaeological authority under the Historic Places Act 1993; or
 - (viii) restoring cultural landscape features; or
 - (ix) redesign of structures that interfere with ecosystem processes; or
 - (x) decommissioning or restoring historic landfill and other contaminated sites which are, or have the potential to, leach material into the coastal marine area.

POLICY 15: NATURAL FEATURES AND NATURAL LANDSCAPES

To protect the natural features and natural landscapes (including seascapes) of the coastal environment from inappropriate subdivision, use, and development:

- (a) avoid adverse effects of activities on outstanding natural features and outstanding natural landscapes in the coastal environment; and
- (b) avoid significant adverse effects and avoid, remedy, or mitigate other adverse effects of activities on other natural features and natural landscapes in the coastal environment; including by:
 - (c) identifying and assessing the natural features and natural landscapes of the coastal environment of the region or district, at minimum by land typing, soil characterisation and landscape characterisation and having regard to:
 - (i) natural science factors, including geological, topographical, ecological and dynamic components;
 - (ii) the presence of water including in seas, lakes, rivers and streams;
 - (iii) legibility of expressiveness—how obviously the feature or landscape demonstrates its formative processes;
 - (iv) aesthetic values including memorability and naturalness;
 - (v) vegetation (native and exotic);
 - (vi) transient values, including presence of wildlife or other values at certain times of the day or year;
 - (vii) whether the values are shared and recognised;
 - (viii) cultural and spiritual values for tangata whenua, identified by working, as far as practicable, in accordance with tikanga Māori; including their expression as cultural landscapes and features;
 - (ix) historical and heritage associations; and
 - (x) wild or scenic values;
- (d) ensuring that regional policy statements, and plans, map or otherwise identify areas where the protection of natural features and natural landscapes requires objectives, policies and rules; and
- (e) including the objectives, policies and rules required by (d) in plans.

APPENDIX D

**RELEVANT PROVISIONS OF THE NORTHLAND REGIONAL POLICY
STATEMENT**

APPENDIX D

Regional Policy Statement for Northland (“RPS”)

Issue 2.5 – Issues of significance to tangata whenua – participation in resource management

The following issues have been identified by iwi authorities as regionally significant as they relate to tangata whenua participation in resource management:

- (a) There is inadequate provision for the early and effective participation of tangata whenua as partners in regional council resource management decision-making processes affecting natural and physical resources;
- (b) The lack of recognition and provision for the sustainable management of Māori land and returned Treaty settlement assets by tangata whenua;
- (c) Current use of Māori land may not provide for the sustainable social, cultural, economic and environmental wellbeing of tangata whenua. In particular, the importance and role of marae and papa kāinga has not been acknowledged in the past by the regional and district councils;
- (d) Mātauranga Māori is not sufficiently recognised and used in the ongoing management and monitoring of natural and physical resources; and (e) The inclusion of Māori concepts, values and practices within resource management processes is frequently limited and ineffective.

Issue 2.6 – Issues of significance to tangata whenua – natural and physical resources

The following issues have been identified by iwi authorities as regionally significant as they relate to the state of, and pressures on, natural and physical resources:

- (a) The decline of the mauri of natural resources (in particular water and land). (See also Issue 2.1 – Fresh and coastal water);
- (b) The decline of mahinga kai, particularly kai moana harvesting sites, is impacting on the ability of tangata whenua to feed their whanau and manaaki manuhiri. (See also Issue 2.1 – Fresh and coastal water);
- (c) Some tangata whenua in rural areas are drinking untreated water from streams and rivers. (See also Issue 2.1 – Fresh and coastal water);
- (d) Land use and development can lead to damage, destruction and loss of access to wāhi tapu, sites of customary value and other ancestral sites and taonga which Māori have a special relationship with. (See also Issue 2.8 – Significant natural areas, features / landscapes and historic heritage);
- (e) The loss of indigenous biodiversity, particularly where it negatively impacts on the ability of tangata whenua to carry out cultural and traditional activities. (See also Issue 2.2 – Indigenous ecosystems and biodiversity);
- (f) The impacts of climate change. (See also Issue 2.7 – Natural hazards); and

- (g) The use of genetic engineering and the release of genetically modified organisms to the environment.

Objective 3.4 – Indigenous ecosystems and biodiversity

Safeguard Northland’s ecological integrity by:

- (a) Protecting areas of significant indigenous vegetation and significant habitats of indigenous fauna;
- (b) Maintaining the extent and diversity of indigenous ecosystems and habitats in the region; and
- (c) Where practicable, enhancing indigenous ecosystems and habitats, particularly where this contributes to the reduction in the overall threat status of regionally and nationally threatened species.

Objective 3.5 – Enabling economic wellbeing

Northland’s natural and physical resources are sustainably managed in a way that is attractive for business and investment that will improve the economic wellbeing of Northland and its communities.

Objective 3.12 – Tangata whenua role in decision-making

Tangata whenua kaitiaki role is recognised and provided for in decision-making over natural and physical resources.

Objective 3.14 – Natural character, outstanding natural features, outstanding natural landscapes and historic heritage

Identify and protect from inappropriate subdivision, use and development;

- (a) The qualities and characteristics that make up the natural character of the coastal environment, and the natural character of freshwater bodies and their margins;
- (b) The qualities and characteristics that make up outstanding natural features and outstanding natural landscapes;
- (c) The integrity of historic heritage.

Policy 4.4.1 – Maintaining and protecting significant ecological areas and habitats

- (1) In the coastal environment, avoid adverse effects, and outside the coastal environment avoid, remedy or mitigate adverse effects of subdivision, use and development so they are no more than minor on:
 - (a) Indigenous taxa that are listed as threatened or at risk in the New Zealand Threat Classification System lists;
 - (b) Areas of indigenous vegetation and habitats of indigenous fauna, that are significant using the assessment criteria in Appendix 5;
 - (c) Areas set aside for full or partial protection of indigenous biodiversity under other legislation.

- (2) In the coastal environment, avoid significant adverse effects and avoid, remedy, or mitigate other adverse effects of subdivision, use and development on:
- (a) Areas of predominantly indigenous vegetation;
 - (b) Habitats of indigenous species that are important for recreational, commercial, traditional or cultural purposes;
 - (c) Indigenous ecosystems and habitats that are particularly vulnerable to modification, including estuaries, lagoons, coastal wetlands, dunelands, intertidal zones, rocky reef systems, eelgrass, northern wet heathlands, coastal and headwater streams, floodplains, margins of the coastal marine area and freshwater bodies, spawning and nursery areas and saltmarsh.
- (3) Outside the coastal environment and where clause (1) does not apply, avoid, remedy or mitigate adverse effects of subdivision, use and development so they are not significant on any of the following:
- (a) Areas of predominantly indigenous vegetation;
 - (b) Habitats of indigenous species that are important for recreational, commercial, traditional or cultural purposes;
 - (c) Indigenous ecosystems and habitats that are particularly vulnerable to modification, including wetlands, dunelands, northern wet heathlands, headwater streams, floodplains and margins of freshwater bodies, spawning and nursery areas.
- (4) For the purposes of clause (1), (2) and (3), when considering whether there are any adverse effects and/or any significant adverse effects:
- (a) Recognise that a minor or transitory effect may not be an adverse effect;
 - (b) Recognise that where the effects are or maybe irreversible, then they are likely to be more than minor;
 - (c) Recognise that there may be more than minor cumulative effects from minor or transitory effects.
- (5) For the purpose of clause (3) if adverse effects cannot be reasonably avoided, remedied or mitigated then it may be appropriate to consider the next steps in the mitigation hierarchy i.e. biodiversity offsetting followed by environmental biodiversity compensation, as methods to achieve Objective 3.4

Policy 4.4.2 – Supporting restoration and enhancement

Support voluntary efforts of landowners and community groups, iwi and hapū, to achieve Objective 3.15.

Policy 4.5.1 – Identification of the coastal environment, outstanding natural features and outstanding natural landscapes and high and outstanding natural character

The areas identified in the Regional Policy Statement - Maps will form Northland's:

- (a) Coastal environment;
- (b) High and outstanding natural character areas within the coastal environment (except where the coastal marine area beyond harbours / estuaries remain unclassified); and
- (c) Outstanding natural features and outstanding natural landscapes.

Where following further detailed assessment, an area in the Regional Policy Statement – Maps has been amended in accordance with Method 4.5.4, and the amended area is operative in the relevant district or regional plan, it shall supersede the relevant area in the Regional Policy Statement – Maps.

Policy 4.5.2 – Application of the Regional Policy Statement – Maps

The Regional Policy Statement Maps of high and outstanding natural character and outstanding natural features and outstanding natural landscapes identify areas that are sensitive to subdivision, use and development. The maps of these areas identify where caution is required to ensure activities are appropriate. However, suitably qualified assessment at a site or property-specific level can be used to demonstrate lesser (or greater) sensitivity to particular subdivision, use and development proposals given the greater resolution provided.

Policy 4.5.3 – Assessing, identifying and recording historic heritage

Historic heritage resources (areas, places, sites, buildings, or structures either individually or as a group) are identified taking into account one or more of the following criteria:

- (a) Archaeological and / or scientific importance: the resource contributes significantly to our understanding of human history or archaeological research;
- (b) Architecture and technology: the structure or building is significant due to design, form, scale, materials, style, period, craftsmanship, construction technique or other unique element / characteristic;
- (c) Rarity: the resource or site is unique, uncommon or rare at a district, regional or national level;
- (d) Representativeness: the resource is an excellent example of its class in terms of design, type, use, technology, time period or other characteristic;
- (e) Integrity: the resource retains a high proportion of its original characteristics and integrity compared with other examples in the district or region; Regional Policy Statement for Northland Page 74 of 178
- (f) Context: the resource forms part of an association of heritage sites or buildings which, when considered as a whole, become important at a district, regional or national scale;

- (g) People and events: the resource is directly associated with the life or works of a well-known or important individual, group or organisation and / or is associated with locally, regionally or nationally significant historic events;
- (h) Identity: the resource provides a sense of place, community identity or cultural or historical continuity;
- (i) Tangata whenua: the resource place or feature is important to tangata whenua for traditional, spiritual, cultural or historic reasons; and
- (j) Statutory: the resource or feature is recognised nationally or internationally, including: a World Heritage Site under the World Heritage Convention 1972; is registered under the Historic Places Act 1993; or is recognised as having significant heritage value under a statutory acknowledgement or other legislation.

Policy 4.7.1 – Promote active management

In plan provisions and the resource consent process, recognise and promote the positive effects of the following activities that contribute to active management:

- (a) Pest control, particularly where it will complement an existing pest control project / programme;
- (b) Soil conservation / erosion control;
- (c) Measures to improve water quality in parts of the coastal marine area where it has deteriorated and is having significant adverse effects, or in freshwater bodies targeted for water quality enhancement;
- (d) Measures to improve flows and / or levels in over allocated freshwater bodies;
- (e) Re-vegetation with indigenous species, particularly in areas identified for natural character improvement;
- (f) Maintenance of historic heritage resources (including sites, buildings and structures);
- (g) Improvement of public access to and along the coastal marine area or the margins of rivers or lakes except where this would compromise the conservation of historic heritage or significant indigenous vegetation and / or significant habitats of indigenous fauna;
- (h) Exclusion of stock from waterways and areas of significant indigenous vegetation and / or significant habitats of indigenous fauna;
- (i) Protection of indigenous biodiversity values identified under Policy 4.4.1, outstanding natural character, outstanding natural landscapes or outstanding natural features either through legal means or physical works;
- (j) Removal of redundant or unwanted structures and / or buildings except where these are of historic heritage value or where removal reduces public access to and along the coast or lakes and rivers;

- (k) Restoration or creation of natural habitat and processes, including ecological corridors in association with indigenous biodiversity values identified under Policy 4.4.1, particularly wetlands and / or wetland sequences;
- (l) Restoration of natural processes in marine and freshwater habitats.

Policy 4.7.2 – Supporting landowner and community efforts

Support landowners, iwi, hapū, and community efforts to actively manage or improve key aspects of the environment especially where there is willing collaboration between participants and those efforts are directed at one or more of the activities in Policy 4.7.1.

Policy 4.7.3 – Improving natural character

Except where in conflict with established uses promote rehabilitation and restoration of natural character in the manner described in Policy 4.7.1 in the following areas:

- (a) Wetlands, rivers, lakes, estuaries, and their margins;
- (b) Undeveloped or largely undeveloped natural landforms between settlements, such as coastal headlands, peninsulas, ridgelines, dune systems;
- (c) Areas of high natural character;
- (d) Land adjacent to outstanding natural character areas, outstanding natural features, and outstanding natural landscapes;
- (e) Remnants of indigenous coastal vegetation particularly where these are adjacent to water or can be linked to establish or enhance ecological corridors; and
- (f) The areas or values identified in Policy 4.4.1 (protecting significant areas and species).

Policy 8.1.1 – Tangata whenua participation

The regional and district councils shall provide opportunities for tangata whenua to participate in the review, development, implementation, and monitoring of plans and resource consent processes under the Resource Management Act 1991.

Policy 8.1.2 – The regional and district council statutory responsibilities

The regional and district councils shall when developing plans and processing resource consents under the Resource Management Act 1991 (RMA):

- (a) Recognise and provide for the relationship of tangata whenua and their culture and traditions with their ancestral land, water, sites wāhi tapu, and other taonga;
- (b) Have particular regard to kaitiakitanga; and
- (c) Take into account the principles of the Treaty of Waitangi including partnership.

Policy 8.1.3 – Use of Mātauranga Māori

The regional and district councils shall provide opportunities for the use and incorporation of Mātauranga Māori into decision-making, management, implementation, and monitoring of natural and physical resources under the Resource Management Act 1991.

Policy 8.1.4 – Māori concepts, values and practices

Relevant Māori concepts, values and practices will be clarified through consultation with tangata whenua to develop common understandings of their meaning and to develop methodologies for their implementation.