IN THE ENVIRONMENT COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI TAIAO O AOTEAROA
TĀMAKI MAKAURAU ROHE

IN THE MATTER	of the Resource Management Act 1991
AND	of an appeal under clause 14 of Schedule 1 of the Act
BETWEEN	**ROYAL FOREST AND BIRD PRECTION SOCIETY OF NEW ZEALAND**
	BAY OF ISLANDS MARITIME PARK INCORPORATED
	Appellants
	NORTHLAND REGIONAL COUNCIL
	Respondent

EVIDENCE IN CHIEF OF MURRAY JOHN BRASS
ON BEHALF OF THE MINISTER OF CONSERVATION AND THE MINISTER FOR OCEANS AND FISHERIES
PLANNING
TOPIC 14 – MARINE PROTECTED AREAS
14 MAY 2021

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Table of Contents

Introduction

1. My full name is Murray John Brass.

2. I have been asked to provide planning evidence on behalf of the Minister of Conservation (MOC) and the Minister for Oceans and Fisheries (MOF) on the appeals by Bay of Islands Maritime Park Incorporated (BOIMP) and The Royal Forest and Bird Protection Society Incorporated (F&B) against parts of the proposed Regional Plan for Northland, in relation to "Topic 14" matters. The relevant appeal points seek to introduce provisions constraining fishing activities for the purpose of protecting marine ecosystems, and areas with significant ecological, cultural and natural character values, from the effects of fishing activities within defined areas.

3. My evidence is part of a combined appearance on these matters by the MOC and the MOF.

Qualifications and experience

4. I am employed by the Department of Conservation (DOC) in Dunedin as a Senior RMA Planner. I have worked for DOC since late 2019.

5. Prior to this I have over twenty years' experience in resource management, including senior and management roles in both consenting and plan development. This includes eight years as a Consents Officer and Senior Consents Officer at the Taranaki then Otago Regional Councils, nine years as Planning and Environment Manager at the Clutha District Council, and four years as Resource Planner / Policy Advisor at the University of Otago.

6. My experience relevant to the current process includes:

   (a) Eight years' experience of processing the full range of coastal permits for regional councils, including as reporting officer for non-notified and notified applications, and as senior officer at hearings.

   (b) Also, during my time in regional councils, providing staff input into the development of those councils' regional policy statements and regional plans, including coastal plans.

   (c) Nine years' experience managing the overall planning function for the Clutha District Council, including consent processing, plan changes, council processes, and monitoring and reporting.

(e) Providing input from a local government perspective to the Ministry for the Environment in the development of the National Environmental Standards for Plantation Forestry 2018, the National Policy Statement for Renewable Electricity Generation 2011, and the National Environmental Standard for Assessing and Managing Contaminants in Soil to Protect Human Health 2011. Through both local government and the New Zealand Planning Institute I have also provided input into various Quality Planning guidance notes.

7. I hold a Bachelor of Science degree (Geology, 1984) and a Diploma for Graduates (Ecology / Environment 1991), both from the University of Otago.

8. I am a Full Member of the New Zealand Planning Institute.

Code of Conduct

9. I confirm that I have read the Code of Conduct for expert witnesses as contained in the Environment Court's Practice Note 2014 (the Code). I have complied with the Code when preparing my written statement of evidence.

10. The data, information, facts and assumptions I have considered in forming my opinions are set out in my evidence to follow. The reasons for the opinions expressed are also set out in the evidence to follow.

11. Unless I state otherwise, this evidence is within my sphere of expertise and I have not omitted to consider material facts known to me that might alter or detract from the opinions that I express. I wish to record that my opinions are based on the expert evidence that has been exchanged to date, i.e. that of the appellants and the parties who support them, and the Council. I am open to my opinions changing in the event there is any relevant compelling expert evidence filed by the further section 274 parties that alters the understanding on which my evidence relies.

Scope of evidence

12. I have been asked to provide evidence in relation to the appeals by BOIMP and F&B on the proposed Regional Plan for Northland (pRPN), and a s274 proposal by Te Uri o Hikihiki.

13. My evidence is divided into the following parts:

a) Background;

b) Statutory framework;

c) Relevant planning provisions;

d) Assessment of proposals;

e) Drafting of proposed provisions;

f) Conclusions.

Material Considered

14. In preparing my evidence I read and considered the following documents:

a) The Proposed Regional Plan for Northland Sections C.1 Coastal Rules, D.1 Tangāta whenua, D.5 Coastal Policies, F Objectives;

b) The notice of appeal of Bay of Islands Maritime Park Incorporated;

c) The notice of appeal of The Royal Forest and Bird Protection Society Inc;

d) The s274 joining notices of Te Uri o Hikihiki, Ngati Kuri and Ngati Kuta;

e) The MOC's and MOF's s274 joining notices for both appeals;

f) Other submissions and appeals where they are referred to in my evidence;

g) The evidence of Mr Jacob Hore (both briefs) and Ms Alicia McKinnon for the MOF, and Mr Enrique Pardo for the MOC;

h) The planning evidence of Mr Peter Raeburn for the appellants, Dr Mark Bellingham for Te Uri o Hikihiki, and Mr James Griffin for the Northland Regional Council, and other evidence where it is referred to in my evidence.

Executive Summary

15. My evidence assesses the two proposals in terms of the relevant planning requirements.

16. When deciding whether or not to adopt the proposed marine spatial protection measures, the Court is required to assess the proposals in terms of s32AA of the RMA and the relevant provisions of s32.

17. My evidence sets out an assessment firstly of the relevant planning provisions. I consider it is clear that the proposed marine spatial protection would give effect to Policy 11 of the NZCPS and related provisions in the NRPS and pRPN, and would also assist in giving effect to Policies 13 and 14 of the NZCPS and related provisions in the NRPS and pRPN.

18. I consider that an objective along the lines of that discussed Mr Griffin's evidence would be appropriate, and I provide potential drafting based on that. There may be other evidence on the specific wording, and it could be reworded to more directly reflect the NZCPS requirements, but I support the intent of providing protection under the pRPN to the values of the defined areas.

19. However, I consider it is less clear that the specific measures proposed are the most appropriate, and I consider that any provisions which are adopted need to provide benefit which is additional to protection already provided by other legislation (including the Fisheries Act). I make some suggestions in terms of the provisions, but anticipate that the Court will make its own assessment of appropriate locations, layout and provisions once it has heard all of the evidence. I also anticipate that there will be further iterations of drafting, and I am available to assist with that as appropriate.

Background

20. The pRPN was notified on 6 September 2017 and did not include marine spatial protection measures. However, several submitters on the pRPN, including BOIMP and F&B, sought for such spatial protection measures to be included.

21. The Northland Regional Council decided against including marine spatial protection measures in the pRPN in May 2019. BOIMP and F&B appealed the Council's decision to the Environment Court, seeking measures to protect biodiversity and natural character in the coastal marine area (CMA).

22. The then Minister of Fisheries (MOF), Hon Stuart Nash, joined the proceedings in July 2019 in partial opposition to the proposed protection measures, pending the outcome of the Court of Appeal decision in *Attorney-General v Trustees of*

the Motiti Rohe Moana Trust & Ors[1] (the Motiti decision) and on the basis that it was unclear whether the relief was within scope of the regional council's jurisdiction. The Minister of Fisheries joined the proceedings to inform the discussion on the sustainable utilisation of fisheries resources and to ensure that the trade-offs, costs and benefits of any protection measures on tangata whenua and fisheries stakeholders are appropriately assessed.

23. The MOC is an appellant and party to various appeal points on the pRPN, but initially did not join these specific appeal points. However, following the release of the *Motiti* decision a waiver application was granted to join late. The MOC's s274 notice stated general support for the appeals, insofar as they are consistent with the New Zealand Coastal Policy Statement (NZCPS) and promote sustainable management of natural and physical resources.

24. The appeals seek controls within the coastal marine area, so once the appeal process is complete these elements of the pRPN will come to the Minister of Conservation for approval (pursuant to Clause 19 of the First Schedule to the RMA).

25. Two different geographical areas have been proposed for marine spatial protection measures, with some overlap between the two. Sub-areas are identified for different levels of fishing restrictions based on differences in biodiversity, natural character and cultural values (as identified by the appellants).

26. In collaboration with and under the scope created by the appellants, the proposed Te Hā o Tangaroa Protection Area – Rakaumangamanga-Ipipiri to the north has been primarily determined by Ngāti Kuta. Similarly, the proposed Te Mana o Tangaroa Protection Area to the south has been proposed by Te Uri o Hikihiki.

27. A map showing the location and layout of both proposals, and a summary of the proposed fishing restrictions, is included in the evidence of Ms McKinnon (figure 1 and Appendix 2). I have reviewed that information, and confirm that it reflects my understanding of the proposals. Where I refer to specific areas which are

[1] [2019] NZCA 532.

part of either proposal, my references are in accordance with the area labels shown on that map.

Statutory framework for marine spatial protection

28. A regional coastal plan is a mandatory requirement for all regions (RMA s64(1)). In the case of Northland, it is proposed that the coastal plan provisions be contained within the regional plan, rather than as a separate document.

29. Under the RMA the purpose of a regional plan generally is to "assist a regional council to carry out any of its functions in order to achieve the purpose of this Act" (RMA s63(1)). The purpose of a regional coastal plan, without limiting s63(1), is to "assist a regional council, in conjunction with the Minister of Conservation, to achieve the purpose of this Act in relation to the coastal marine area of that region" (RMA s63(2)). Of relevance to these appeals, one of the functions of a regional council is "the establishment, implementation, and review of objectives, policies, and methods for maintaining indigenous biological diversity" (RMA s30(ga)).

30. A coastal plan is required to state objectives for the region, policies to implement the objectives, and rules (if any) to implement the policies (RMA s67(1)). The plan must give effect to any national policy statement, the NZCPS, national planning standards, and the regional policy statement (RMA s67(3)).

31. As well as these RMA provisions, the Fisheries Act 1996 also has a role in the management of the marine environment.[2] In essence, the RMA is concerned with the sustainable management of natural and physical resources, whereas the Fisheries Act has a narrower focus of providing for the utilisation of fisheries resources while ensuring sustainability. The RMA has a wide-ranging ability to control use of land, use of the coastal marine area, use of the beds of lakes and rivers, use of water, discharges, and noise. The Fisheries Act's focus is on fisheries resources, avoiding, remedying or mitigating effects of fishing on the aquatic environment, and controlling fishing activities, fishing vessels, and aquaculture (for further detail, see the 'fisheries management' brief of evidence

[2] As touched on in the EIC of Mr Pardo, I note that other legislation such as the Marine Reserves Act 1971, Marine Mammals Protection Act 1978 and Wildlife Act 1953 also has a role in the management of the marine environment.

of Mr Hore). Controls on fishing activities include by method, species, area and time period.

32. I note that the Maori Fisheries Act 2004 and the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 also have a role in fisheries management, in relation to the management and allocation of settlement assets in the marine environment.

33. The interface between the Fisheries Act and the RMA is addressed in several provisions within those Acts. In particular, a regional council must not control the taking, allocation or enhancement of fisheries resources for the purpose of managing fishing or fisheries resources controlled under the Fisheries Act 1996 (RMA s30(2)).

34. Also, regional plan or coastal permit provisions are not enforceable if they allocate access to any fisheries resources to any fishing sector in preference to any other fishing sector, or confer rights to occupy land in the CMA to any fisher that excludes any other fisher (Fisheries Act s6).

35. When preparing or changing a regional plan, a regional council must have regard to any regulations relating to ensuring sustainability, or the conservation, management, or sustainability of fisheries resources (including regulations or bylaws relating to taiāpure, mahinga mātaitai, or other non-commercial Maori customary fishing) (RMA s66(2)(c)(iii)).

36. In November 2019, the Court of Appeal released the *Motiti* decision. This decision confirmed (at [67]) that regional councils can control fishing and fisheries resources in the exercise of their s30 functions, including those listed in s30(1)(d), provided they do not do so to manage those resources for Fisheries Act purposes.

37. I understand that the lawfulness of the proposed marine spatial protection measures will be a matter for legal submissions. If, having heard those submissions the Court considers that the proposals are a lawful option, then whether they are appropriate in terms of the RMA itself is subject to assessment under the regulatory framework of that Act and the matters set out in s32AA, which my evidence now addresses.

Relevant planning provisions

38. The regulatory framework relevant to these proposals is set out in the evidence of Mr Griffin in his Planning Analysis (Griffin EiC paras 30-46, including reference where relevant to the evidence of Mr Raeburn).

39. I consider that Mr Griffin's analysis sets out the key documents and provisions relating to marine protection, and so I rely on his assessment in that regard.

40. Mr Griffin also addresses Part 2 of the RMA (Griffin EiC paras 47-52). I am not convinced there is a need to refer to Part 2, as I do not consider that the applicable provisions of the NZCPS are invalid, incomplete or uncertain[3]. However, should the Court find that there is reason to refer to Part 2, then I record that I agree with Mr Griffin's assessment of that matter.

41. In addition to provisions referred to above, there are also provisions which the Court may find helpful when assessing economic effects of the proposals – NRPS 3.4 (enabling economic wellbeing), and pNRP Objective 5.1.4 (enabling economic wellbeing) and Policy D.2.2 (social, cultural and economic benefits of activities).

Assessment of proposals

42. My assessment below first addresses whether the proposed measures would give effect to the applicable planning documents as required under section 67 of the Act, and then addresses whether the measures are the most appropriate in terms of s32AA.

Assessment against higher order RMA documents and the pRPN

43. I generally agree with Mr Griffin's assessment of the proposals against the higher order RMA documents (such as the NZCPS) and the pRPN. I also consider that it is reasonable for the Court to conclude that the proposed protections are appropriate provisions to achieve the proposed objectives of the pRPN, and the purpose of the Act. As I explain later however, I do not consider

[3] *Environmental Defence Society v The New Zealand King Salmon Company Limited* [2014] NZSC 38.

that this means they are necessarily the most appropriate method in their currently proposed form.

44. I note that the higher order documents and the pRPN were prepared prior to the *Motiti* decision, which has clarified that there is a role for the RMA in terms of managing the effects of fishing. This means that those documents are largely silent on measures which would control fisheries activities. However, I do not consider this is a barrier to applying those documents – rather, I consider that the documents' objectives and policies provide direction on the outcomes to be sought, and controls on fisheries activities should be assessed against those outcomes in the same way as any other proposed provisions.

45. In particular, NZCPS Policy 11 is "To protect indigenous biodiversity in the coastal environment", and it sets out specific requirements that:

    a) all adverse effects of activities on the values set out in Policy 11(a) are to be avoided, while;

    b) significant adverse effects on the values set out in Policy 11(b) are to be avoided, and other adverse effects on them avoided, remedied, or mitigated.

46. The pRPN is required to "give effect" to the NZCPS (RMA s67(3)(b)).

47. The Regional Policy Statement for Northland (RPSN) contains provisions which flow from Policy 11 of the NZCPS, and which require protection of significant indigenous vegetation and habitats of indigenous fauna, and maintenance of the extent and diversity of indigenous ecosystems and habitats (Objective 3.4, and the related Policy 4.4.1 and Method 4.4.3.1). The pRPN is required to give effect to the RPSN (RMA s67(3)(c)).

48. The evidence of Mr Pardo (as summarised in his paras 139-141 and Tables 4 and 5) and other ecological experts establishes that the areas covered by the proposed protection contain a number of indigenous values listed in NZCPS Policy 11 (a) and (b) and RPSN Policy 4.4.1. These include threatened or at-risk taxa, threatened or naturally rare ecosystems and vegetation, and nationally significant community types (NZCPS 11(a)), and areas of predominately indigenous vegetation, habitats that are important during vulnerable life stages, vulnerable coastal ecosystems and habitats, and habitats

of species that are important for recreational, commercial, traditional or cultural purposes (NZCPS 11(b)).

49. The evidence of Dr Phillip Ross for the Northland Regional Council sets out the adverse effects that fishing can have on those values. He concludes that the ecology of East Northland has changed over time as a result of fishing, with effects including lowered fish diversity, reduction in biomass of key species, and altered age and size structure of fish and invertebrate populations (Ross EiC para 11). However, in this regard I also note Mr Hore's 'fisheries management' brief of evidence (paras 37-47), which outlines recent responses under the Fisheries Act to declining fish stocks.

50. NZCPS Policy 13 requires preservation of natural character, and Policy 14 requires restoration of natural character.

51. Natural character can be viewed as the result of three attributes – abiotic elements (topography, substrate etc), biotic elements (species, habitats, ecosystems etc), and the experiential elements (how people experience the abiotic and biotic elements). The proposed spatial protection measures are intended to improve biotic elements within the protected areas, and so would be expected to contribute to preservation and restoration of natural character.

52. The evidence of Dr Vicky Froude addresses this. She concludes that a number of locations within the proposed protection areas have high to outstanding natural character, and that the natural character of those locations would be protected and improved by the proposed measures. She also concludes that the proposed measures would restore (or improve) natural character in other parts of the proposed protection areas. The evidence of Ms Lucas supports this, concluding that extensive areas of at least high natural character are considered to be present, and that the pRPN should contain provisions to sustain natural character.

53. I consider that Objective 3 and Policy 2 of the NZCPS relating to the principles of the Treaty of Waitangi and the role of tangata whenua are also relevant. Given the involvement of local hapū in the development of the marine spatial protection proposals, implementing those proposals would recognise their relationship with the areas proposed for protection and would protect characteristics of special value to them. However, there are differing views from

other Māori interests, so whether the proposals would overall give effect to Objective 3 and Policy 2 of the NZCPS will be a matter for the Court to consider after having heard all of the evidence.

54. Also relevant, under s66(2)(c)(i) ("management plans and strategies prepared under other Acts"), is the Conservation Management Strategy (CMS) Northland 2014-2024. The CMS records that "Northland has the greatest marine biodiversity in New Zealand" (Section 3.5), and that "Marine values in the Bay of Islands are very high" (section 11.1). One of the outcomes sought for the Bay of Islands is that "The marine environment is protected by a tangata whenau and community initiative across a range of habitats (Outcome 11.2.1)".

55. In regard to marine protection, the CMS includes Objective 5.1.1.5 "Engage in collaborative processes to build a nationally representative network of marine reserves and other marine protected areas, taking into account the marine ecosystems listed in Appendix 8." Appendix 8 provides a detailed listing of marine habitats and ecosystems, including significant values and pressures/threats.

56. In summary, I consider it is clear that the proposed protection measures are in accordance with the higher order documents and the pRPN. They would specifically give effect to Policy 11 of the NZCPS, and would contribute to giving effect to Policies 13 and 14 of the NZCPS. However, I express no opinion on whether they would give effect to Objective 3 and Policy 2 of the NZCPS. The protection measures would also be consistent with the Northland CMS.

Assessment under s32AA / s32

57. Section 32AA of the Act requires that any changes proposed after the s32 report was prepared are also assessed in accordance with subsections (1)-(4) of s32. As these marine spatial protection measures have arisen through appeals, they were not assessed in the original s32 report, and s32AA applies.

58. Section 32 requires that an assessment of the proposal must firstly "examine the extent to which the objectives of the proposal being evaluated are the most appropriate way to achieve the purpose of this Act" (s32(1)(a)), and then "examine whether the provisions in the proposal are the most appropriate way to achieve the objectives" s32(1)(b)).

Assessment of Objective

59. Mr Griffin has reviewed the objectives contained in both proposals, and considers that a single objective for both areas would be preferable, and that the approach taken in Mr Raeburn's first option F.1.x is his preferred wording. My understanding is that this would give wording along the lines:

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

60. I agree that a combined objective for both areas would be good planning practice – it reflects the similar purposes of the two proposals, and would be the simplest and clearest approach within the plan. While I agree with the intent of that combined objective, I anticipate that there will be further iterations of the drafting to come, and consider that the objective could usefully be reworded to more directly reflect the NZCPS and RPSN.

61. I consider that an objective along those lines could be considered to be the most appropriate way of achieving the purpose of the Act. Specific provisions to achieve the Act's purpose have been developed through the NZCPS, and in the RPS and pRPN provisions which flow from that. Given my assessment above of those planning documents, I consider that protection of areas with significant indigenous biodiversity values and high or outstanding natural character directly gives effect to the higher order documents, and through them gives effect to the purpose of the Act. Not requiring such protection, or seeking to achieve it without an explicit objective, would not give effect to those higher order documents in my opinion.

62. However, I do not consider that this means that the specifics of these proposals are therefore necessarily the most appropriate – while protection is required, the exact locations and controls applied under that protection remain matters of fact for the Court to consider after having heard all of the evidence. The degree of protection to be afforded to the proposed areas in terms of protecting biodiversity is directed by Policy 11 of the NZCPS (as set out above in para 45).

63. Mr Griffin does not support proposed objectives requiring investigation of further spatial areas for protection. I agree with him on that matter, for the reasons he gives, including inconsistency with the architecture of the pRPN. I note that this

would not preclude the Council and/or other parties undertaking such investigations should they wish to do so.

Assessment of provisions

64. In examining whether the provisions are the most appropriate way to achieve the objectives, s32(1)(b) requires consideration of other reasonably practicable options, and assessment of the efficiency and effectiveness of the provisions.

65. In terms of other reasonably practicable options, I acknowledge that Mr Griffin considers that the proposed marine spatial protection is the most appropriate option, but I discuss this further on a number of specific points below. I agree with Mr Griffin that the marine spatial protection option could include a reduced form of the proposed provisions, which I consider could involve reduction of the spatial extent and/or reduction or simplification of the provisions.

Options under other legislation

66. While Mr Griffin disregarded fisheries controls under other legislation, on the basis that the Court could not order such an outcome, I consider that they are worthy of further assessment – both to understand what fisheries measures are currently in place and their effect, and to evaluate whether seeking new fisheries measures would be an appropriate option. I consider that this approach is supported by s66(2)(c)(iii) of the RMA and Policy 2(f)(iii) of the NZCPS.

67. In this regard, Mr Hore's 'fisheries management' brief of evidence outlines the measures generally applicable under the Fisheries Act, and Ms McKinnon's evidence outlines the fisheries regulations currently in force for the specific areas proposed for protection. These regulations include restrictions and prohibitions on taking certain species, and restrictions and prohibitions on certain methods of fishing, with separate sets of regulations for commercial and recreational fishing. Although many of these regulations apply over a wide area (including within and beyond the proposed protection areas), some are specific to localised areas within the proposed protection areas, and some are also temporary or only apply for certain times or seasons.

68. I consider that this evidence demonstrates that Fisheries Act measures can provide protection to biodiversity values, and so could be an option for

maintaining indigenous biodiversity. Given that there are well-established compliance, monitoring and enforcement regimes in place under the Fisheries Act, whereas marine spatial protection is less well established under the RMA, there may be some advantages in terms of efficiency and effectiveness.

69. However, I also consider that there are limits to the effectiveness of such measures:

a) The purpose and powers of the Fisheries Act are not the same as the RMA (see paras 29-31 above), so such measures are less likely to directly align with the Regional Council's RMA s30 functions.

b) The Fisheries Act controls involve a range of measures which apply over various scales, types and locations, whereas the proposed marine spatial protection provisions could provide an integrated set of controls tailored for the specific area(s).

c) A regional plan which covers marine, coastal, freshwater and terrestrial environments provides the ability to integrate marine spatial protection with plan provisions outside the marine environment (eg sediment controls on land to reduce run-off into the areas proposed for marine spatial protection).

d) The evidence of the various ecological experts to date is that there are adverse effects arising from fishing within the areas proposed for protection, despite the existing fisheries measures.

70. I note (as referred to in Mr Pardo's evidence paras 35-36) that a Marine Mammal Sanctuary has been proposed for the Bay of Islands, under the Marine Mammals Protection Act 1978. The area of this proposed sanctuary overlaps the proposed marine spatial protection (see Appendix 1), so it represents an option for protecting biodiversity in this area separate to the RMA. However, it is limited to marine mammals, only affects tourism and navigation, and is only at the consultation stage, so I consider that little weight can be applied to it in this process. If it does proceed, I consider it would be more appropriately viewed as a complementary measure to the current proposals, rather than as an alternative.

71. In summary therefore, I consider that while existing measures under other legislation do provide some protection for biodiversity, the marine spatial protection measures proposed for the pRPN would provide additional protection and would be more effective than not having controls in the regional plan and relying on other legislation.

72. However, I do consider that Ms McKinnon's and Mr Hore's evidence raise matters which are relevant to the scope and nature of what marine spatial protection measures are appropriate.

Removal of redundant provisions

73. Where proposed provisions simply mirror Fisheries Act restrictions, or do not increase biodiversity protection, then it may be more appropriate for the plan to be silent on those matters. For example, if the rules contained no provisions relating to kina (see McKinnon EiC paras 30-37), then their taking would still not require consent under the RMA, but it would not risk creating an expectation of unlimited take or confusion with the Fisheries Act take limits. While this would require minor changes to the drafting of the permitted and prohibited activity rules, it would not reduce biodiversity protection, so would have the same effect as the current wording.

74. Similarly, as drift netting, and the taking of great white sharks, are prohibited under the Fisheries Regulations, creating prohibited activities under the regional plan does not provide any additional protection.

75. The inclusion of such provisions could create a risk that fishers may confuse the different requirements or miss relevant provisions. Such a risk is inevitable to a certain extent wherever there is more than one law applying to an activity, and does not necessarily mean that overlapping regulation is inappropriate – indeed, it is common for two or more sets or legislation to apply to the same activity (RMA, Building Act, Wildlife Act etc).

76. However, I consider that where overlap and risk of confusion can be minimised then it is good practice to do so, and I acknowledge that regional rules should only be imposed where existing measures under the Fisheries Act have been considered and the regional rules would provide some additional benefit.

Potentially overlapping or conflicting provisions

77. There are also areas where Ms McKinnon has raised concern about direct conflict between the proposed regional plan provisions and existing Fisheries Act restrictions.

78. In particular, the protection areas would overlap the area of the existing temporary closure of Maunganui Bay under s186A of the Fisheries Act, and would also overlap the Mimiwhangata Marine Park. Mr McKinnon also outlines numerous examples of other overlap and/or potential conflict, including relating to trawling, Danish seining and dredging.

79. I do not consider this is a barrier to adopting the proposed regional plan provisions – as discussed above it is common for different legislation to apply to the same activity, and I note that even within the Fisheries Act measures there are multiple differing provisions that apply in different locations.

80. However, as discussed above I consider that it would be good practice for the regional plan provisions to only be imposed where they provide additional benefit, and for them to be kept as simple and clear as possible. I consider that this will require significant review and redrafting, and would be appropriate to be addressed in expert conferencing and subsequent iterations of the proposed provisions.

81. Mr Hore ('fisheries management' brief Paras 94-95) has raised concern about provisions which could allocate access to fisheries resources to one sector in preference over another, which would make those provisions unenforceable under s6 of the Fisheries Act. I consider that this would render any such provisions ineffective, and this will also need to be addressed in further review and redrafting.

Costs and benefits

82. S32(2)(a) of the RMA requires that, when assessing the proposed provisions, the Court must consider the costs and benefits of the environmental, economic, social and cultural effects of the provisions, including the opportunities for economic growth and employment to be provided or reduced.

83. The (confidential) brief of evidence of Mr Hore regarding 'impact of proposals on fisheries and fisheries resources' outlines the potential impacts of the proposals on current fishing activities, including the values of fish caught and the potential responses in terms of fishing activity. I consider that this is a directly relevant matter under s32(2)(a), and will be for the Court to consider along with related evidence (such as has been received from Mr Denne, and will likely come from other parties).

Risk of not acting

84. S32(2)(c) of the RMA requires assessment of the risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the provisions. Given the extent of information already before the Court through the evidence exchanged to date, I consider it highly unlikely that the information available to the Court will not be adequate to allow informed decision-making.

Drafting of proposed provisions

85. Given that expert conferencing is likely to lead to further iterations of the drafting, I have focussed on the general approach taken rather than the detail of wording. For the sake of clarity, I note that my comments are based on Mr Raeburn's Appendix A to his Evidence in Chief, and Mr Bellingham's document "Marine Protected Areas Uri_o_Hikihiki Final" as provided on 11 December, which I understand to be the document referred to as Appendix 2 in his Evidence in Chief.

86. In terms of overall approach I support making the provisions, especially the rules, as simple and effective as possible, and I support the limiting of rules to only permitted and prohibited activities. I also support applying different levels of control to different sub-areas, reflecting their specific values and sensitivities.

87. I generally agree with Mr Griffin's assessment of the proposed drafting, and his recommended changes, subject to the further changes and considerations outlined in paras 57-61 and 73-81 above.

88. I share Mr Griffin's concerns about the proposed management plan approach included in the Te Mana o Tangaroa proposal, and consider that if this was retained it would require substantial further provisions to be added to address

the development and approval of those management plans, in order to ensure both natural justice and plan certainty.

89. I note that the final version of provisions will need to contain clear references to the applicable areas and sub-areas, especially if both proposals are adopted, and there will also be a need for further definitions of terms to provide certainty.

90. Should the Court wish to adopt both proposals, the drafting would also need to align the provisions within the area where the proposals (as currently laid out) overlap. In order to be clear and consistent, this would require development of a specific single set of appropriate provisions, not just combining provisions from both proposals. More generally, it would also be good practice to review provisions across the overall coverage of both proposals to provide consistency and simplicity.

91. Ms McKinnon (para 55) has raised concern about the reference in the Te Mana o Tangaroa proposal to require longlining to use “approved seabird mitigation devices, other technology to avoid seabird capture, and on-board monitoring cameras and devices”. I consider that requirement to be insufficiently certain to function as a rule requirement. The Te Hā o Tangaroa proposal contains similar provisions, but limited to “approved seabird mitigation devices” – this may be able to be made sufficiently certain, but would require a clear definition of what the relevant approval is.

Conclusions

92. The Court of Appeal decision in the *Motiti* case confirmed that regional councils can control fishing activities in the exercise of their s30 functions, so long as those controls are not for Fisheries Act purposes.

93. When deciding whether or not to adopt the proposed marine spatial protection measures, the Court is required to assess the proposals in terms of s32AA of the RMA and the relevant provisions of s32.

94. On the basis of the ecological evidence exchanged to date, I consider it is clear that the proposed marine spatial protection would give effect to Policy 11 of the NZCPS and related provisions in the NRPS and pRPN, and would also assist in giving effect to Policies 13 and 14 of the NZCPS and related provisions in the NRPS and pRPN.

95. I consider that the proposed objective (along the lines of Mr Griffin's evidence) is appropriate. There may be other evidence on the specific wording, and it could be reworded to more directly reflect the NZCPS requirements, but I support the intent of providing protection to the values of the defined areas.

96. However, I consider that it is less clear that the specific measures proposed are the most appropriate. I have made some suggestions in terms of the provisions, but anticipate that the Court will make its own assessment of appropriate locations, layout and provisions once it has heard all of the evidence. Should that lead to further changes, as is common for such processes, I remain available to provide further evidence or response as appropriate.

Murray John Brass

DATED this 14th day of May 2021

Appendix 1: Map of proposed Marine Mammal Sanctuary