BEFORE THE ENVIRONMENT COURT

AT AUCKLAND

I MUA I TE KŌTI TAIAO O AOTEAROA

TĀMAKI MAKAURAU ROHE

UNDER	the Resource Management Act 1991
IN THE MATTER	of appeals under Clause 14 of Schedule 1 of the Act
BETWEEN	**BAY OF ISLANDS MARITIME PARK INCORPORATED**
	(ENV-2019-AKL-000117)
	ROYAL FOREST AND BIRD PROTECTION SOCIETY OF NEW ZEALAND INCORPORATED
	(ENV-2019-AKL-000127)
	Appellants
AND	**NORTHLAND REGIONAL COUNCIL**
	Respondent

REBUTTAL EVIDENCE OF PETER DEAN REABURN FOR BAY OF ISLANDS MARITIME PARK INC AND ROYAL FOREST AND BIRD PROTECTION SOCIETY OF NEW ZEALAND INC (PLANNING)

TOPIC 14 – MARINE PROTECTED AREAS

22 JUNE 2021

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MAY IT PLEASE THE COURT

INTRODUCTION

1. My name is Peter Dean Reaburn.

2. My qualifications and experience are set out in my primary statement of evidence dated 19 March 2021. I confirm that in preparing this evidence I have complied with the Expert Witness Code of Conduct.

3. This statement of rebuttal evidence responds to the evidence of:

    a. James Henry Griffin

    b. Philip Hunter Mitchell

    c. Murray John Brass

    d. Jonathon Clive Holdsworth

    e. Jacob Dylan Hore

    f. Barry David Torkington

    g. Kim Lawrence Drummond

    h. Paul Roy Knight

    i. Thomas Charles Clark

    j. Keir Volkering

4. I attended the Planner's Expert Witness Conferencing on 21 June 2021 and have signed the Joint Witness Statement – Planning (**JWS - Planning**) which includes, as an attachment, the Agreed Statement of Facts - Planning. I have read the Joint Witness Statements of the Fisheries Experts and the Ecology Experts.

5. In summary, in this rebuttal evidence I:

    a. Confirm that, while I consider it to be good planning practice to have early involvement of all stakeholders / interested parties, I further understand that whether there has been a correct Schedule 1 process followed is a legal, rather than planning issue.

    b. Acknowledge that I give significant weight to Policies 11 and 13, and also NZCPS Policy 14 and the RPS and pNRP provisions that give effect to those policies. However I have also I considered tāngata whenua involvement to be integral to meeting the various obligations imposed by the relevant planning framework and and have also given weight to Objective 3 and Policy 2 of the NZCPS and the RPS and pNRP provisions that implement them.

    c. Confirm, with minor amendments, that I continue to support the provisions proposed by the appellants.

d. Refer to conflicts with the Fisheries Act, however understand these to be primarily legal issues.

e. Consider the extra information available in s274 party evidence to be of assistance in an s32 analysis, also that the overall evaluation of s32 is appropriate, and the further information available does not change my view that the proposed provisions are appropriate.

f. Acknowledge an overlap between the proposed provisions and Fisheries regulations but consider there are issues in the proposed provisions only applying where Fisheries regulations do not.

REBUTTAL EVIDENCE

Scope / Consultation

6. Dr Mitchell canvasses the background to these appeals and raises concerns that the detailed relief sought was not clear through the submissions and Council hearings stages and, 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[1]. Dr Mitchell raises a concern that there has been no public process as envisaged by Schedule 1 of the RMA, and in particular consultation with tāngata whenua[2]. He states that it is therefore not possible to give full effect to Objective 3 and Policy 2 of the NZCPS[3].

7. Matters of scope are legal matters and therefore the subject of legal submission.

8. As a matter of good planning practice, I agree with Dr Mitchell that early involvement of all stakeholders / interested parties is best. Any issue about whether there has been a correct Schedule 1 process followed is a legal, rather than planning issue.

9. That said, I have regarded hapū involvement in the relief sought by the appellants to be a critical component in the case now being addressed by the Court. I recognise that, in developing the provisions now subject to the relief sought, the extent of involvement from Māori interested parties has been raised as a concern. Mr Willoughby addresses this matter in his rebuttal.[4]

10. From the perspective of differing views as to whether the aspirations of Ngāti Kuta should be reflected by adopting the relief sought I note that Ngāti Kuta, in exercising what they see as their kaitiaki responsibilities, have been prepared to forgo their customary and recreational fishing rights in part of their rohe. Beyond that I cannot offer a view on the weight to be given to the other concerns that

[1] Dr Mitchell's evidence, paragraphs 35-46
[2] Dr Mitchell's evidence, paragraph 47
[3] Dr Mitchell's evidence, paragraph 49
[4] Mr Willoughby's rebuttal, paragraphs 4-5.

have been expressed in evidence before the Court, except to say I consider it valuable that they have been expressed and are able to be considered by the Court.

Application of the Planning Framework

11. All expert planners have agreed on the content of the planning framework they consider to be relevant to this case. This is recorded in the Agreed Statement of Facts – Planning with the key provisions agreed by the planners being recorded in the JWS - Planning.

12. Dr Mitchell considers that, in giving effect to the NZCPS, a "considerably wider lens" is required than policies 11, 12 and 13, which he considers were focused on in my primary evidence[5].

13. I do not refer to Policy 12 in my primary evidence. That policy, which relates to harmful aquatic organisms, has not been central to the appellant's case. I have however agreed with it being added to the list referred to in paragraph 11 above.

14. I acknowledge that I give significant weight to Policies 11 and 13, and NZCPS Policy 14 and the RPS and pNRP provisions that give effect to those policies. For the reasons outlined in my primary evidence I consider these to be key provisions as they contain directive language, including directions to avoid adverse effects. The Joint Witness Statement of Ecology Experts confirms that these provisions will be important to the Court's considerations. In relation to Policy 11 specifically, I note that Dr Mitchell generally agrees with the analysis given in Paragraphs 5.8 – 5.26 of my primary evidence[6].

15. However, I also consider and give weight to Objective 3 and Policy 2 of the NZCPS and the RPS and pNRP provisions that implement them, as discussed further below.

16. Dr Mitchell goes on to state that recognition of tāngata whenua as part of the plan making process "has clearly not happened here"[7].

17. I am not sure what Dr Mitchell means by his reference to "the plan making process". In my interpretation that process is still underway, and this hearing is part of it. In respect of recognising issues of concern and provisions of relevance to tāngata whenua I have canvassed the following in my primary evidence:

    a. In Section 4 I highlight key provisions including RMA s6(e) and s7(a) (I acknowledge s8 is also relevant). Under the NZCPS I identify Objective 3 and Policy 2. Under the RPS I identify Objective 3.12 and Policies 8.1.1, 8.1.3 and 8.2.1. Under the pNRP I identify Objective F.1.8 and Policy D1.1.

[5] Dr Mitchell's evidence, paragraph 57
[6] Dr Mitchell's evidence, paragraph 58
[7] Dr Mitchell's evidence, paragraph 57

b. In Section 6 I relate the above provisions to the hapū evidence and state:

> Ngāti Kuta has taken a lead role in identifying Te Hā o Tangaroa Protection Area Rakaumangamanga-Ipipiri and the boundaries of its sub-Areas, and a fundamental reason for the provisions as sought is achieving regulatory alignment with those kaitiaki responsibilities[8].

c. In Section 7 I discuss marine spatial planning and, in commenting on the Environment Foundation Environment Guide state:

> The Guideline referred to specifically refers to best practice including the need to integrate mātauranga Māori into the understanding of the issues and potential solutions[9].

d. Also in Section 7, I state:

> I would expect that future request for a Te Hā o Tangaroa Protection Area will most likely come from or in close association with tāngata whenua, and in any case would need to have tāngata whenua involvement[10].

> The proposed rules have been devised according to expert advice (including from Hapū) as to what level of management is appropriate in each sub-area[11].

e. I devised the overall structure of the draft Schedule of Characteristics, qualities, and values for the Te Hā o Tangaroa Protection Areas (within Appendix A to my evidence)[12]. There are three categories, being "Cultural", "Ecology" and "Natural Character". I note that Mr Griffin identifies the same three areas in his evidence[13]. The content of the Cultural section of the Schedule was drafted by representatives of Ngāti Kuta. Those characteristics, qualities and values are then referred to in the Objective and policies and are a central component in the relief the appellants and Ngāti Kuta seek.

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[8] P Reaburn Primary Evidence paragraph 6.4
[9] P Reaburn Primary Evidence paragraph 7.6
[10] P Reaburn Primary evidence, paragraph 7.11
[11] P Reaburn Primary evidence, paragraph 7.35
[12] I understand from discussion with Mr Bellingham that Te Uri o Hikihiki supports the schedule, however to date have not populated the part of it that relates to the Te Mana o Tangaroa Protection Areas.
[13] Mr Griffin's evidence, paragraph 60.

18. To summarise my view, I consider tāngata whenua involvement to be integral to meeting the various obligations imposed by the relevant planning framework.

19. The relief sought in respect of mapped boundaries has come from Hapū (Ngāti Kuta and Te Uri o Hikihiki). After receipt of s 274 party evidence the appellants and Ngāti Kuta have further refined the Te Hā o Tangaroa Protection Areas by deleting the Sub-Area A buffer and substantially reducing the area contained within sub-Area C. Sub-Area C now does not include any area with the (gazetted) rohe moana of Ngā Hapū o Taiamai Ki Te Marangi.

20. I note the concern raised by Mr Knight, that the spatial extent and substance of the proposed marine protection areas has not been clearly explained in evidence.[14] This is the explanation - the process has been subject to boundaries agreed by the Hapū. My evidence, and the evidence of other experts, in particular those relating to ecology and natural character (i.e. applying NZCPS Policies 11 and 13 and the other relevant provisions) is based in a spatial sense on what the Hapū themselves are seeking.

21. The Hapū have also had a major involvement in the protections sought in the proposed rules.

22. It will be clear from the above that the appellants' relief has not been led by NZCPS Policies 11 and 13 (or 14), i.e., not exclusively based in biodiversity and natural character. If it was then the arrangement of sub-area boundaries may well have been more extensive. The proposed rules would then have been applied differently as well.

Proposed Provisions

23. As stated in my primary evidence my focus has been on the Te Hā o Tangaroa provisions. I have had discussions with Mr Bellingham and understand that Te Uri o Hikihiki may present amended Te Mana o Tangaroa provisions that achieve more alignment between the current two sets of provisions. Ideally, in my view, there should be the maximum possible degree of alignment, however in the meantime my comments are confined to the Te Hā o Tangaroa provisions.

24. Regarding proposed Objective 1 two alternatives have been put forward by the appellants, being:

> Te Hā o Tangaroa Protection Areas
>
> Protect from inappropriate use, disturbance and development the characteristics, qualities and values that make up Te Hā o Tangaroa Protection Areas. or
>
> Protect from inappropriate disturbance, use and development the mauri and taonga species and their habitats, and

[14] Mr Knight's evidence, paragraphs 8.21(e)(iii), 10.4.

customary values that make up Te Hā o Tangaroa Protection Areas.

25. Mr Griffin supports the objective. He does not have a strong preference between the two objective options given, however on balance prefers the first option for the reasons I have given in my primary evidence[15]. I maintain my view that the first option wording is, with a possible naming change, the most appropriate. In that respect I note that Mr Brass also supports the objective, subject to possible wording changes that would refer to both Te Hā o Tangaroa Protection and Te Mana o Tangaroa Protection Areas [16]. I would consider it better for the parties to agree on one name, which may be a different name altogether. I see this as being an iteration that can be addressed at a later time as necessary.

26. The proposed protection policies are:

In Te Ha o Tangaroa Protection Areas

(1) Avoid adverse effects of activities on the identified characteristics, qualities and customary values of Te Hā o Tangaroa Protection Areas — Sub Areas A

(2) Avoid, remedy or mitigate adverse effects of activities on the identified characteristics, qualities and customary values of Te Hā o Tangaroa Protection Areas — Sub Areas other than Sub Areas A.

27. I note that both the objective and the policies are focussed on adverse effects of activities on identified characteristics, qualities, and customary values. These matters are then described in the characteristics, qualities, and customary values Schedule. The provisions, as proposed, do not specifically refer to the damaging effects of plant and animal extraction, or more specifically to fishing methods. While the proposed rules do manage those effects, the objective and policies would also be relevant to other activities, for instance sedimentation, that also damage the marine environment. In that way, I do not see these provisions as being unrelated to other parts of the Plan that manage effects on the marine environment.

28. Mr Griffin raises a concern, specifically in relation to Policy (2), that in sub-areas other than Sub-Area A, the policy direction does not achieve the intent of the proposal as adverse effects are still intended to be avoided (through prohibited activity status).

29. I agree with Mr Griffin that, in relation to the specified prohibited activities adverse effects are intended to be avoided, albeit in relation to a more limited range of activities compared to Sub-Area A. The proposed sub-Area A rules are intended to achieve comprehensive avoidance of adverse effects (apart from the very minor effects that may arise from permitted activities). That cannot be said for sub-Areas

[15] Mr Griffin's evidence, paragraph 78.
[16] Mr Brass' evidence, paragraph 61.

B and C where activities are still allowed that may have adverse effects. In that case remedy and mitigation, alongside avoidance, is the more appropriate policy wording.

30. I agree with Mr Griffin[17] that, in order to maintain consistency with the objective, the word "customary" could be deleted from these policies.

31. With regard to proposed Objective 2, its associated policies are:

> **Objective- Investigate Possible Future Te Hā o Tangaroa Protection Areas**
>
> Investigate and identify areas that may qualify as further Te Hā o Tangaroa Protection Areas and implement measures for those areas that will protect them from inappropriate use, disturbance and development.
>
> **Policies - Possible Future Te Hā o Tangaroa Protection Areas**
>
> (1) Consider proposals from tāngata whenua and/or the community to identify, investigate and monitor areas of the coastal marine area that are, or are likely to be, adversely affected by activities (including fishing).
>
> (2) Where Te Hā o Tangaroa Protection Areas have been identified, introduce the further marine spatial planning mechanisms that may be required to protect and restore them.

32. Mr Griffin acknowledges that there are other areas in Northland where protection is likely to be warranted. However, he does not agree with that objective because[18]:

- The identification of future areas needs to be informed by tāngata whenua involvement (as well as other stakeholders) and the Council does not have the cultural knowledge to be able to identify and investigate areas in a strategic and coordinated way.
- The objective would lead to a presumption or expectation that areas that may be proposed in the future would automatically be incorporated in the Proposed Plan.
- In designing the Proposed Plan, the Council decided that the Plan should be streamlined and not include non-regulatory methods. The objective and related policies suggest a non-regulatory method, which is inconsistent with the architecture of the Proposed Plan.

[17] Mr Griffin's evidence, paragraph 82.
[18] Mr Griffin's evidence, paragraphs 63 – 66 and 79

33. Mr Brass agrees with Mr Griffin[19].

34. Mr Torkington raises a concern that the prospect of introducing further protection areas, if that was to occur, would further concentrate fishing pressure on remaining areas[20]. Mr Clark raises a concern that the proposed provisions are seen as being a model of similar types of fisheries controls across the region and goes on to estimate the value impact that could have.[21]

35. In my initial discussions with the appellants, it was made clear to me that the issues raised were not confined to the particular areas addressed in the (now) appeal relief. There was knowledge of interest from other iwi and hapū in the Northland Region that similar issues may be raised in their areas. I was accordingly asked to draft provisions that recognised other areas may need to be investigated.

36. I acknowledge that, even without these provisions, the door remains open for other areas to be proposed and considered. However, I continue to support the greater certainty that would be provided through provisions that recognise the possible need to investigate other areas.

37. The policy is worded in a way that Council would respond to proposals from tāngata whenua and/or the community. I agree with Mr Griffin that the identification of future areas needs to be informed by tāngata whenua involvement and in that respect would support removal of the "/ or" from the policy.

38. I do not agree that the objective would lead to a presumption or expectation that areas that may be proposed in the future would automatically be incorporated in the Proposed Plan. The policy refers to Council "considering" requests. That would need to be done in a way that satisfied RMA requirements, including s 32, and would then need to follow a Schedule 1 process. That process would need to address all relevant issues, including that raised by Mr Torkington.

39. The second policy refers to introducing further marine spatial planning mechanisms that may be required to protect and restore them. These could be regulatory or non-regulatory mechanisms, within or outside the plan. Regarding the point Mr Griffin makes about the Plan not being designed to include non-regulatory methods I note that there are already other policies that suggest this. For instance, Policy 4.4.2 refers to supporting voluntary efforts to achieve Objective 3.15.

40. I acknowledge the difficulty of the pNRP not containing methods. In that respect this same issue was addressed in the *Mōtītī* case and was addressed by the way of a method. I have attached that method, now in the operative Bay of Plenty Regional Coastal Environment Plan, in Appendix A to this evidence. In the absence of methods in the pNRP a policy appears to be the only way to address what would otherwise, in my view, remain a gap in the Plan. However the Bay of Plenty method example is more comprehensive than the proposed policy wording here

[19] Mr Brass' evidence, paragraph 63
[20] Mr Torkington's evidence, paragraph 9.3
[21] Mr Clark's evidence, paragraphs 120 – 122.

and I would support consideration of an expanded policy wording along the same lines should that be seen to be necessary.

41. In paragraph 6.13 of my primary evidence, I acknowledged that a further provision, relating to rehabilitation or restoration, could be justified. In that respect I note that the Te Mana o Tangaroa proposal contains the following policy:

> Restore or enhance areas of cultural significance, including significant cultural landscape features and culturally sensitive landforms and the mauri of coastal waters, where customary activities are restricted or compromised

42. I support a policy along these lines, although would prefer wording as follows:

> In areas identified as [Protection Areas] encourage and support initiatives from tāngata whenua and the community generally for the restoration or enhancement of marine areas of cultural, ecological and natural character significance

43. In respect of the rules and the proposed schedule, I note that these have not been addressed in detail in other evidence. Mr Griffin generally supports these provisions[22].

44. Following the planner's expert conferencing I have had a brief opportunity to view a further draft of an amended version of Te Uri o Hikiki rules, however have not seen a final version. I see some merit, as a permitted activity, in referring to kina /sea urchin "management" rather than "harvest" and that reference be made to "the study of matauranga Māori", although where this is not clear it may need some definition. These and the other minor changes I have canvassed in this evidence are incorporated in an amended version I attach as Appendix B to this evidence.

Conflicts with Fisheries Act

45. Dr Mitchell takes an approach of considering the relationship of sections 30 and 30(2) of the RMA, in respect of indigenous biodiversity and natural values, alongside the effects of imposing rules, particularly the effect on Māori customary (non-commercial and commercial) and recreational fishing interests. His, and other, evidence outlines the historical processes, including an important Treaty settlement, that have led to the current regime of Māori rights to fish. Dr Mitchell states: *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*[23].

[22] Mr Griffin's evidence, paragraph 85
[23] Dr Mitchell's evidence, paragraph 73

46. In referring to the Mōtītī case Dr Mitchell outlines five indicia set out by the Court of Appeal and distinguishes this case from the Mōtītī one[24].

47. In my view these are legal considerations and I understand from counsel that they will be addressed in legal submissions. However, I note that the size of the proposed "no take" areas (the proposed sub-Area A) are reasonably similar as between Mōtītī and the relief sought in this proceeding.

48. Mr Hore raises a potential concern about the provisions differentiating between sectors. Mr Holdsworth raises a similar issue[25].

49. This is also primarily a legal issue, but I note that the Te Hā o Tangaroa provisions manage fishing methods for resource management purposes and do not differentiate between who undertakes those methods. The provisions apply equally to commercial, non-commercial, and customary fishers.

Section 32

50. Mr Volkering raises several concerns about whether there has been a sufficiently robust s 32 process[26].

51. As noted in my primary evidence, much of the basis for the proposed provisions exists in the pNRP already – including all of the provisions relating to natural character (such as Policy D.2.17) and ecology (including D.2.18). These have been subject to separate s 32 analysis throughout the process to date (I understand the policies referred to here are now deemed operative).

52. The primary purposes of the proposed provisions are to establish a spatial layer of how those other policies are applied in specifically identified areas. I acknowledge that the s 32 material and evaluation report produced by the Council did not envisage this and that a further evaluation (although not necessarily a report) is necessary to address s 32 requirements.

53. I address s 32 requirements in my primary evidence. I refer to the relevant planning instruments in Section 4, the significance of the environment and adverse effects (primarily via reference to other evidence) in Section 5, give an assessment of the proposed objectives in Section 6, and evaluate the proposed provisions, alternatives, and efficiency, effectiveness and cost (the latter also the subject of Dr Denne's evidence) in Section 7.

54. I acknowledge that matters relevant to a s32 analysis have also been raised in s274 party evidence, which represents a broad range of interests.

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[24] Dr Mitchell's evidence, paragraphs 77 - 79
[25] Mr Holdsworth's evidence, paragraph 11.14
[26] Mr Volkering's evidence, Section 8

55. Regarding particular matters that have been raised, I agree with Dr Mitchell that a consideration of alternative mechanisms is relevant to the evaluation under section 32AA[27].

56. In respect of the evidence that has been received that relates to costs I rely on the rebuttal evidence of Dr Denne in relation to costs to fishers of costs of changing location or methods, noting that Dr Denne has made a distinction between costs and value. He considers value should not be affected as total catch is determined by the supply of annual catch entitlements under the quota management system rather than the availability of fishing space. In respect of the additional restrictions and costs of effort for Māori being a consequent loss of rangatiratanga I defer to the rebuttal evidence of Robert Willoughby and Matu Clendon, although make further comment on tāngata whenua issues below. In respect of effects on recreational fishing, this is certainly a relevant consideration but in my opinion cannot outweigh the directions in Policies 11 and 13 NZCPS.

57. Mr Griffin identifies and comments on four options, being[28]:

    1. do nothing and maintain the status quo;

    2. do nothing, but lobby for the introduction of protection under other legislation (e.g. fisheries controls, the establishment of marine parks or marine protected areas);

    3. the proponents' provisions or a reduced form of the proponents' provisions; and;

    4. a hybrid approach of amending the Proposed Plan's existing controls to attempt to manage the issues.

58. I agree with Mr Griffin's assessment in relation to Options 1, 3 and 4[29]. I also agree with Mr Griffin's view that the most appropriate way to address the issues is through spatially identified marine protection measures[30].

59. Dr Mitchell is incorrect that alternatives have not been addressed by the appellant[31]. This is addressed in paragraphs 7.17 – 7.30 of my primary evidence where I canvass the status quo, the Fisheries Act, temporary closures, taiāpure-local fisheries, mātaitai reserves and the Marine Reserves Act.

60. Dr Mitchell is also incorrect that my primary evidence was that alternatives under other legislation are matters the Court cannot consider[32]. He may be referring to Mr Griffin who does not discuss measures under other legislation on the basis that the Court could not order such an outcome[33].

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[27] Dr Mitchell's evidence, paragraph 62
[28] Mr Griffin's evidence, paragraph 69
[29] Mr Griffin's evidence, paragraphs 71 - 74
[30] Mr Griffin's evidence, paragraph 61
[31] Dr Mitchell's evidence, paragraphs 62, 80, 82 and 85
[32] Dr Mitchell's evidence, paragraph 83
[33] Mr Griffin's evidence, paragraph 66

61. As discussed in my primary evidence on options I acknowledge that there are other potential measures that can provide protection for biodiversity values. It is worthwhile, given Dr Mitchell's statements, for me to repeat paragraph 7.29 here:

> Taking all of the above into account, I acknowledge the Fisheries Act, Marine Reserves Act and other legislation may provide possibilities to achieve the stated Objectives. If, under other legislation, there was confidence controls on fishing were already in place, or to be put in place, then a cross-reference to those protections in the pRECP could be seen as satisfying those objectives.

62. I note the evidence that refers to the greater flexibility for controls and mechanisms under the Fisheries Act[34]. I see that there is also contrary evidence (such as the evidence of Julianne Cheltham, and rebuttal of Mr Willoughby and Mr Clendon) which describes the barriers and drawbacks associated with Fisheries Act mechanism. I note that other evidence refers to various other initiatives that are being undertaken or that are underway, both regulatory and non-regulatory.[35]

63. Mr Holdsworth refers to Ecosystems Based Fisheries Management and considers the advantages of this approach would be that it has a wider scale[36]. In that respect, and since preparing my primary evidence I have read a recent publication from the Prime Minister's Chief Science Advisor on The Future of Commercial Fishing in Aotearoa New Zealand[37]. The document promotes, ultimately, an Oceans Strategic Action Plan and an Ecosystem Approach to Fisheries Management (EAFM).

64. While the scope of the Chief Science Advisor's publication is confined to commercial fishing the document contains a worthwhile discussion of the sort of issues raised in this appeal. The following are extracts from this publication:

> A key limitation of taking a collaborative, multi-stakeholder approach to region-specific management is that progress can be slow, despite action sometimes being urgent. These approaches are also resource intensive.[38]
>
> The Sea Change – Tai Timu Tai Pari marine spatial plan is an example of how to integrate a range of stressors into a plan for managing the marine environment. That this is yet to be implemented illustrates the challenges in putting such plans into action[39].

65. The document does point out that:

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[34] For example, Mr Knight's evidence, paragraph 8.21(e)(i)
[35] As examples, the list given in paragraph 40 of Ms Te Heuheu's evidence.
[36] Mr Holdsworth's evidence, paragraph 11.14
[37] The Future of Commercial Fishing in Aotearoa New Zealand A report from the Office of the Prime Minister's Chief Science Advisor, Kaitohutohu Mātanga Pūtaiao Matua ki te Pirimia February 2021. See https://www.pmcsa.ac.nz/topics/fish/
[38] Ibid Page 19
[39] Ibid Page 27

> However, there are many provisions within the current Fisheries Act 1996 that could be better used to enact immediate change, in parallel with the broader conversation.[40]

However, goes on to say[41]:

> While much attention is focused on MPAs, less profile is given to specific provisions in the Fisheries Act 1996 for habitat protection. For fisheries management, the specific regulatory lever for habitat protection is through Section 9(c) of the Fisheries Act 1996. This states that, in relation to the utilisation of fisheries resources or ensuring sustainability, decision makers shall take into account the environmental principle that habitats of particular significance for fisheries management (HPSFM) should be protected. This supports the sustainability of fisheries, the environment, and our ecosystems as a whole.
>
> However, according to Fisheries New Zealand, there have been no HPSFM defined or applied in the approximately 25 years the Fisheries Act 1996 has been in place.

66. Mr Knight has interpreted my primary evidence as saying that there is no prospect of alternative measures[42]. My evidence referred to no "current" prospect, however I acknowledge that there are initiatives underway, and the above very recent publication is evidence of recognition of what more can be done, and how, to address marine biodiversity issues. I also accept that possibilities may be available under the Fisheries Act or a new regime.

67. However, at present, there are issues with the current regulations that are clearly not being effective in protecting the marine environment. Even where they are in place, they are not universally efficient. As an example, in respect of Maunganui Bay, hapū could just keep applying for the s 186A temporary closure every 2 years. In my view, 10-year RMA controls are more efficient and effective than 2 yearly applications. Further, s186A closures are focussed on sustaining the fishery not the ecosystem - the Minister may impose a s 186A closure only if he or she is satisfied that it will recognise and make provision for the use and management practices of tangata whenua in the exercise of non-commercial fishing rights.

68. Overall, I see the issue, is that it has been shown, by hapū, diver tourism operators and the ecologists, that there are adverse effects relevant to RMA plan provisions, not currently being fully addressed by other mechanisms. While there is talk of possible further controls using other mechanisms, none have been formally proposed. To give effect to the RMA plan provisions, an RMA plan response, as sought here, is justified in my view.

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[40] Ibid Page 19
[41] Ibid Page 49
[42] Mr Knight's evidence, paragraph 10.4

69. Mr Torkington raises a concern based on his assumption that the proposed provisions are intended to enable, in time, a resumption of customary use, but that there is no evidence of how and when this could occur. He considers the management tools available under the Fisheries Act are better able to respond to the issues raised by Ngāti Kuta[43] and prefers other measures to address the issues raised, including setting a maximum size limit for snapper and crayfish and a 50% natural unfished state threshold for those species[44].

70. Leaving aside the length of time that it may take for the Protection Area to recover to a point that Ngāti Kuta would be satisfied it is no longer required, the proposed RMA method is one that has been specifically sought by Ngāti Kuta. Regardless, as with the importance of Ngāti Kuta (and Te Uri o Hikihiki) being a party with a primary involvement in what is being sought here, I would expect them to have a major role in all future plan changes or reviews affecting these provisions.

Overlap - Proposed Provisions vs Fisheries Act Provisions

71. Mr Brass refers to the matter of overlap between the proposed provisions and Fisheries Act provisions and raises the following concerns[45]:

- The proposed rules allow the taking of kina, and yet this is regulated under the Fisheries Act. If this provision was removed it would have no effect on biodiversity protection, which would still be ensured under the Fisheries Act regulations.
- Drift netting is already prohibited under the Fisheries Regulations[46].
- Where overlap and risk of confusion can be minimised, it is good practice to do so and additional rules should only be imposed where they would provide some additional benefit.

72. Regarding kina, I note that the taking of kina is already excluded from the s 186A temporary restriction area in part of the proposed sub-Area A. I am not aware that has created any confusion with the other restrictions that apply under the Fisheries Act. I do not understand the intention to be to allow unrestricted take of kina above the daily bag limit as stated by Ms McKinnon[47] and I do not consider that the proposed rule would authorise this. I do not see an issue with the proposed wording, but I am open to alternative wording to express the appellants' and Ngāti Kuta's intention: that kina may be taken (subject to Fisheries Act bag limits), but not other marine life.

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[43] Mr Torkington's evidence, paragraph 5.6
[44] Mr Torkington's evidence, paragraph 13.3 – I note that Mr Drummond also refers to this possibility in his evidence – paragraph 122
[45] Mr Brass' evidence, paragraphs 77 - 81
[46] Also referred to by Mr Knight's in his evidence, paragraph 10.4
[47] Ms McKinnon's evidence, paragraph 34.

73. In summary I consider the further information that is available to the Court from s274 party evidence assists in rounding out a s32 analysis, however it does not change the conclusions I have reach in my primary evidence.

74. There is clearly an overlap between the Fisheries regulations and the proposed provisions. The Fisheries regulations, in themselves, are complex and I do not see the relatively simple provisions sought in the relief to add significant extra complexity.

75. I have already acknowledged the possibility that a pNRP objective could be seen as being satisfied if it was fully achieved by other mechanisms. In this case, there is at least partial achievement through the Fisheries regulations, and I can understand there may be an option of the pNRP just addressing the gap. However, due to the different spatial bases used that would not be a simple exercise and may create even more complexity. Of greater concern, it may prove difficult for the pNRP to respond to changes that may occur to the Fisheries regulations. For example, if a Fisheries Act control was introduced in relation to recreational scallop dredging in sub-Area B – currently one of the gaps to be addressed in the proposed provisions, would there then need to be a plan change to remove that rule from the pNRP?

76. Lastly, I cannot see a way of drafting "gap filling" provisions that would be in compliance with the legal requirements that RMA controls must be for an RMA purpose and not distinguish between fishing sectors. Commercial scallop dredging is already controlled under Fisheries regulations, so in theory the RMA control in Area B could apply only to recreational scallop dredging. This would ensure no overlap between the RMA and Fisheries controls, but, as I understand it, would be unenforceable by virtue of s6 Fisheries Act.

77. On balance, it is generally my view the better option is for the pNRP to generally cover all aspects, notwithstanding an overlap with other regulations. If there was to be an exception, that could perhaps be deleting reference to drift netting, a current Fisheries restriction that it appears there will be no prospect of being changed.

78. Finally, in any event, I would support the possibility of an explanatory note in the plan that explains and alerts readers to other regulations that apply.

CONCLUSION

79. Having read the evidence of other parties, I remain in support of the substance of the provisions provided with my primary evidence (as modified by the narrowed relief circulated by Counsel on 8 June 2021). Improvements to detailed wording may be possible, including to further align the relief sought by Te Uri o Hikihiki and the appellants' and Ngāti Kuta.

Peter Reaburn

22 June 2021

APPENDIX A

Bay of Plenty Regional Coastal Environment Plan

Method 19AA

Council will partner with tangata whenua for additional spatial mechanisms for the coastal marine area that identify and protect:

(a) Areas or sites of cultural, biodiversity and/or natural character value that may require additional protection and/or restoration;
(b) Areas or sites of cultural, biodiversity and/or natural character value that are, or are likely to be, adversely affected by activities (including fishing), and options to manage such activities for the protection of cultural, biodiversity and/or natural character values.

When considering such a proposal, and whether or not to implement it through a plan change process or other means, Council will take into account relevant matters including the following:

(i) Te Tiriti o Waitangi Settlement processes;
(ii) Whether there are outstanding applications for customary recognitions under the Marine and Coastal Area Act;
(iii) Whether the group has undertaken consultation with other tangata whenua;
(iv) Whether the proposal is supported by a relevant iwi or hapū management plan;
(v) The level of support for the proposal from the community and other tangata whenua that have a relationship with the area;
(vi) Urban development capacity and current and future infrastructure needs;
(vii) The extent to which the proposal provides for the social, economic and cultural well-being of the wider community, including consideration of current and future public access, and existing uses and activities; and
(viii) Whether a collaborative approach to resource management is appropriate in accordance with Method 33 of the RPS.

Advisory note: A Schedule 1 process will be required to incorporate any planning outcomes in a statutory framework, such as a regional, district or city plan.

Implementation responsibility: Tangata whenua, the community, Regional Council, city and district councils, the Department of Conservation and the Ministry Primary Industries.

APPENDIX B RECOMMENDED PROVISIONS

(June 2021)

F OBJECTIVES

F.1.x Te Hā o Tangaroa Protection Areas

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

[or]

Protect from inappropriate disturbance, use and development the mauri and taonga species and their habitats, and customary values that make up Te Hā o Tangaroa Protection Areas.

F.1x Investigate Possible Future Te Hā o Tangaroa Protection Areas

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

D POLICIES

D.2.x Te Hā o Tangaroa Protection Areas – manage adverse effects

In Te Hā o Tangaroa Protection Areas

(1) Avoid adverse effects of activities on the identified characteristics, qualities and ~~customary~~ values of Te Hā o Tangaroa Protection Areas – Sub Areas A

(2) Avoid, remedy or mitigate adverse effects of activities on the identified characteristics, qualities and ~~customary~~ values of Te Hā o Tangaroa Protection Areas – Sub Areas other than Sub Areas A

(3) In areas identified as [Protection Areas] encourage and support initiatives from tāngata whenua and the community generally for the restoration or enhancement of marine areas of cultural, ecological and natural character significance

D.2.x Possible Future Te Hā o Tangaroa Protection Areas

(3) Consider proposals from tāngata whenua and/or the community to identify, investigate and monitor areas of the coastal marine area that are, or are likely to be, adversely affected by activities (including fishing).

(4) Where Te Hā o Tangaroa Protection Areas have been identified, introduce the further marine spatial planning mechanisms that may be required to protect and restore them.

C RULES

C.1.9 Te Hā o Tangaroa Protection Areas

Note: The rules in this section do not apply to aquaculture activities (refer C.1.3 Aquaculture)

Note: Further regulations apply under the Fisheries Act 1996

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 – permitted activities

The following activities in a Te Hā o Tangaroa Protection Area involving the temporary or permanent damage or destruction or removal of fish, aquatic life or seaweed are permitted activities, subject to any other applicable rules:

(a) All Sub-Areas (Sub-Area A, Sub-Area A buffer zone, Sub-Area B and Sub-Area C)

i. Kina/sea urchin harvest (or Kina/sea urchin management);
ii. Resource consent monitoring undertaken in accordance with resource consent conditions;
iii. Marine biosecurity incursion investigation and/or response;
iv. Wildlife rescue;
v. Monitoring and enforcement carried out by a regulatory agency;
vi. Mooring, anchoring and hauling small vessels ashore;
vii. Scientific research, conservation activities and monitoring undertaken by, under the supervision of, or on behalf of, the following entities:
    - Crown research Institutes;
    - Recognised Māori research entities;
    - Tertiary education providers;
    - Regional Councils;
    - Department of Conservation;
    - Ministry for Primary Industries;
    - An incorporated society having as one of its objectives the scientific study of marine life or natural history, or the study of matauranga Māori.

~~(b) In the Sub-Area A buffer zone (in addition to those listed in (a)):~~

~~i. hand fishing with one line and one hook per person~~
~~ii. hand gathering of aquatic life that does not involve the use of scuba equipment or any implement (such as a knife, hook or spear).~~

(c) In Sub-Area B (in addition to those listed in (a)):

Any activity involving the temporary or permanent damage or destruction or removal of fish, aquatic life or seaweed that is not a prohibited activity in Section C.1.9 of this Plan.

(d) In Sub-Area C (in addition to those listed in (a)):

Any activity involving the temporary or permanent damage or destruction or removal of fish, aquatic life or seaweed that is not a prohibited activity in Section C.1.9 of this Plan.

C.1.9.2 Temporary or permanent damage or destruction or removal of fish, aquatic life or seaweed in a Te Hā o Tangaroa Protection Area - prohibited activities

The following activities in a Te Hāo Tangaroa Protection Area involving the temporary or permanent damage or destruction or removal of fish, aquatic life or seaweed that is not a permitted activity in Section C.1.9 of this Plan, are prohibited activities:

(a) In Sub Area A:

Any activity involving the temporary or permanent damage or destruction or removal of fish, aquatic life or seaweed that is not a permitted activity in Section C.1.9 of this Plan.

(b) In the Sub-Area A buffer zone:

Any activity involving the temporary or permanent damage or destruction or removal of fish, aquatic life or seaweed that is not a permitted activity in Section C.1.9 of this Plan.

(c) In Sub-Area B:

a. Bottom trawling;
b. Bottom pair trawling;
c. Danish seining;
d. Purse seining,
e. Longlining without approved seabird mitigation devices;
f. Drift netting;
g. Scallop or other dredging.

(d) In Sub-Area C:

a. Bottom trawling;
b. Bottom pair trawling;
c. Danish seining;
d. Purse seining,
e. Longlining without approved seabird mitigation devices;

f. Drift netting.

MAPS

Map Layer	Description
Te Hā o Tangaroa Protection Areas	These areas are overlays within identified Significant Ecological Areas, Significant Bird Areas, Significant Marine Mammal and Seabird Areas, Sites and areas of significance to tangata whenua or Outstanding or High Natural Character areas. The areas have been identified as being particularly vulnerable to environmental or cultural degradation such that specific protection is justified, focused on avoiding adverse effects arising from extraction of flora and fauna, and disturbance of the seabed. In some cases, Taiapure and Mataitai areas are excluded. This is because different hapu have determined that further protection through this regional plan is not required. Te Hā o Tangaroa Protection Areas may overlap. This recognises that a major basis for identifying these areas relates to the various Northland hapū rohe moana. In some areas these rohe moana are shared. Te Hā o Tangaroa Protection Areas are broken down into sub-areas which have different combinations of characteristics, qualities and values and appropriate levels of protection from activities that may permanently or temporarily damage these characteristics, qualities and values – (see the Te Hā o Tangaroa Protection Area Schedules).

Mapped Marine Protection Area – Te Uri o Hikihiki and Ngāti Kuta