Submission on the proposed south-east marine protected areas

3 August 2020

NZ ROCK LOBSTER
INDUSTRY COUNCIL

PĀUA INDUSTRY COUNCIL

FISHERIES INSHORE NEW ZEALAND

Contents

1. Introduction

1. This submission is made jointly by:

    - The NZ Rock Lobster Industry Council (NZRLIC);
    - The Pāua Industry Council (PIC); and
    - Fisheries Inshore New Zealand (FINZ).

2. NZRLIC, PIC and FINZ are national representative bodies for the relevant sectors of the inshore fishing industry. This submission is made on behalf of quota owners, fishers and affiliated seafood industry personnel in inshore shellfish and finfish fisheries. Collectively – and together with regional organisations the Otago Rock Lobster Industry Association Incorporated (ORLIA), PauaMAC 5 Incorporated and Southern Inshore Fisheries Management Company (SIFMC) – we directly represent all of the major inshore fisheries in the south-east of the South Island. The involvement of national representative industry organisations reflects the significance of the Forum's proposals to the entire inshore fishing industry. For the purposes of this submission, the submitters are referred to as '*the fishing industry*'.

2. Summary of industry position

3. The fishing industry supports the effective protection of marine biodiversity. However, we do not support the presumption that marine reserves or other forms of marine protected areas (MPAs) are the best way of achieving New Zealand's marine biodiversity protection objectives. We consider that effective biodiversity protection requires careful definition of objectives and identification of threats, followed by selection of the least-cost tool for managing the identified threats and achieving the objectives. If fishing is posing a risk to marine biodiversity, measures implemented under the Fisheries Act 1996 or directly by fishing sector groups will usually be the most appropriate management response.

4. In the fishing industry's experience, the process to establish MPAs in the south east region of the South Island (the SEMPA process) has been divisive and flawed to the extent that Ministers should not rely on it as a basis for making decisions about marine protection. The SEMPA proposals will have significant negative impacts on sustainable fisheries management, the fishing industry, and the wellbeing of local communities. These impacts will exacerbate the harsh economic circumstances of New Zealand's COVID-19 recovery for individuals, businesses, and the south-east region. The benefits of the proposed MPAs are illusory and overstated and there are lesser-cost options available for achieving biodiversity protection objectives in the region. The proposed implementation mechanisms are not fit for purpose. It is widely accepted that New Zealand's Marine Reserves Act 1971 (MRA) is well past its 'use by' date and was never intended to protect areas for biodiversity protection purposes. The Type 2 MPA proposals go far beyond measures that can legitimately be implemented to manage adverse effects of fishing under the Fisheries Act 1996.

5. The fishing industry therefore opposes the SEMPA Network 1 proposals in their entirety and objects to each individual Type 1 and Type 2 MPA and the kelp protection area. The primary grounds for our opposition to individual proposed MPAs can be summarised as follows.

Proposed MPA	Reasons for objection
Marine reserve B1 Waitaki	• MRA s.5(6)(e) contrary to the public interest
Marine reserve D1 Te Umu Koau	• MRA s.5(6)(c) undue interference with commercial fishing • MRA s.5(6)(d) undue interference with and adverse effects on recreational fishing • MRA s.5(6)(e) contrary to the public interest
Marine reserve H1 Papanui	• MRA s.5(6)(c) undue interference with commercial fishing • MRA s.5(6)(d) undue interference with and adverse effects on recreational fishing • MRA s.5(6)(e) contrary to the public interest
Marine reserve I1 Ōrau	• MRA s.5(6)(c) undue interference with commercial fishing • MRA s.5(6)(d) undue interference with and adverse effects on recreational fishing • MRA s.5(6)(e) contrary to the public interest
Marine reserve K1 Okaihae	• MRA s.5(6)(c) undue interference with commercial fishing • MRA s.5(6)(d) undue interference with and adverse effects on recreational fishing • MRA s.5(6)(e) contrary to the public interest
Marine reserve M1 Hākinikini	• MRA s.5(6)(d) undue interference with and adverse effects on recreational fishing • MRA s.5(6)(e) contrary to the public interest
Type 2 MPA A1 Tuhawaiki **Type 2 MPA C1 Moko-tere-a-torehu** **Type 2 MPA E1 Kaimata** **Type 2 MPA L1 Whakatorea** **Type 2 MPA Q1 Tahakopa**	• Inconsistent with purpose of Fisheries Act • No evidence of adverse effects of fishing • Unjustified restriction of utilisation of fisheries resources
Kelp Protection Area T1 Arai Te Uru	• Inconsistent with purpose of Fisheries Act • No evidence of adverse effects of fishing • Unjustified restriction of utilisation of fisheries resources

3. Marine reserve proposals

3.1 Objections to all proposed marine reserves: contrary to the public interest

6. An objection to a marine reserve must be upheld if the marine reserve is contrary to the public interest (MRA s.5(6)(e)). The fishing industry objects to each of the proposed marine reserves on the grounds that the marine reserves are individually and collectively contrary to the public interest because:

    a) The MRA is not fit for purpose;

    b) The marine reserves are not justified in relation to the purpose of the MRA;

    c) The marine reserves jeopardise sustainable fisheries management;

    d) The costs of the marine reserves are significant and under-estimated;

    e) The benefits are illusory and overstated;

    f) The marine reserves will not achieve their intended purpose because numerous threats to marine biodiversity remain unmanaged;

    g) The marine reserves are not necessary in order for New Zealand to meet its international obligations;

    h) The costs imposed by the marine reserves are unnecessary and undue when lower-cost alternatives are available;

    i) The marine reserves are inconsistent with the Minister of Fisheries' obligations under the Fisheries Settlement;

    j) Each of the above concerns is exacerbated by a failure to consider cumulative impacts; and

    k) The proposals are the outcome of a flawed and divisive process.

7. Each of these eleven grounds for objection is outlined in more detail below. First, however, we note that the issue of 'public interest' is not directly addressed in the application. The public interest is <u>not</u> (as implied in the application and consultation document) simply a bundling of the various interests of stakeholder groups.

8. Whether or not something is contrary to the public interest is a judgement call that is likely to change with time, as guided by societal values. The public interest in relation to marine reserves today is very different from the public interest when the MRA was first enacted – for example, Treaty considerations are a more widely recognised aspect of the public interest now than they were in 1971, and our understanding of the importance of biodiversity protection and sustainable fisheries management has evolved significantly.

9. The Office of the Ombudsman recently provided useful guidance about the 'public interest' test in the Official Information Act, some of which is relevant to the MRA. The Ombudsman advises:[1]

> *The public interest is broadly equivalent to the concept of* ***the public good****. It can cover a wide range of values and principles relating to the public good, or* ***what is in the best interests of society****…*
>
> *Public interest* ***does not mean the entire population has to be affected, or even a significant section of it*** *(although the fact that a large number of people are affected may increase the public interest…).* ***The private interests of individuals can also reflect wider public interests***.

10. While – as noted in the application – submissions in support may be *relevant* to the public interest, it does not follow that a proposed marine reserve that has many supporters is *in the public interest*.[2] Furthermore, if a proposed marine reserve is considered to be contrary to the public interest, an objection must be upheld under MRA s.5(6)(e), so submissions in opposition are likely to be more relevant to a decision about whether or not to declare a marine reserve – a fact not mentioned in the application.

11. For the avoidance of doubt, the fishing industry agrees that it is in the public interest to protect marine biodiversity from identified threats, but we submit that the SEMPA marine reserve proposals collectively and individually are not in the public interest for the reasons outlined below.

3.1.1 Marine Reserves Act is not fit for purpose

12. The fishing industry considers that it is not in the public interest to seek to protect marine biodiversity using outdated legislation that is contentious, not fit for purpose (i.e., has a purpose unrelated to biodiversity protection), and does not directly recognise or give effect to the Treaty relationship. Agencies and Ministers are well aware of the failings of the MRA as it has been under review since 2000. The 'unfitness' of the Act is also apparent in the application, as the applicant – the Department of Conservation (DOC) – attempts to retrospectively justify the proposed marine reserves using language and concepts that are unrelated to the purposes for which the sites were identified by the Forum under the MPA Policy.

13. It is particularly contrary to the public interest to continue to use unfit legislation when alternative, more effective approaches for protecting marine biodiversity are currently available – for example, managing identified threats to marine biodiversity using fit-for-purpose legislation such as the Fisheries Act and Resource Management Act 1991 (RMA).

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[1] Office of the Ombudsman (2019) Public interest. A guide to the public interest test in section 9(1) of the OIA and section 7(1) of the LGOIMA 22 Apr 2019. As for all the cited extracts of documents referred to in this submission, the emphasis is ours.

[2] Proposed southeast marine protected areas. Appendices to consultation document, page 57.

3.1.2 Proposals not justified in relation to purpose of Marine Reserves Act

14. It is not in the public interest to establish marine reserves that have not been, and cannot be, justified in relation to the purpose of the MRA. The purpose of the MRA is to [preserve] *as marine reserves **for the scientific study of marine life**, areas of New Zealand that contain underwater scenery, natural features, or marine life, of such distinctive quality, or so typical, or beautiful, or unique, that their continued **preservation is in the national interest***.[3]

Scientific study of marine life

15. The application does not seek to justify the individual sites in relation to the statutory purpose of preserving areas *for the scientific study of marine life,* nor in relation to the more onerous requirement that declaring the marine reserve will be *in the **best interests** of scientific study*.[4] The application does not identify particular research projects that would be undertaken in each reserve, nor consider practical matters such as the relative inaccessibility of many of the reserve sites for scientific study purposes due to adjacent private land ownership, limited road access, and prevailing harsh sea conditions. The absence of site-specific justification is not surprising as the sites were selected for reasons unrelated to scientific study.

16. Under the MRA, each marine reserve must be assessed on its merits, including its value in relation to the scientific study of marine life, and not as part of a network of representative areas. However, the only references to scientific study in the application are generic justifications for all six proposed sites.

17. The application states that *representation of the full range of habitats and ecosystems in marine reserves **has high scientific value**, contributing to the scientific purpose of the Act.* This is simply an assertion – the application contains no information to explain why it is necessary or in the best interests of scientific study to preserve representative habitats generally, or the proposed sites specifically.

18. While the application identifies a wide variety of scientific studies that could be undertaken in the proposed reserves, all of the suggested generic research projects could be undertaken irrespective of whether a marine reserve is established at a specific site. In particular, the suggested use of marine reserves as reference areas (i.e., without environmental pressures) is not valid as the sites are subject to a wide range of threats that will not be controlled by establishing a marine reserve (see **section 3.1.6** of this submission). Furthermore, even if all threats were able to be controlled, an MPA can only provide an effective 'control' site if it is large enough to capture the movement of all resident species. None of the proposed MPAs have been designed with this intent.

[3] Marine Reserves Act, section 3.
[4] Marine Reserves Act, section 5(9).

National interest

19. The 'national interest' justification in the application is also generic and formulaic rather than site-specific, and is not directly related to the 'scientific study' aspect of the Act's purpose .[5] The assumption throughout the application is that the proposed marine reserves are in the national interest because they contribute to New Zealand's international obligations under the Convention on Biological Diversity (CBD) and implement government policy – i.e., the New Zealand Biodiversity Strategy (NZBS) and MPA Policy. While the CBD, NZBS and MPA Policy are valid 'national interest' considerations, the CBD and domestic policies enable a range of tools to be used to protect marine biodiversity. None of these obligations support a 'national interest' argument that assumes that a marine reserve is the only, or the best, tool to achieve New Zealand's marine biodiversity objectives (see **sections 3.1.5** and **3.1.7**).[6]

20. Alternative management responses are available that reflect the national interest in marine biodiversity protection more effectively – for example, identifying specific threats to marine biodiversity and implementing the most effective, least cost way of managing those threats.

3.1.3 Proposals jeopardise sustainable fisheries management

21. Under the Fisheries Act, New Zealand's fisheries must be managed to provide for utilisation while ensuring sustainability. It is not in the public interest to establish marine reserves which threaten the sustainability of fisheries.

22. It is now widely understood that displacement of fishing effort from inside marine reserves has a negative effect on the abundance of surrounding fish populations.[7] Research shows that the negative impacts of displaced fishing effort are *more severe* in countries like New Zealand where fisheries are regulated by a Total Allowable Catch (TAC). Unless the TAC is reduced when a marine reserve is established, the same amount of catch will continue to be taken, effectively guaranteeing that fishing will become more intense outside the reserve.[8] Therefore, in TAC-regulated fisheries such as rock lobster, pāua, eels and QMS finfish stocks, the implementation of the proposed marine reserves will:

- Increase the risk of local depletion. For example, recreational pāua catch displaced from marine reserves at sites I1 and K1 will rapidly deplete the few remaining pāua reefs that are accessible to recreational fishers near Dunedin;

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[5] Proposed southeast marine protected areas. Appendices to consultation document, section 3.6.3.
[6] We are aware that the MPA Policy requires that one example of each habitat type should be protected in a marine reserve, but we consider that this aspect of the MPA Policy is political in origin, not able to be justified on scientific grounds, and contradicts the principled approach that is promoted in much of the remainder of the Policy.
[7] For example, see the review of relevant research in Hilborn, R., K. Stokes, J. Maguire, T. Smith, L. Botsford, M. Mangel, J. Orensanz, A. Parma, J. Rice, J. Bell, K. Cochrane, S. Garcia, S. Hall, G. Kirkwood, K. Sainsbury, G. Stefansson and C. Walters (2004). When can marine reserves improve fisheries management? Ocean and Coastal Management 47 (2004) 197-205.
[8] Ovando, D. (2018). Of Fish and Men: Using Human Behavior to Improve Marine Resource Management. University of California Santa Barbara, Santa Barbara California.

- Slow down stock rebuilding rates. This effect has been observed in international studies[9] and has been directly experienced in the pāua fishery PAU5D in response to displacement of commercial harvest from previously established mātaitai reserves;
- Preclude anticipated future increases to TACs and Total Allowable Commercial Catches (TACCs). For example, modelling of the rock lobster fishery CRA7 shows the current stock in very good shape, with biomass well above Bmsy and fishing intensity well below the optimum. The displaced catch from the marine reserves will not only deplete the CRA7 biomass and reduce catch per unit effort (CPUE) – it will also require the industry to forego a significant TACC increase that otherwise would have arisen;[10]
- Exacerbate spatial conflict between fishing sectors. Customary, recreational and commercial fishers will all be forced to operate in a reduced area, which will result in increased competition, particularly for species that are highly valued by all sectors and have a strong spatial dependence such as rock lobster, pāua, eels and blue cod; and
- Increase the risk of a cascade of future controls on fishing. For example, hapū may choose to protect areas of importance for customary fishing from the impacts of displaced commercial and recreational catch by establishing new mātaitai reserves or implementing further controls on fishing within taiāpure or mātaitai reserves in the region. In turn, these measures will result in further displacement of fishing effort and additional threats to fisheries sustainability.

23. The negative effects on surrounding fisheries that are identified above will <u>not</u> be mitigated by 'spillover' benefits to fisheries from the proposed marine reserves. Studies in New Zealand and elsewhere show that while spillover effects outside a marine reserve may be detectable, they are confounded by environmental and management variables and often dissipate at distances greater than 1km from a reserve border.[11]

24. More significantly, the detection of spillover near a reserve boundary does <u>not</u> equate to net increases in fish abundance at a regional scale. The theoretical literature consistently shows that marine reserves can benefit abundance outside reserves only when fishing pressure is very high and stocks are seriously over-exploited.[12] The same result is seen in empirical studies – for example, monitoring of southern Californian reserves showed that the estimated trend of abundance for targeted species increased within the reserves but *decreased* outside

[9] Hilborn, R., F. Micheli, and G. A. De Leo. (2006). Integrating marine protected areas with catch regulation. Canadian Journal of Fisheries and Aquatic Sciences 63:642-649.
[10] Breen Consulting. CRA7 surplus production modelling. 13 May 2020.
[11] Ovando, D. (2018). Full reference above.
[12] Hilborn et al (2004) and Ovando, D. (2018), full references above; Hilborn, R. (2017). Are MPAs effective? ICES Journal of Marine Science, doi:10.1093/icesjms/fsx068; Rassweiler, A., C. Costello, R. Hilborn, and D. A. Siegel. (2014). Integrating scientific guidance into marine spatial planning. Proceedings of the Royal Society B-Biological Sciences 281.

the reserves over a five year period.[13] The fisheries in the SEMPA region are not over-exploited, and the proposed marine reserves have not been explicitly designed to reflect the adult and larval movement of the resident fish species. It is therefore not credible to suggest that the SEMPA marine reserves will benefit the fish populations in the south-east of the South Island.

25. In summary, if marine reserves are established without 'rebalancing' the affected fisheries,[14] the marine reserves will jeopardise and be incompatible with sustainable fisheries management. Furthermore, threats to sustainability such as those noted above are inconsistent with Minister of Fisheries' responsibilities under Fisheries Act and are therefore matters that the Minister should consider when exercising concurrence under the MRA.

3.1.4 Costs are significant and underestimated

26. It is not in the public interest to implement marine reserves that impose significant economic costs on individuals, businesses, local communities, the south-east region, and New Zealand as a whole, particularly when:

- Entire categories of cost have been omitted and are therefore unknown and not factored into the analysis;
- The economic costs are real and largely measurable while any benefits are purely speculative (see **section 3.1.5**);
- The costs fall disproportionately on only a few sectors of society (primarily customary, commercial and recreational fishers in the Otago region), whereas the assumed benefits accrue primarily to other parties;
- Available mechanisms to mitigate some of the identified costs (i.e., by rebalancing affected fisheries using TAC reductions and compensating affected rights owners) were ignored by the Forum and are absent from the SEMPA proposals;
- The economies of Otago and Southland were severely impacted by COVID-19 restrictions and these two regions are predicted to have the slowest economic recovery in New Zealand (**section 6.2.5**); and
- Lower cost alternatives to achieve the Government's biodiversity protection objectives are available (**section 3.1.8**).

27. The direct costs of the SEMPA network on the fishing industry are significant and have been understated in the application. For example:

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[13] Hamilton, S. L., J. E. Caselle, D. P. Malone, and M. H. Carr. (2010). Incorporating biogeography into evaluations of the Channel Islands marine reserve network. Proceedings of the National Academy of Sciences of the United States of America 107:18272-18277.

[14] Rebalancing includes reducing the TAC, TACC and allowances, compensating affected commercial fishing rights owners, reducing recreational daily bag limits, and giving effect to customary fishing aspirations.

- The costs of the proposals for the rock lobster industry are considerably underestimated.[15] The applicant estimates only a $2,068,328 loss of export value, and does not identify or quantify any of the other costs that would be borne by the rock lobster industry, as detailed below and in the ORLIA submission;
- The estimated costs for pāua are omitted entirely from the individual site descriptions and analysis, and appear only as percentage figures in a summary table, meaning that submitters are not provided with any indication of the importance of individual sites for the PAU 5D fishery;[16]
- The estimated costs for the kina fishery are not mentioned at all in the application. The estimates in the consultation document grossly understate the impact on the kina industry as they are "*based on the % of "fishable ground" in the QMA*"[17] and take no account of the presence or absence of healthy kina populations or whether the water conditions allow safe and reliable harvesting. The submission of the Kina Industry Council states that the entire SUR 3 kina fishery would be lost if areas D1 and K1 become marine reserves, because the poor economics of harvesting alternative lower-quality areas would render the fishery valueless;
- The applicant estimates that MPA H1 Papanui would displace $122,000 of finfish catch annually, whereas the analysis in the SIFMC submission estimates the displaced catch is worth over $700,000 per annum; and
- For all species, the gross level of economic analysis in the application and consultation document disguises the <u>actual</u> cost that is imposed as a result of disruption to the existing patterns of fishing activity (e.g., disruption of patterns of spatial distribution of CRA7 fishers in order to maintain a stable conflict-free fishery, disruption of fishing patterns driven by inter-annual variability of catch in sub-areas of the PAU 5D fishery; disruption of rotational harvesting of eels in estuaries around the region).

28. Entire categories of cost have been omitted from the analysis presented in the application and consultation document, including:

- Reductions in quota value, including the value of Settlement Quota – not only in the SEMPA region, but nationally as a result of policy uncertainty if marine reserves are established in a manner that is contrary to quota owners' expectations of the statutory regime;
- Significant economic impacts on individual fishers, their families and businesses caused by the proposed marine reserves (separately and cumulatively), including additional costs of fishing and reductions in profitability;

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[15] Proposed southeast marine protected areas. Appendices to consultation document, page 73.
[16] Proposed southeast marine protected areas. Appendices to consultation document, page 73.
[17] Joint agency advice on the South-East Marine Protection Forum recommendations. 19 October 2018. Released under the OIA.

- Flow-on economic and social costs in affected fishing ports including Timaru, Moeraki, Port Chalmers, Karitane and Taieri Mouth, including value-chain costs for businesses supplying affected commercial and recreational fishers (e.g., fuel, bait, boat supplies), and costs for seafood processors and marketers;
- Costs associated with the need to reduce TACCs and recreational daily bag limits as a direct result of displacement of recreational and commercial fishing effort from the marine reserves;
- The cost of foregone future utilisation opportunities that will arise as a result of slowing the rate of rebuild of PAU5 and precluding the legitimate expected harvest of rebuilt abundance in CRA7;
- Costs associated with the loss of development rights for developing fisheries in the south-east region – for example, bladder kelp and kina. These fisheries are currently not fully utilised, but the loss of future utilisation opportunities has not been assessed or considered;
- Costs associated with impacts on recreational fishing – the absence of reliable information on existing level of recreational fishing means impacts on recreational fishing are downplayed and have not been assessed at all; and
- Cumulative costs of the proposals (as discussed in **section 3.1.10**)

29. We note that the numerous references in the consultation document to the Forum's attempts to minimise costs on existing users (e.g., by excluding certain areas from the proposed marine reserves or not progressing some of the MPAs initially put forward by the Forum) are irrelevant to the current assessment. The statutory assessment under the MRA relates only to the areas that have been proposed as marine reserves, not to sites or areas that are not included in the marine reserve proposals.

3.1.5 Benefits are illusory and overstated

30. It is not in the public interest to implement marine reserves for which the benefits are illusory and overstated. Each of the intended benefits of the marine reserves can be achieved (often more effectively) without establishing a marine reserve.

31. The application and consultation document provide no site-specific analysis of the benefits of the individual proposed marine reserves. Although the features of individual sites are described, the depiction of a site using MRA language – i.e., terms such as 'underwater scenery', 'natural features', 'typical', 'beautiful', or 'unique' – is of no more relevance than a pretty photograph: it does not explain why it would be beneficial to declare the site a marine reserve. After all, the described attributes of the sites are present now without the sites being marine reserves.

32. In place of a site-specific analysis of benefits, the consultation document provides a formulaic and generic statement of benefits, with the following identical conclusion repeated for each site: *By protecting a range of representative habitats and unique features, this site would*

contribute to New Zealand's international biodiversity commitments, protect significant biodiversity, and provide an important representative area for research and scientific study.

33. Each of these assertions is overstated. The proposed marine reserves:

- Cannot *protect a range of representative habitats and unique features* or *protect significant biodiversity* because the majority of threats to marine environments are not effectively managed in a marine reserve (see **section 3.1.6**) and any adverse effects of fishing – typically the only activity that is prohibited in a marine reserve – on the habitats or biodiversity of the site can be managed more effectively using fisheries legislation;
- Are not necessary in order to meet New Zealand's international biodiversity commitments (see **section 3.1.7**); and
- Are not necessary for the purposes of research or scientific study (see **section 3.1.2**).

34. In the absence of any site-specific benefits, the benefit analysis in the consultation document is highly reliant on the claimed benefits of the proposed *network* of MPAs.[18] The analysis of network benefits in the consultation document contains numerous incorrect and unjustified statements, as follows.

Biodiversity conservation

a) The *status quo* is falsely described as '*no protection provided*'. This is patently incorrect: there are currently numerous management measures that serve to protect marine biodiversity in the south east region of the South Island, including regulations and other management settings under the Fisheries Act, mātaitai reserves, marine mammal sanctuaries, and non-regulatory measures (see **section 3.1.10**). These measures, together with any future, targeted measures to manage identified threats, can ensure that marine biodiversity in the south east region is '*maintained and allowed to recover'*.

b) Establishment of the MPA network is <u>not</u> necessary in order to meet New Zealand's international biodiversity commitments (see **section 3.1.7**).

c) Neither is it necessary to meet the objectives of the NZBS or the MPA Policy:

- The NZBS 2000 promotes the use of a range of tools to achieve biodiversity objectives and is currently in the process of being revised. The revised NZBS focuses on effective protection of biodiversity, not on the use of particular tools such as marine reserves. The proposed MPA network is therefore not necessary in order to meet the objectives of the current or revised NZBS; and
- Aspects of the guidelines for implementing the MPA Policy have been described by the Office of the Auditor General as *not supporting the achievement of New*

[18] Proposed southeast marine protected areas. Consultation document section 3.2, page 17.

Zealand's marine biodiversity objectives.[19] The proposed MPA network therefore cannot be justified in relation to the MPA Policy, as the MPA Policy guidance itself does not support the achievement of New Zealand's marine biodiversity protection objectives.

d) As far as we are aware, no-one is proposing that *ad hoc* MPAs should be established in the south east region, so the comparison between a network of MPAs and *ad hoc* MPAs is irrelevant. In any case:

- Network attributes such as spatial links and connectivity are concepts adopted from terrestrial protected area network design and are inappropriate in the marine environment where ecosystems are naturally connected through the aquatic medium; and
- The claim that a network of MPAs can avoid risks to individual sites from localised disasters or climate change impacts lacks justification and defies logic – while a network of MPAs may help ensure that a damaged site is replicated elsewhere, a network cannot avoid localised risks to individual sites as claimed.

Reference areas for scientific study

e) An MPA network is not necessary for the purposes of providing reference areas for scientific study or understanding the impacts of climate change (see **section 3.1.2**).

Social, cultural and economic impacts

f) '*Well being and public enjoyment*' benefits such as tourism and educational activities can occur irrespective of whether an area is an MPA. However, these benefits rely on MPAs being accessible to the public. Public access to nearly all of the proposed sites is poor due to limited and remote road access and prevailing harsh weather and sea conditions.

g) The proposed MPAs do not provide *potential fisheries benefits* – this statement is incorrect and not justified by evidence. MPAs are <u>not</u> fisheries management tools and will jeopardise sustainable fisheries management in the region (see **section 3.1.3**).

35. Irrespective of the above disputed benefits of the MPA network, under the MRA each proposed marine reserve must be justified on the basis of its individual merits in relation to criteria in the Act, and not in relation to purported attributes of an MPA network or the requirements of the MPA Policy. The applicant has not provided any such justification of public benefit.

3.1.6 Non-fishing threats are not managed in marine reserves

36. It is not in the public interest to impose costly marine reserves when the majority of threats to the values of the sites cannot be managed by establishing a marine reserve. The existence of pervasive unmanaged threats – as detailed in **section 3.2** of this submission for the individual

[19] See **section 6.1.4**.

marine sites – means that the sites cannot be preserved as far as possible in their natural state, as required under MRA s.3(2)(a).

37. A comprehensive assessment of anthropogenic threats to New Zealand's marine habitats evaluated 65 threats to 62 marine habitat types and concluded that:[20]

- The two top threats, 83% of the top six threats, and over half of the twenty-six top threats fully, or in part, stemmed from human activities external to the marine environment itself;
- By a considerable margin, the highest scoring threat was ocean acidification, and the second highest overall scoring threat was rising sea temperatures resulting from global climate change. Seven other threats deriving from global climate change all ranked 19= or higher, indicating the importance of international threats to New Zealand's marine ecosystems;
- Threats deriving from human activities in catchments that discharge into the coastal marine environment were among the highest scoring threats. Increased sedimentation resulting from changes in land-use was the third equal highest ranked threat over all habitats and was the highest ranked threat for some coastal habitat types, including kelp forest; and
- Seven of the threats to marine habitats ranking 19= or higher were directly related to human activities in the marine environment including fishing, invasive species, coastal engineering and aquaculture. Bottom trawling was the third equal highest ranking threat.

38. Of this wide range of potential threats to New Zealand's marine habitats, the only potential threat to marine biodiversity that is typically prohibited by declaring a marine reserve is legal fishing. To the extent that illegal fishing activity occurs in an area, it is not prevented by the declaration of a marine reserve.

39. No other significant threats to biodiversity are prohibited by establishing a marine reserve.[21] In particular, the highest ranking threats, ocean acidification and climate change, cannot be controlled by establishing a marine reserve.[22] Neither can the large number of highly ranked

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[20] MacDiarmid, A, A McKenzie, J Sturman, J Beaumont, S Mikaloff-Fletcher and J Dunne (2012). Assessment of anthropogenic threats to New Zealand marine habitats. New Zealand Aquatic Environment and Biodiversity Report No 93.

[21] The MRA does not directly prohibit mining and petroleum exploration. Access restrictions to all marine reserves apply under Schedule 4 of the Crown Minerals Act 1991, but exceptions can be made under s.61(1A) of that Act.

[22] We are aware that marine reserve advocates argue that MPAs are more resilient to climate change. No evidence has been provided to support this proposition. Furthermore, even if an area inside a marine reserve may be more resilient to climate change, utilisation pressures outside the marine reserve will increase when a marine reserve is established. While the net result is difficult to predict, it cannot be assumed that the overall resilience of the marine environment to climate change will increase. Marine reserves are therefore unlikely

threats deriving from terrestrial activities. A review of land based impacts on coastal fisheries and marine biodiversity throughout New Zealand (including the SEMPA region) concluded that the most important land-based stressor in marine environments is sedimentation, including suspended sediment, deposition effects, and associated decreases in water clarity. Riverine sediments can have adverse effects on marine ecosystems by causing direct physiological and physical effects on marine organisms, as well as behavioural responses, and sublethal and lethal effects. Heavy nutrient loading from river sediment plumes reduces oxygen availability and adversely affects benthic communities.[23] None of these impacts can be managed by declaring an area to be a marine reserve.

40. If the aim is to prohibit fishing (since this is all that a marine reserve can realistically achieve), then New Zealand's legislative framework has a far more effective, purpose-built statute that is already used for managing and, if necessary, prohibiting fishing – i.e., the Fisheries Act.

3.1.7 Proposals are not necessary for New Zealand's international obligations

41. It is not in the public interest to implement ineffective and costly marine reserves that are not necessary in order to meet New Zealand's international obligations.

42. The applicant seeks to justify the proposed marine reserves on the basis that they are necessary in order to contribute New Zealand's international obligations under the CBD. The application and consultation document contain numerous references to the CBD which are partial and misleading in relation to New Zealand's actual obligations under the Convention – for example:

> *New Zealand signed the United Nations Convention on Biological Diversity in 1993, agreeing to the goal of establishing an effectively and equitably managed, ecologically representative, and well connected system of MPAs and other conservation-related measures covering at least 10% of its coastal and marine areas by 2020. New post-2020 international biodiversity targets are to be agreed in late 2020, and there is a push for more ambitious targets. These new targets will establish a yardstick by which New Zealand will be measured in the coming decade and beyond*.[24]

43. The fishing industry emphasises that signing the CBD did not commit New Zealand to establishing MPAs over 10% of our coastal areas. Instead, the CBD – which does not mention marine biodiversity specifically – sets out a series of pragmatic, flexible, high-level obligations for parties with respect to biodiversity conservation. The Convention promotes the use of a variety of tools – including area-based and activity-based measures – to manage threats to biodiversity. Only one of the CBD's 42 Articles mentions protected areas, and nine of the

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to reliably enhance the resilience of the marine environment at a regional scale, but effective broad-scale management of identified threats can reliably help achieve such an outcome.

[23] Morrison, M. A., Lowe, M. L., Parsons, D. M., Usmar, N. R., & McLeod, I. M. (2009). A review of land-based effects on coastal fisheries and supporting biodiversity in New Zealand. *New Zealand Aquatic Environment and Biodiversity Report*, *37*, 100.

[24] Proposed southeast marine protected areas. Consultation document, page 7.

thirteen measures in that Article apply to management of biodiversity *outside* protected areas.[25] In relation to protected areas, the CBD provides parties with a choice of establishing either 'a system of protected areas' or 'other areas' where special measures are applied to conserve biodiversity.

44. Numerical targets for marine biodiversity protection are set out in the Aichi targets, which are part of the CBD Strategic Plan adopted in 2010. The numerical target for marine conservation – 10% of coastal and marine areas by 2020[26] – is one of 20 targets alongside others focusing on effective management of particular threats to biodiversity. The CBD Strategic Plan makes it clear that the targets are intended as '*a flexible framework for the establishment of national targets*' and parties may set their own targets. Reflecting the Convention text, the Strategic Plan recognises that the 10% target can be met through 'systems of protected areas' and other effective *area-based conservation measures*.

45. The south east region of the South Island already has numerous area-based conservation measures that have been in place for many years, as well as broader-scale measures under the Fisheries Act to manage any risks of adverse effects of fishing on protected species and the aquatic environment (see **section 3.1.8**). These measures *already* contribute to New Zealand's CBD obligations. If additional threats to marine biodiversity are identified or if particular areas require additional protection from threats, then this objective can readily be achieved without resorting to high-cost marine reserves, while still enabling New Zealand to contribute further to our obligations under the CBD.

46. We do not know what the post-2020 biodiversity targets will be, but we do know that they will be implemented within the pragmatic, flexible framework of the CBD itself, which enables countries to set their own targets in a manner that suits their circumstances. As noted above, the revised NZBS has moved away from objectives based on arbitrary percentages of the marine environment being set aside using particular tools, and focuses instead on the effective protection and management of biodiversity. The fishing industry supports this progressive move, and has recommended that New Zealand should advocate a threat-based approach in negotiations at the CBD. From what we have seen to date on the post-2020 CBD targets, it appears that this is precisely the direction that the parties to the CBD are taking. 'Ambitious' and inflexible future CBD targets for marine reserves are therefore not something that can or should be held over New Zealand like a stick, as is threatened by DOC and FNZ in the SEMPA consultation document.

47. Furthermore, the CBD is not New Zealand's only international obligation that is relevant to the SEMPA proposals. The United Nations Convention on the Law of the Sea 1982, the United Nations Fish Stocks Agreement, and numerous regional fisheries management conventions and arrangements are equally relevant to New Zealand's national interest, and obligations under these agreements must be weighed by both Ministers in relation to the proposed

[25] Article 8, In-situ conservation.
[26] Aichi target 11.

MPAs. We note that the Minister of Fisheries has a specific statutory obligation to act in a manner consistent with New Zealand's international obligations relating to *fishing*, as discussed in **section 4.1.5**.[27]

3.1.8 Proposals impose unnecessary costs when lower cost alternatives are available

48. It is not in the public interest to impose unnecessary and undue costs on New Zealanders when lower cost, more effective alternative management responses are available.

Best regulatory practice

49. The Treasury document *Government Expectations for Good Regulatory Practice* (2017) sets out guidance for the design of regulatory systems, including the requirement that regulation seeks to achieve its stated objectives *'**in a least cost way**, and with the **least adverse impact** on market competition, **property rights**, and individual autonomy and responsibility.'*[28]

50. The proposed marine reserves are inconsistent with this requirement. The stated objectives of the marine reserves – whether these are defined in terms of protecting marine biodiversity or providing for scientific study – can quite clearly be met in ways that have less cost and considerably fewer adverse impacts on property rights.

The cost of ignoring existing management measures

51. The failure to take account of existing management measures when assessing the need for marine reserves is just one example of how the proposals impose unnecessarily high costs.[29] An extensive network of fisheries restrictions is already in place in the south east region, including sustainable catch limits for all commercially-harvested stocks, widespread prohibitions on Danish seining, trolling and set netting along the entire coast of the region, as well as smaller but nevertheless significant restrictions on commercial shellfish harvesting, trawling and purse seining. The industry has voluntarily closed additional areas, including numerous closures to commercial pāua harvesting and trawl bans in the bryozoan beds off the Otago peninsula and an area south of Timaru. Additional existing measures are detailed in **section 3.1.10**.

52. Although these regulated and voluntary fisheries restrictions are not classified as MPAs, they are nonetheless *relevant* when assessing whether particular types of marine habitat or ecosystem already have a level of protection or may be threatened by the use of particular fishing methods. However, the application does not demonstrate whether or how these existing protections have been taken into account.

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[27] Fisheries Act, section 5.
[28] Expectations for Good Regulatory Practice (2017) www.treasury.govt.nz/regulation/expectations
[29] The MPA Policy requires that existing protection of marine biodiversity in the region should be taken into account: In order *to identify areas where MPAs are required ….an inventory will be taken of **existing marine areas that have some level of protection**, and the extent to which those areas cover representative habitats and ecosystems* (MPA Policy page 6).

53. There are also seven mātaitai reserves in the south east region – i.e., Tuhawaiki, Waihoa, Moeraki, Waikouaiti, Otākou, Puna-wai-Toriki and Waikawa Harbour. Mātaitai reserves are recognised in NZBS Policy 3.6(a) as one of several tools that can be part of a network of areas to protect marine biodiversity, even though they are established for customary fishing purposes rather than for biodiversity protection. Mātaitai reserves prohibit all commercial fishing and achieve the MPA protection standard *in every substantive respect*. In addition, a large number of estuaries in the region are managed by DOC and closed to commercial eel fishing.[30] In spite of this, marine reserves are proposed for three estuarine areas (Stony Creek, Pleasant River, Akatore Estuary), replicating a subset of the habitat types already protected in mātaitai reserves and conservation estate estuaries. This is quite clearly not a least-cost approach to regulation.

Network 2 achieved similar protection outcomes at much lower cost

54. Network 2, which was put forward by the fishing industry during the Forum's consultation process (with support from many other submitters), sought to apply a least-cost approach to marine biodiversity protection within the constraints of the MPA Policy. The number of habitats that would be protected in Network 2 (taking account of existing management measures) was the same as in the twenty MPAs originally proposed by the Forum, but with far less impact on marine user groups – including lower direct costs and fewer opportunities foregone. The Network 2 proposal demonstrates that it is possible to achieve the stated objectives of the SEMPA Network at considerably less cost than the current proposals.

55. The fishing industry acknowledges that Network 2 is not under consideration. We recommend that the regulatory approach that is most consistent with the *Government Expectations for Good Regulatory Practice* is to identify specific threats to marine biodiversity values in the south east region, and manage those threats using appropriate, fit-for-purpose legislation – in particular, the Fisheries Act for fishing-related threats, and the RMA for most other threats.

Using Fisheries Act tools as an alternative

56. The Fisheries Act is a purpose-built statute under which the activity of fishing can be regulated, including through prohibitions if necessary, in order to provide for the utilisation of fisheries resource while ensuring sustainability. The Act's definition of ensuring sustainability includes *avoiding, remedying or mitigating any adverse effects of fishing on the aquatic environment.* Management measures that are available to avoid, remedy or mitigate adverse effects of fishing on marine biodiversity, protected species and aquatic ecosystems and habitats include:

    - Setting catch limits to ensure the sustainability of harvested stocks, including requirements to have regard to the interdependence of stocks and to rebuild depleted stocks to sustainable levels (FA s.11, s.13);

[30] See submission of the South Island Eel Industry Association.

- Implementing fisheries plans for the bespoke management of fish stocks or areas, including managing at a scale that is finer than quota management areas (FA s.11A);
- Avoiding, remedying, or mitigating any adverse effect of fishing on protected species such as marine mammals or seabirds, including by setting a limit on fishing-related mortality or promulgating regulations – for example, specifying gear or area restrictions (FA s.15); and
- Giving effect to the Act's environmental principles, which provide that *associated or dependent species should be maintained above a level that ensures their long-term viability; biological diversity of the aquatic environment should be maintained; and habitat of particular significance for fisheries management should be protected* (FA s.9). The Minister is able to implement a non-limiting list of measures to give effect to these principles, including controls on size, sex or biological state of fish that may be taken, area controls, fishing method controls, and fishing seasons (FA s.11).

57. The Fisheries Act also provides area-based tools to recognise and provide for Māori non-commercial customary fishing rights – i.e., mātaitai reserves, taiāpure, and temporary closures.[31] Although established for customary fishing purposes, restrictions on fishing within these areas can also provide biodiversity protection benefits. For example, in mātaitai reserves, all commercial fishing is prohibited – which removes commercial fishing pressure from the area and, to the extent that particular fishing methods may have an adverse effect on marine biodiversity, also reduces that impact.

58. If fishing is <u>not</u> adversely affecting marine biodiversity in an area, no protection benefits will be gained by establishing a marine reserve. However, in situations where fishing activity is considered to have an adverse effect on marine biodiversity values, the Fisheries Act tools outlined above provide a more targeted, least-cost way of managing these risks and achieving genuine biodiversity protection benefits, than the establishment of marine reserves.

3.1.9 Inconsistent with the Minister of Fisheries' obligations under Fisheries Settlement

59. It is not in the public interest to implement measures that are inconsistent with the Crown's obligations under relevant Treaty settlements.

60. DOC's administration of the MRA is subject to the obligation in the Conservation Act 1987 s.4 to interpret and administer the Act to give effect to the principles of the Treaty of Waitangi. The Minister of Fisheries has explicit Treaty obligations under Fisheries Act s.5(b), which requires the Minister to act in a manner consistent with the provisions of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 (TOW(FC)S Act). The TOW(FC)S Act requires the Crown to further the agreements expressed in the Deed of Settlement, including a general obligation to reflect the special relationship between the Crown and Māori and provide Māori with the ability to directly engage on any matters of major concern. General principles of the

[31] Implemented respectively under the customary fishing regulations promulgated under s.186 of the Act, Part 9 of the Act, and sections 186A and 186B.

Treaty of Waitangi require the Government to (among other things) uphold the integrity of existing settlements between the Government and Māori/Iwi including the Fisheries Settlement; and not extinguish, or substantively preclude the exercise of, the quota held under the Settlement without the informed consent of Iwi.

61. The fishing industry is not aware that Iwi have given their consent to the proposed marine reserves. The application notes three issues which, unless they are resolved, will cause Ngāi Tahu to oppose the proposed MPAs – i.e., rebalancing for any impacts the MPA network may have on Ngāi Tahu rights and interests; co-management of the MPA network by Ngāi Tahu and the Crown, and generational review of the MPA network. The fishing industry supports these three requirements. In particular, 'rebalancing' is a management response that has been collectively developed and promoted for many years by Ngāi Tahu, PIC and NZ RLIC.

62. More broadly, we consider that the adverse effects of the proposed marine reserves on the sustainable management of fisheries (see **section 3.1.3**) are relevant to the Treaty obligations of both Ministers. Displacement of fishing effort from the proposed marine reserves will result in an influx of fishing pressure into areas of importance for customary fishing, including the mātaitai reserves at Moeraki and Kaka Point. This in turn will incentivise the establishment of new bylaws in these mātaitai reserves, new regulations in the East Otago Taiāpure, and new applications for mātaitai reserves, further displacing recreational and commercial catch. The creation of a cascade of adverse effects on the sustainable utilisation of fisheries in the south east region will harm the rights and interests of all fisheries users including customary fishers and Māori commercial fishing rights protected under the Fisheries Settlement.

63. Furthermore, we consider that the fully utilised nature of some of the fisheries that are highly valued by customary fishers – for example pāua – will make it extremely difficult for applications for new mātaitai reserves to comply with the 'prevent test' in the customary fishing regulations.[32] The establishment of new marine reserves which displace even a small amount of pāua catch will, in our view, prevent the Crown from giving effect its obligations to Ngāi Tahu under the Fisheries Settlement in relation to providing for areas of importance for customary food gathering for pāua. Similar constraints may also apply to establishing new mātaitai reserves for other fisheries with a high spatial dependency, such as rock lobster.

64. The Minister of Fisheries' deliberations on the SEMPA proposals – in particular, the weight given to permissible relevant fisheries considerations such as TOW(FC)S Act obligations and sustainable fisheries management – will be precedent-setting. As such, the Minister's decisions may have implications for the security and value of quota, including Settlement assets, far beyond Otago and Southland.

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[32] Fisheries (South Island Customary Fishing) Regulations 1999, regulation 20(1)(e)(ii): The Minister must be satisfied that a proposed mātaitai reserve will not "*prevent persons with a commercial interest in a species taking their quota entitlement or annual catch entitlement … within the quota management area for that species*".

3.1.10 Failure to consider cumulative impacts

65. The MRA requires that applications for marine reserves are assessed individually with no explicit consideration of cumulative impacts. The fishing industry considers that it is not in the public interest to implement individual marine reserves which, if implemented in totality, would have cumulative impacts that are both significant and undue. The cumulative impacts that are most contrary to the public interest include:

    a) Cumulative spatial displacement of all fishing – i.e., of commercial, customary and recreational harvest – from individual marine reserve sites;[33]

    b) Cumulative spatial displacement from six proposed marine reserves of fishing for each affected stock, resulting in:

        - significant cumulative increases in fishing pressure outside the marine reserve boundaries;
        - increased risks of localised depletion and threats to fish stock sustainability;
        - increased risk to marine biodiversity values outside the marine reserve boundaries and potentially reduced resilience to other sources of environmental perturbation in the majority of the south east region's marine area; and
        - increased potential for inter-sectoral spatial conflict;

    c) Cumulative impacts of the proposed marine reserves and Type 2 MPAs for finfish and eel fisheries;

    d) Cumulative economic impact for quota owners and fishers who operate in more than one of the affected areas, or who operate in more than one fishery (e.g., rock lobster and set netting); and

    e) Impacts arising from the six proposed marine reserves that are cumulative with impacts arising from existing closures (i.e., areas from which fishing effort has *already* been displaced). These areas include:

        - Seven mātaitai reserves which are closed to all forms of commercial fishing. Displacement from these closures has already been significant for some stocks – for example the mātaitai reserves at Moeraki, Waikouaiti, Punawaitoriki and Waikawa Harbour together displaced around 8-10 tonnes of pāua catch;
        - Numerous small areas in which all commercial shellfish harvesting, including for rock lobster, is prohibited by regulation;
        - Long-standing regulatory closures to the commercial harvesting of most shellfish species (apart from rock lobster) at Waikouaiti Bay, Seacliff, Otago Harbour, Otago Peninsula, Taieri River mouth, Tokomairiro River mouth, and Clutha River mouth;[34]

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[33] The MRA has separate tests for the impacts on these three rights holders and user groups in s.5(6)(c), s.5(6)(d) and s.5(6)(e).

[34] Areas closed to commercial shellfish harvesting in the 1960s for food safety reasons (freezing works, sewage outfalls etc), but remaining open for recreational harvest.

- Additional areas in which the commercial harvesting of kina is prohibited;
- Voluntary closures to commercial pāua harvesting at Shag Point, Catlins Coast, Mahaka Point, Long Point (west side), and Takakopa River bar;
- Regulatory closures to pāua harvesting in areas within the East Otago Taiāpure;
- A prohibition on trolling within 1 nm of the entire coastline;
- A prohibition on Danish seining within 3 nm of the entire coastline;
- A prohibition on commercial set netting within 4 nm of the entire coastline as well as restrictions on set net use within harbours, and new extended set-net closures out to 12 nm off the coast of Timaru;
- Prohibitions on purse seining, trolling and Danish seining in all estuaries and harbours;
- Voluntary trawl prohibitions south of Timaru and at the bryozoan beds; and
- A prohibition on trawlers larger than 46m in length within 12 nm of the entire coastline.

66. It is not in the public interest to ignore these existing closures when assessing the impact of the proposed marine reserves on existing fishing activity in the region and evaluating whether that impact is undue.

3.1.11 Proposals are the outcome of a flawed and divisive process

67. The fishing industry considers that it is not in the public interest to declare marine reserves that are the outcomes of a flawed and divisive process (see **section 6**). This is particularly the case given the high costs that the marine reserves would impose and the availability of lower cost, more effective alternative management approaches.

3.2 Objections in relation to individual marine reserves

3.2.1 MPA B1 Waitaki

Contrary to the public interest

68. The fishing industry objects to MPA B1 Waitaki under MRA s.5(6)(e). The proposed marine reserve is contrary to the public interest for all the reasons identified in **section 3.1**, including in particular:

a) There is no evidence that preserving the site is in the best interests of scientific study;

b) The identified attributes of the site do not support the conclusion that its preservation is in the national interest. For example, the presence of biogenic habitats is anecdotal only and shoals of juvenile squat lobster are a common throughout the east coast. To the extent that the site may be 'typical' of gravel habitats, it is of regional rather than national interest;

c) Lower cost, more effective ways of managing any fishing-related threats to the identified values of the site are available. For example, biogenic habitats (if present) can be protected using voluntary closed areas or fisheries regulations prohibiting bottom-impacting fishing methods. There is no evidence that the attributes of the site are at risk from other fishing methods. Management of fishing-related threats to

protected species such as penguins and shags is best achieved through means other than a marine reserve (i.e., measures implemented at broader spatial scales as part of a Threat Management Plan or National Plan of Action);

d) Cumulative impacts on the set net fishery targeting rig and school shark will arise from MPA B1 Waitaki together with the adjacent proposed Type 2 MPA C1 Moko-tere-a-torehu, and together with existing and new closures to set netting on the east coast of the South Island (**section 3.1.10**);

e) The presence of threats that cannot be managed under the MRA means that the marine reserve cannot be '*preserved as far as possible in [its] natural state*'. The marine reserve will not improve or control the quality of freshwater entering the marine environment at the Waitaki River mouth,[35] and numerous other potential threats exist, including urban runoff from nearby Oamaru (e.g., contaminants in stormwater), discharges from the Alliance Pukeuri freezing works, and several resource consents for discharges (including sewage) into ocean waters adjacent to the proposed marine reserve. Habitat degradation is a far more significant threats to penguins than fishing,[36] but cannot be managed by establishing a marine reserve; and

f) Poor public access means that the public will not be able to '*enjoy in full measure the opportunity to study, observe, and record marine life in its natural habitat*' – the majority of the coastline is inaccessible to the public, with no road access via adjacent private farmland. Access from the nearest road end requires either a 4WD vehicle or a long walk along a deep gravel beach.

Conclusion

69. The applicant has not demonstrated that declaring the area a marine reserve will be in the best interests of scientific study, and the marine reserve is contrary to the public interest. The application should therefore be declined.

3.2.2 MPA D1 Te Umu Koau (Bobby's Head)

Undue interference with commercial fishing

70. The fishing industry objects to MPA D1 Te Umu Koau under MRA s.5(6)(c) because the proposed marine reserve will interfere unduly with commercial fishing. The direct impacts on the CRA7 rock lobster fishery are significant and the marine reserve will have additional impacts on commercial fishing for pāua, kina, eels, blue cod and other finfish. FNZ estimates the export value of potentially displaced commercial catches from the site to be $2 million per

[35] In a 2005 press release from the Labour Party, the Otago MP at that time (Hon David Parker, now Minister for the Environment), when discussing the Waitaki, *expressed alarm at the seriousness of water quality in east coast rivers on the South Island*. https://www.scoop.co.nz/stories/PA0506/S00655.htm

[36] Trathan, P. N., García-Borboroglu, P., Boersma, D., Bost, C. A., Crawford, R. J., Crossin, G. T., ... & Ellenberg, U. (2015). Pollution, habitat loss, fishing, and climate change as critical threats to penguins. *Conservation Biology*, *29*(1), 31-41.

year (for 40.6 tonnes of catch).[37] As noted elsewhere in this submission, we consider this to significantly under-estimate the costs of the proposed marine reserve on commercial fishing. Interference with commercial fishing will be undue because the benefits of the marine reserve are overstated and it is contrary to the public interest (as discussed below).

71. **Rock lobster**: Site D1 is of critical importance for the rock lobster industry. The adverse effects of the proposed marine reserve on the rock lobster fishery and rock lobster industry are significantly underestimated in the application. As detailed in the ORLIA submission, the impact on the economics of the CRA7 fishery and on the fishers and their families and communities will be severe.

72. **Pāua**: Site D1 is a relatively small but important part of the PAU5D fishery. Although the average annual commercial pāua catch from the area is not large, in some years it has provided over 2% of PAU5D catch. Further information is provided in the submission of PauaMAC 5 Incorporated.

73. **Kina***:* Site D1 is highly significant for the future development of the kina industry because of the available resources and suitable water conditions for harvesting, as noted in the submission of the Kina Industry Council.

74. **Eels***:* Eels are harvested commercially in the two estuaries included in MPA D1, as described in the submission of the South Island Eel Industry Association. Commercial eel fishers have very limited ability to take their shortfin eel catch elsewhere in the region as many other estuaries are already closed or restricted to commercial fishing activity (as noted in **section 3.1.8**).

75. **Finfish**: The site is important for trawl fisheries targeting gurnard and elephantfish, as detailed in the submission of Harbour Fish Limited.

Undue interference with and adverse effects on recreational fishing

76. The fishing industry objects to MPA D1 Te Umu Koau under MRA s.5(6)(d) because the proposed marine reserve will interfere unduly with and adversely affect recreational fishing in the area. In support of this objection we note that:

    a) The applicant's conclusion that adverse effects on recreational opportunities will be low '*as other suitable locations are available nearby*' is contrary to MRA s.5(6)(d) which requires that an objection must be upheld if there are adverse effects on existing recreational usage *of the area*. The reported existence of other suitable locations nearby (which the applicant has not identified) is irrelevant to the consideration of whether there are adverse effects on existing recreational fishing *in the area* of the proposed marine reserve;

    b) The application states that it is likely that the area is used for floundering, whitebaiting, trout fishing, collecting pāua and targeting reef fishes and rock lobster.

[37] Proposed southeast marine protected areas. Appendices to consultation document, page 89.

The proposed marine reserve clearly interferes with and adversely affects existing recreational usage of the area as all recreational fishing in the area will be prohibited; and

c) Interference with and adverse effects on recreational fishing are undue because the public benefits of the proposed marine reserve are overstated and it is contrary to the public interest (as discussed below in relation to MRA s.5(6)(e)).

77. Furthermore, we consider that DOC, in its role as applicant, has failed to inform itself or adequately assess and describe the nature and extent of existing recreational fishing activity at site D1 and at each of the other proposed marine reserve sites. An absence of information on existing recreational fishing in the application hinders the ability of submitters to make informed submissions and will be a significant constraint on concurrence by the Minister of Fisheries under the MRA.

78. The Minister of Fisheries' obligations under the Fisheries Act are matters that the Minister can take into account when considering concurrence under the MRA. The Fisheries Act requires that decisions are based on the best available information, which *means the best information that, in the particular circumstances, is available without unreasonable cost, effort, or time*.[38] The fishing industry considers that DOC and FNZ could readily have obtained information on recreational fishing at the proposed marine reserve sites without unreasonable cost or effort in the four years since the MPA sites were first identified in 2016. However, the agencies have not taken steps to obtain this information, leaving the Minister of Fisheries to make decisions in relation to adverse effects on recreational fishing without access to the best available information. This is a generic concern relevant to the fishing industry's objections to each of the proposed marine reserves.

Contrary to the public interest

79. The fishing industry objects to MPA D1 Te Umu Koau under MRA s.5(6)(e). The proposed marine reserve is contrary to the public interest for all the reasons identified in **section 3.1**, including in particular:

a) There is no evidence that preserving the site is in the best interests of scientific study. While the application states that it is of scientific interest to study how rock lobster stock would respond to protection, there are alternative locations around New Zealand and in the south east region where unfished rock lobster populations can be studied (e.g., in marine reserves and other closed areas throughout New Zealand and, locally, in the portion of statistical area 922 that lies in CRA7 between Nugget Point and Long Point adjacent to the CRA8 boundary);

b) Lower cost, more effective ways of managing any fishing-related threats to the identified values of the site are available. The identified environmental features of the site relate only to benthic habitats and the biodiversity associated with these habitats

[38] Fisheries Act s.2.

could therefore be protected without prohibiting all fishing. Furthermore, Moeraki mātaitai contains marine habitats that are similar to those in MPA D1 and estuarine habitats are already protected in five mātaitai reserves in the region – i.e., Waihoa, Waikouaiti, Moeraki, Otakou and Waikawa Harbour;

c) The displacement of existing fishing activity from MPA D1 is likely to result in localised depletion in other areas of the region, particularly in relation to rock lobster, pāua, blue cod and eels, all of which show a strong preference for particular habitat;

d) The displacement of fishing from MPA D1 Te Umu Koau will be exacerbated by the cumulative displacement from existing management measures in the vicinity, including the Moeraki mātaitai reserve (in which all commercial fishing is prohibited) and the East Otago taiāpure. The taiāpure already contains some fisheries restrictions (e.g., areas closed to commercial pāua harvesting), and there is a risk that restrictions inside the taiāpure may become more extensive if MPA D1 displaces additional fishing effort into the taiāpure;

e) The cumulative impacts of displacement on the CRA7 rock lobster fishery from proposed MPAs D1, I1 and K1 will be significant and undue. Eel fisheries have been subject to cumulative spatial displacement from existing closures, and the cumulative impacts of displacement of eel fisheries from proposed MPAs D1, L1 and Q1 will be significant and undue;

f) The presence of threats that cannot be managed under the MRA means that the marine reserve cannot be '*preserved as far as possible in [its] natural state*'. For example, estuarine habitat threats are typically terrestrial in origin, yet no management measures are proposed in response to terrestrial threats. Several resource consents have been granted in the area of the Pleasant River estuary. The main threat to hoiho/yellow-eyed penguins is habitat degradation, which a marine reserve will not address.[39] Tourism has also been identified as a threat to hoiho, resulting in significantly lower breeding success and fledging weights.[40] As Bobby's Head is one of the few public access point to site D1, tourism-related threats to the breeding birds are likely to <u>increase</u> if a marine reserve is established; and

g) Limited public access means that the public will not be able to '*enjoy in full measure the opportunity to study, observe, and record marine life in its natural habitat*'. Cliffs and private farmland restrict access to most of the shoreline aside from three road access points at Bobby's Head, Pleasant River, and Stony Creek (where entry without permission is prohibited).

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[39] Trathan, P. N., García-Borboroglu, P., Boersma, D., Bost, C. A., Crawford, R. J., Crossin, G. T., ... & Ellenberg, U. (2015). Pollution, habitat loss, fishing, and climate change as critical threats to penguins. *Conservation Biology*, *29*(1), 31-41.

[40] Ellenberg, U., Setiawan, A. N., Cree, A., Houston, D. M., & Seddon, P. J. (2007). Elevated hormonal stress response and reduced reproductive output in Yellow-eyed penguins exposed to unregulated tourism. General and comparative endocrinology, 152(1), 54-63.

Conclusion

80. The applicant has not demonstrated that declaring the area a marine reserve will be in the best interests of scientific study, the marine reserve interferes unduly with commercial fishing and existing recreational usage of the area and is contrary to the public interest. The application should therefore be declined.

3.2.3 MPA H1 Papanui

Undue interference with commercial fishing

81. The fishing industry objects to MPA H1 Papanui under MRA s.5(6)(c) because the proposed marine reserve will interfere unduly with commercial fishing for finfish species, as detailed in the submission of SIFMC. As noted elsewhere in this submission, we consider that the application significantly under-estimates the costs of the proposed marine reserve on commercial fishing. Interference with commercial fishing will be undue because the benefits of the marine reserve are overstated and it is contrary to the public interest (as discussed below).

Undue interference with and adverse effects on recreational fishing

82. The fishing industry objects to MPA H1 Papanui under MRA s.5(6)(d) because the proposed marine reserve will interfere unduly with and adversely affect recreational fishing in the area. In support of this objection we note that:

a) The application and associated consultation document contain no information about recreational fishing at the site. The generic concern about lack of information on recreational fishing impacts in **section 3.2.2** applies to MPA H1;

b) The applicant's conclusion that '*the adverse effects on overall recreational opportunities would likely be minimal as the generally preferred recreational destination at Saunders Canyon would remain available*' is contrary to MRA s.5(6)(d) which requires that an objection must be upheld if there are adverse effects on existing recreational usage *of the area*. The alternative nearby destination of Saunders Canyon is irrelevant to the consideration of whether there are adverse effects on existing recreational fishing *in the area* of the proposed marine reserve;

c) The proposed marine reserve clearly interferes with and adversely affects existing recreational usage of the area as all recreational fishing in the area will be prohibited; and

d) Interference with and adverse effects on recreational fishing are undue because the public benefits of the proposed marine reserve are overstated and it is contrary to the public interest (as discussed below).

Contrary to the public interest

83. The fishing industry objects to MPA H1 Papanui under MRA s.5(6)(e). The proposed marine reserve is contrary to the public interest for all the reasons identified in **section 3.1**, including in particular:

a) There is no evidence that preserving the site is in the best interests of scientific study;

b) Lower cost, more effective ways of managing any fishing-related threats to the identified values of the site are available. The identified environmental features of the site (canyon habitats and bryozoan thicket habitats) relate only to benthic habitats and the biodiversity associated with these habitats could therefore be protected without prohibiting all fishing. Management of protected species such as seabirds, seals and whales is best achieved through means other than marine reserves (i.e., measures implemented at broader spatial scales as part of a Threat Management Plan or National Plan of Action);

c) Cumulative impacts on affected finfish fisheries will arise from proposed MPA H1 Papanui and proposed Type 2 MPA E1 Kaimata, including cumulative impacts on set net fisheries for school shark and rig, line fisheries and cod potting. Small fishing vessels that operate out of Karitane and Dunedin will be significantly affected by the establishment of two adjacent MPAs, as these vessels have a limited range and therefore limited choices if they have to move to alternative fishing grounds;

d) The presence of threats that cannot be managed under the MRA means that the marine reserve cannot be '*preserved as far as possible in [its] natural state*'. In particular, the disposal site for Otago Harbour dredging spoil is approximately 6km away from the proposed marine reserve. Evidence presented on behalf of Port Otago states that '*adverse effects on ecology from disposal of large volumes of spoil cannot be avoided*'. Although impacts are most serious at the disposal site, increased levels of suspended sediments and sedimentation will extend outwards '*for a few kilometres'*, with potential adverse effects on fish and birdlife in the vicinity.[41] In addition, elevated sedimentation from the Clutha and Taieri Rivers can extend up to 100km north, potentially affecting site H1.[42] The risk arising from exotic marine pests that may be introduced from the nearby Port Otago (categorised by Biosecurity NZ as a "High Risk Site" for transmission of invasive non-indigenous marine species) will not be managed by establishing a marine reserve; and

e) Limited public access means that the public will not be able to '*enjoy in full measure the opportunity to study, observe, and record marine life in its natural habitat*'. As the site is entirely offshore, only people with access to a boat will be able to visit the reserve.

Conclusion

84. The applicant has not demonstrated that declaring the area a marine reserve will be in the best interests of scientific study, the marine reserve interferes unduly with commercial fishing

[41] Statement of Evidence of Mark Richard James on behalf of Port Otago Limited. Before the Otago Regional Council. March 2011.

[42] Morrison, M. A., Lowe, M. L., Parsons, D. M., Usmar, N. R., & McLeod, I. M. (2009). A review of land-based effects on coastal fisheries and supporting biodiversity in New Zealand. *New Zealand Aquatic Environment and Biodiversity Report*, *37*, 100.

and existing recreational usage of the area and is contrary to the public interest. The application should therefore be declined.

3.2.4 MPA I1 Ōrau (Sandfly Bay)

Undue interference with commercial fishing

85. The fishing industry objects to MPA I1 Ōrau under MRA s.5(6)(c) because:

- The closure of the area would adversely affect the Otago rock lobster industry and the application significantly under-estimates the proportion of CRA7 rock lobster catch that is taken from the site. Further details are provided in the ORLIA submission; and
- The displacement of recreational harvest of pāua at the site is so significant (see objection under MRA s.5(6)(d)) that displaced recreational pāua fishing will interfere with commercial pāua fishing for PAU5D, as described in this submission and in the submission of PauaMAC5.

86. In both cases interference with commercial fishing will be undue because the public benefits of the marine reserve are overstated and the marine reserve is contrary to the public interest (as discussed below).

87. The site of proposed MPA I1 is of major interest to recreational pāua divers because it is accessible, supports an abundant pāua population, and is close to Dunedin. If the Ōrau marine reserve is established, it will displace an unknown but potentially very significant amount of recreational fishing effort for pāua. Displaced recreational fishing will interfere with commercial pāua fishing by:

a) **Increasing the risk of local and serial depletion** of adjacent pāua populations in PAU5D. Pāua are sedentary organisms with very specific habitat requirements and pāua populations are therefore susceptible to localised depletion. As discussed below, very limited areas of PAU5D will remain available for recreational diving near Dunedin and these areas will come under significant pressure and be rapidly depleted, resulting in a shift of fishing effort to other parts of the fishery (i.e., serial depletion);

b) **Threatening the rate of rebuild of PAU5D** and the ability to maintain the stock at its target level. The PAU5D fishery is currently fluctuating around its management target level of 40% Bo. The path to rebuilding the fishery to this level of abundance has been long and slow, and was achieved only by severely constraining commercial pāua harvest. Additional recreational fishing pressure displaced from the marine reserve will prevent quota owners from obtaining the benefits of increased stock abundance that they anticipated would arise from a 40% TACC reduction in 2002/2003 and an additional 30% ACE shelving that has been maintained for the last 6 years.

Previously implemented restrictions on commercial fishing access in PAU5D (see below) have demonstrated that even relatively small amounts of displaced catch can have significant impacts on the abundance of the fishery, making it extremely vulnerable to any additional displacement;

c) **Increasing the risk of additional commercial closures** if tangata whenua seek to protect areas of importance for customary fishing from recreational fishing effort displaced from Ōrau and other proposed marine reserves – for example by establishing further mātaitai reserves in PAU 5D or further restricting pāua harvest in the East Otago Taiāpure;[43]

d) **Exacerbating inter-sectoral spatial conflict** between commercial harvesters and recreational fishers as the few remaining accessible areas of PAU5D are reduced over time. The PAU5D fishery has a history of spatial conflict between recreational and commercial harvesters which gave rise to the *Pāua to the People* campaign in 2013. Site I1 was one of the key areas that recreational pāua divers sought to maintain as an exclusively non-commercial pāua fishery. Since that time, tensions have reduced, but establishing the Ōrau marine reserve is likely to reignite spatial conflict between the sectors; and

e) **Interfering with the implementation of the PAU5 Fisheries Plan** prepared by PauaMAC5. The PAU5 Fisheries Plan is currently in draft form and is undergoing consultation with key stakeholders prior to being referred to the Minister of Fisheries for approval under s.11A of the Fisheries Act. The above impacts from displaced recreational catch are contrary to many of the objectives and strategies in the Fisheries Plan.

88. The fishing industry considers that the interference with commercial fishing that is described above is significant. If the sustainability of the PAU5D fishery is threatened by displaced recreational catch, the TACC may need to be reduced, with serious impacts on PAU5D quota owners and harvesters. These impacts are even more significant when assessed cumulatively with the displacement of recreational pāua catch from the nearby proposed marine reserves at sites K1 Okaikae and M1 Hākinikini.

Undue interference with and adverse effects on recreational fishing

89. The fishing industry objects to MPA I1 Ōrau under MRA s.5(6)(d) because the proposed marine reserve will interfere unduly with and adversely affect recreational fishing in the area. In support of this objection we note that:

a) The application and associated consultation document contain very little information about recreational fishing at the site, aside from noting that it is valued by recreational fishers, particularly for pāua and blue cod. Our generic concern about lack of information on recreational fishing impacts in **section 3.2.2** applies to MPA I1;

b) The applicant's conclusion that '*while there would be an effect on some types of fishing (particularly shore-based fishing) the adverse effects on overall recreational*

[43] Note that elsewhere in this submission we have described how the displacement of pāua catch from the proposed marine reserves – in particular at site I1 – will make it extremely difficult, perhaps impossible, for new mātaitai applications to be approved.

opportunities would likely be moderated by the availability of other suitable locations nearby' is contrary to MRA s.5(6)(d) which requires that an objection must be upheld if there are adverse effects on existing recreational usage *of the area*. The reported existence of other suitable locations nearby (which the applicant has not identified) is irrelevant to the consideration of whether there are adverse effects on existing recreational fishing in the area of MPA I1;

c) When responding to the Forum's proposals, a large number of individual local submitters emphasised the high value of the site as the closest pāua fishery to Dunedin, its relative accessibility for recreational fishers and divers, and the absence of commercial pāua fishing as a result of long-standing regulatory closures;

d) In 2013 when MPI consulted on removing regulatory closures to commercial pāua diving at the site of proposed MPA I1 and other locations, 2,740 submissions were received, indicating a very high level of public interest. The overwhelming majority of submitters opposed any change to the *status quo*. Although MPI did not have detailed recreational catch information to verify the actual level of recreational fishing activity, MPI:[44]

- acknowledged that the closed areas adjacent to cities and towns (including the site of MPA I1), *were known by MPI to be popular with recreational and customary fishers*;
- noted that *pāua is a key recreational and customary fishery in southern New Zealand and, therefore, it is important to* ***ensure these benefits are retained***; and
- declined to remove the regulatory closures to commercial pāua diving;

e) Consultation by MPI in 2013 and by the Forum in 2018 demonstrates the very high value of the site for recreational diving for pāua. The applicant also acknowledges that *the establishment of a marine reserve at this site would be likely to have an impact on the recreational fishing sector*.[45] The proposed marine reserve clearly interferes with and adversely affects existing recreational usage of the area as all recreational fishing in the area, including for pāua, will be prohibited;

f) One of the nearest equivalent sites for recreational fishing is the proposed Okaihae marine reserve. If proposed marine reserves I1 and K1 are declared, only a very small area of coast near Dunedin at Blackhead will remain available for recreational fishers, placing incredible pressure on this one spot and resulting in a cascade of serial depletion that will further reduce commercial and customary fishing opportunities (including the nearby mātaitai reserves at Moeraki and Kaka Point) as well as those for recreational fishers; and

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[44] Ministry for Primary Industries (2013) Final Advice Paper https://www.mpi.govt.nz/dmsdocument/7716-review-of-fisheries-regulatory-controls-for-1-october-2013-final-advice-papers

[45] Proposed southeast marine protected areas. Appendices to consultation document, page 101.

g) Interference with and adverse effects on recreational fishing are undue because the public benefits of the proposed marine reserve are overstated and it is contrary to the public interest (as discussed below).

Contrary to the public interest

90. The fishing industry objects to MPA I1 Ōrau under MRA s.5(6)(e). The proposed marine reserve is contrary to the public interest for all the reasons identified in **section 3.1**, including in particular:

a) There is no evidence that preserving the site is in the best interests of scientific study;

b) The preservation of the site is not in the national interest under the MRA because many of its identified values are based on features above MHWS (exposed volcanic rock shorelines and cliffs, sandy and boulder beaches, rocky headlands, rock stacks and islands, and a '*beautiful and inspiring coastline*') whereas the MRA applies only below MHWS;

c) Lower cost, more effective ways of managing any fishing-related threats to the identified values of the site are available. All of the identified features (e.g., encrusting communities of sponges and ascidians) are benthic and can therefore be protected, if necessary, without prohibiting all fishing at the site. Management of fishing-related threats to protected species such as penguins, other seabirds, fur seals and sea lions is best achieved through means other than marine reserves (i.e., measures implemented at broader spatial scales as part of a Threat Management Plan or National Plan of Action);

d) Cumulative effects are significant. The displacement of commercial rock lobster fishing from proposed MPA I1 Ōrau is exacerbated by the cumulative displacement from proposed MPAs D1 Te Umu Koau and K1 Okaihae. The cumulative displacement of recreational fishing for pāua from proposed MPAs D1, I1 and K1 is likely to be significant and undue; and

e) The presence of many threats that cannot be managed under the MRA, including threats arising from the adjacent Dunedin suburbs and city population, means that the marine reserve cannot be '*preserved as far as possible in [its] natural state'*. For example, no management measures are proposed for known identified threats such as coastal structures and sewage and stormwater discharges on land and offshore within the proposed marine reserve. The main threat to penguins which live in the area is habitat degradation, which a marine reserve will not address.[46] The risk arising from exotic marine pests that may be introduced from the nearby Port Otago (categorised by Biosecurity NZ as a "High Risk Site" for transmission of invasive non-indigenous marine species) will not be managed by establishing a marine reserve. Elevated

[46] Trathan, P. N., García-Borboroglu, P., Boersma, D., Bost, C. A., Crawford, R. J., Crossin, G. T., ... & Ellenberg, U. (2015). Pollution, habitat loss, fishing, and climate change as critical threats to penguins. *Conservation Biology*, *29*(1), 31-41.

sedimentation from the Clutha and Taieri Rivers can extend up to 100km north, potentially affecting site I1. [47]

Conclusion

91. The applicant has not demonstrated that declaring the area a marine reserve will be in the best interests of scientific study, the marine reserve interferes unduly with commercial fishing and existing recreational usage of the area and is contrary to the public interest. The application should therefore be declined.

3.2.5 MPA K1 Okaihae (Green Island)

Undue interference with commercial fishing

92. The fishing industry objects to MPA K1 Okaihae under MRA s.5(6)(c) because the site is an important area for maintaining the stable and sustainable pattern of fishing effort in CRA7. Further details of adverse effects on commercial fishing are provided in the ORLIA submission. Although the amount of directly affected CRA7 catch is not large, interference with commercial fishing will be undue because the public benefits of the marine reserve are significantly overstated and the marine reserve is contrary to the public interest.

Undue interference with and adverse effects on recreational fishing

93. The fishing industry objects to MPA K1 Okaihae under MRA s.5(6)(d) because the proposed marine reserve will interfere unduly with and adversely affect recreational fishing in the area. In support of this objection we note that:

a) The application and associated consultation document contain no information about recreational fishing at the site, even though it was identified as an important recreational fishing spot in earlier submissions. Our generic concern about lack of information on recreational fishing impacts in **section 3.2.2** applies to MPA K1 Okaihae;

b) The applicant's conclusion that '*while there would be an effect on [recreational] fishing, the adverse effects on overall recreational opportunities would likely be moderated by the availability of other suitable locations nearby*' is contrary to MRA s.5(6)(d) which requires that an objection must be upheld if there are adverse effects on existing recreational usage *of the area*. The reported existence of other suitable locations nearby (which the applicant has not identified) is irrelevant to the consideration of whether there are adverse effects on existing recreational fishing in the area of MPA K1;

c) The proposed marine reserve clearly interferes with and adversely affects existing recreational usage of the area as all recreational fishing in the area will be prohibited;

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[47] Morrison, M. A., Lowe, M. L., Parsons, D. M., Usmar, N. R., & McLeod, I. M. (2009). A review of land-based effects on coastal fisheries and supporting biodiversity in New Zealand. *New Zealand Aquatic Environment and Biodiversity Report*, *37*, 100.

d) The nearest equivalent site for recreational fishing is the proposed Ōrau marine reserve. If proposed marine reserves I1 and K1 are declared, only a very small area of coast near Dunedin at Blackhead will remain available for recreational fishers, placing incredible pressure on this one spot and resulting in a cascade of serial depletion that will further reduce commercial and customary fishing opportunities as well as those for recreational fishers; and

e) Interference with and adverse effects on recreational fishing are undue because the public benefits of the proposed marine reserve are overstated and it is contrary to the public interest (as discussed below).

Contrary to the public interest

94. The fishing industry objects to MPA K1 Okaihae under MRA s.5(6)(e). The proposed marine reserve is contrary to the public interest for all the reasons identified in **section 3.1**, including in particular:

a) There is no evidence that preserving the site is in the best interests of scientific study;

b) The preservation of the site is not in the national interest under the MRA because its identified values are based on features above MHWS (Green Island itself, which is described as unique and beautiful, the seabird species that live on the island, and the seals and sea lions that visit the island) whereas the MRA applies only below MHWS. The potential for Green Island to become an *iconic place* is an irrelevant consideration under the MRA;

c) The benefits of the marine reserve are grossly over-stated. The proposed reserve is too small to effectively protect biodiversity, its habitats are degraded, and the claim that the area could *act as a source of replenishment for invertebrates and fishes on the low-relief reefs* is an assertion that lacks any supporting evidence;

d) The MRA purpose is not to restore degraded habitats but to preserve high quality areas of marine life for the purposes of scientific study. Even if restoration were a relevant purpose under the MRA, the causes of the reported anecdotal decline in diversity and abundance have not been identified. There is therefore no reason to believe that establishing a marine reserve will reverse the reported decline;

e) The presence of many threats that cannot be managed under the MRA means that the marine reserve cannot be '*preserved as far as possible in [its] natural state'*. The outfall from the Green Island Wastewater Treatment Plant discharges effluent near the proposed site. Elevated sedimentation from the Clutha and Taieri Rivers can extend up to 100km north,[48] potentially affecting site K1. The declaration of a marine reserve will do nothing to protect the area from degraded freshwater entering the coastal marine area from these rivers or from the adjacent Kaikorai stream estuary; and

[48] Morrison, M. A., Lowe, M. L., Parsons, D. M., Usmar, N. R., & McLeod, I. M. (2009). A review of land-based effects on coastal fisheries and supporting biodiversity in New Zealand. *New Zealand Aquatic Environment and Biodiversity Report*, *37*, 100.

f) Limited public access means that the public will not be able to '*enjoy in full measure the opportunity to study, observe, and record marine life in its natural habitat*'. With no road access, only people with access to a boat will be able to visit the marine reserve.

Conclusion

95. The applicant has not demonstrated that declaring the area a marine reserve will be in the best interests of scientific study, the marine reserve interferes unduly with commercial fishing and adversely affects existing recreational usage of the area, and is contrary to the public interest. The application should therefore be declined.

3.2.6 MPA M1 Hākinikini (Akatore)

Undue interference with and adverse effects on recreational fishing

96. The fishing industry objects to MPA M1 Hākinikini under MRA s.5(6)(d) because the proposed marine reserve will interfere unduly with and adversely affect recreational fishing in the area. In support of this objection we note that:

a) The application and associated consultation document contain very little information about recreational fishing at the site, aside from noting that it is used by recreational fishers, particularly for pāua. Our generic concern about lack of information on recreational fishing impacts in **section 3.2.2** applies to MPA M1;

b) The applicant's conclusion that '*while there would be an effect on some types of fishing, particularly shore-based fishing, the adverse effects on overall recreational opportunities would likely be moderated by the availability of other suitable locations nearby*' is contrary to MRA s.5(6)(d) which requires that an objection must be upheld if there are adverse effects on existing recreational usage *of the area*. The reported existence of other suitable locations nearby (which the applicant has not identified) is irrelevant to the consideration of whether there are adverse effects on existing recreational fishing in the area of MPA M1;

c) When the Forum was consulting, a large number of submitters who live locally or have cribs nearby commented on the value and importance of this site for recreational fishing, particularly for pāua, and associated family-based activities. The proposed marine reserve clearly interferes with and adversely affects existing recreational usage of the area as all recreational fishing in the area will be prohibited;

d) The nearest equivalent site for recreational pāua diving is Taieri Island, an area of known importance for customary fishing.[49] Taieri Island has a small reef area that would come under increasing pressure from recreational and commercial fishing effort

[49] The Forum's final report states that Te Rūnanga o Kāi Tahu oppose Site M1 due to the effect that the potential transfer of fishing effort to Moturata (Taieri Island) would have on customary commercial fishing rights and interests. The report also notes that Whānau Roopu have already proposed a mātaitai reserve for around Moturata (Taieri Island), but have not yet lodged an application.

displaced from MPA M1. Establishing a marine reserve at site M1 is therefore likely to cause a cascade of serial depletion of pāua populations in the south east region that will further reduce commercial and customary fishing opportunities as well as those for recreational fishers; and

e) Interference with and adverse effects on recreational fishing are undue because the public benefits of the proposed marine reserve are overstated and it is contrary to the public interest (as discussed below).

Contrary to the public interest

97. The fishing industry objects to MPA M1 Hākinikini under MRA s.5(6)(e). The proposed marine reserve is contrary to the public interest for all the reasons identified in **section 3.1**, including in particular:

a) There is no evidence that preserving the site is in the best interests of scientific study;

b) There is no evidence that the site contains underwater scenery, natural features, or marine life, of such distinctive quality, or so typical, or beautiful, or unique, that their continued preservation is in the national interest. The area was originally proposed simply to replicate and connect other proposed MPAs. MPA network design considerations such as replication and connectivity are not relevant considerations under the MRA as each marine reserve must be considered on its merits and justified in relation to the purpose of the Act;

c) Maritime safety risks for commercial and recreational vessels operating out of the nearby port of Taieri Mouth will be increased. The fishing grounds at site M1 Hākinikini are favoured by vessels that harvest rock lobster and mixed trawl species because the area is accessible and relatively safe. However, the nature of the Taieri river mouth is such that vessels need to rapidly seek shelter in adverse weather. The removal of fishing grounds at site M1 will force small vessels to range further up and down the coast to make up for lost catch and any additional steaming time increases the hazard of re-entry at the river mouth;

d) Establishment of a marine reserve is likely to displace catch to Moturata/Taieri Island, an area of significance for customary fishers;

e) The presence of many threats that cannot be managed under the MRA means that the marine reserve cannot be '*preserved as far as possible in [its] natural state'*. For example, elevated sedimentation from the Clutha River can extend up to 100km north, potentially affecting site M1 Hākinikini.[50] Water quality and biodiversity in the Akatore estuary is likely to be heavily influenced by terrestrial activities that cannot be controlled by establishing a marine reserve**.** Future impacts on coastal water quality and biodiversity should also be anticipated from the harvesting of the extensive exotic

[50] Morrison, M. A., Lowe, M. L., Parsons, D. M., Usmar, N. R., & McLeod, I. M. (2009). A review of land-based effects on coastal fisheries and supporting biodiversity in New Zealand. *New Zealand Aquatic Environment and Biodiversity Report*, *37*, 100.

forestry plantations in catchments adjacent to the proposed marine reserve; and

f) Limited public access means that the public will not be able to '*enjoy in full measure the opportunity to study, observe, and record marine life in its natural habitat*'. The site has limited road access and is backed by private farm land.

Conclusion

98. The applicant has not demonstrated that declaring the area a marine reserve will be in the best interests of scientific study, the marine reserve interferes unduly with and adversely affects existing recreational usage of the area and is contrary to the public interest. The application should therefore be declined.

3.3 Proposed conditions

99. The fishing industry objects to each of the proposed marine reserves, but in the event that any marine reserves are established, our position in relation to the proposed conditions is as follows.

3.3.1 Proposed conditions supported

100. For each of the proposed marine reserves, we support the proposed conditions:

- To allow driving on the foreshore by the most direct formed route to launch or retrieve a vessel; and
- To allow the anchoring of vessels.

101. Both these conditions help provide for public access and support the safety of vessel users.

3.3.2 Proposed conditions opposed

102. For each of the proposed marine reserves, we oppose the proposed condition to allow non-commercial gathering of beach stones from the foreshore as this may interfere with juvenile pāua habitat and have adverse effects on habitats of particular significance for fisheries management (i.e., juvenile pāua habitat).

4. Type 2 MPAs

4.1 Opposition to all proposed Type 2 MPAs

4.1.1 Proposals are inconsistent with the purpose of the Fisheries Act

103. The fishing industry considers that the Fisheries Act cannot be used for the purpose of protecting representative areas of marine biodiversity. The Minister does not have any power under the Act to close or restrict fishing in representative habitat types in the absence of a need to do so to ensure sustainability.

104. When implementing measures under the Fisheries Act, the Minister is required to act in a manner consistent with the purpose of the Act, which is to provide for utilisation while ensuring sustainability. The SEMPA proposals do not provide for utilisation, therefore – in order to be consistent with the purpose of the Act – they can be justified only on the basis of

being necessary in order to 'ensure sustainability,' which includes avoiding, remedying, or mitigating any adverse effects of fishing on the aquatic environment.

105. If the best available information does not indicate any actual or potential adverse effects of fishing on the aquatic environment, measures cannot be imposed under the Fisheries Act to protect representative areas of habitat for the sake of protection alone. The SEMPA consultation document and associated background material (i.e., the Forum's report and officials' advice) contain no evidence of adverse effect of fishing on the biodiversity values of the sites (as discussed further below).

106. Even if actual or potential adverse effects of fishing were to be identified, the Minister of Fisheries must still weigh the Act's requirement to provide for utilisation alongside the need to ensure sustainability. There is no indication in the consultation document or associated material that such an analysis has been undertaken.

107. The Type 2 SEMPA proposals are also inconsistent with the MPA Policy itself, which states, with respect to Fisheries Act tools that:[51]

> *The Fisheries Act contains tools to manage the actual and potential adverse effects of fishing on the marine environment… All of these regulatory tools could be used to protect representative sites of marine biodiversity and therefore contribute to the MPA network –* ***provided the tools are used in a manner consistent with the Fisheries Act, i.e. to address either actual or potential adverse effects of fishing on the environment, and are implemented in a manner consistent with the statutory requirements****.*

108. It is clear that the MPA Policy requires that Type 2 MPAs may be implemented only if they are consistent with the Fisheries Act. The fact that the non-statutory 'MPA Protection Standard' specifies that bottom trawling, Danish seining and dredging must be prohibited in an MPA is not in itself a justification for prohibiting these fishing methods in an area. It does not replace the mandatory statutory considerations under the Fisheries Act.

4.1.2 No evidence of actual adverse effects of fishing

109. The SEMPA Type 2 proposals involve the prohibition of a wide range of fishing methods, including bottom trawling, Danish seining, dredging, set netting, mid-water trawling, commercial long-lining, recreational line fishing with more than 5 hooks, purse seining, mechanical harvesting (including spades for collecting shellfish), and fyke net fishing. In order to legitimately prohibit these fishing methods under the Fisheries Act, decision-makers must be satisfied that each fishing method has actual or potential effects that are sufficiently 'adverse' that it is necessary to prohibit their use in each of the proposed sites in order to ensure sustainability.

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[51] MPA Policy and Implementation Plan, paragraphs 36-38.

Assessing adverse effects under the Fisheries Act

110. Whether an effect is *adverse* is a judgement call that must be guided by the provisions of the Act, in particular the environmental principles in section 9, which suggest that an effect may be adverse if the long-term viability of associated or dependent species is not maintained, habitat of particular significance for fisheries management is harmed, or the biological diversity of the aquatic environment is threatened.

111. The long-term viability of associated or dependent species is not directly relevant to the current assessment of adverse effects as: (1) associated and dependent species are managed under the Fisheries Act at scales much broader than the proposed MPAs; and (2) the MPA Policy provides that biodiversity protection must be *at the habitat and ecosystem level, not individual species (e.g. marine mammals)*.[52] The protection of habitat of particular significance for fisheries management is also not relevant, as the proposed Type 2 MPAs have not been identified as habitat of particular significance for fisheries management – instead they are considered to be representative habitats.

112. Because the Type 2 MPAs are being proposed in order to protect habitats and ecosystems that are representative of the region's habitats and ecosystems, it follows that an analysis of the adverse effects of fishing is required at the scale of regional habitats. A Type 2 MPA can be justified only if a fishing method has effects on a particular habitat type that are considered to be adverse *at a regional scale*. As noted in **section 4.2**, the best available information does not support the identification of adverse effects of fishing on habitats and ecosystems at a regional scale.

MPA Policy requirements regarding adverse effects

113. The need for management interventions to be justified on the basis of adverse effects of fishing is a requirement not only of the Act itself, but also of the MPA Policy. The MPA Policy includes a 'protection standard' to help identify what controls are necessary to achieve an 'adequate level of biodiversity protection' for a site. The management measures must provide for the maintenance and recovery at the site of two key matters – i.e., physical features and biogenic structures that support biodiversity; and ecological systems, natural species composition and trophic linkages.[53]

114. The MPA Policy requires a case by case analysis to be undertaken to determine which fishing methods need to be prohibited in order to provide for these two matters.[54] No fishing methods are automatically excluded, although there is a 'presumption' that bottom trawling, dredging and Danish seining will not be permitted, and that purse seining, midwater trawling, midwater gillnetting and benthic netting 'will probably not be permitted'.[55] The MPA Policy emphasises that ***these presumptions need to be checked and assessed on a case by case***

[52] MPA Policy and Implementation Plan, page 11.
[53] Classification, Protection Standard and Implementation Guidelines, page 11.
[54] Classification, Protection Standard and Implementation Guidelines, page 12.
[55] Classification, Protection Standard and Implementation Guidelines, page 11.

basis because using fishing methods as a proxy for extraction from potential MPAs may not accurately reflect the actual extraction from a site, which depends on the frequency and intensity with which the method is used.

115. The Forum's final report proposed the prohibition of a wide variety of fishing methods on the ***presumption*** that these methods prevent the maintenance and recovery of physical features, biogenic structures, ecological systems, natural species composition and trophic linkages. However, the Forum provided no evidence in support of the presumption, which is itself indicative of the absence of the necessary case by case analysis. This failing is repeated in the consultation document which contains no case by case justification for the proposed prohibition of a wide range of fishing methods in the Type 2 MPAs.

116. The maintenance and recovery of physical features and biogenic structures is a site-specific requirement and is discussed in more detail in **section 4.2**.

117. The maintenance of ecological systems, natural species composition and trophic linkages under the Fisheries Act is achieved through management measures that apply at a *broad spatial scale* applicable to the relevant fish stocks. If fisheries management settings are appropriate, the ecological systems, natural species composition and trophic linkages within a proposed MPA should not be at risk from commercial fishing. It follows, therefore, that if these ecosystem attributes are considered to be threatened by the level of fisheries removals, the most effective and appropriate management response is to adjust the fisheries management settings (e.g., by reducing allowable levels of catch) rather than to establish an MPA. Type 2 MPAs of the scale proposed in the consultation document are highly unlikely to enable the maintenance and recovery of ecological systems, natural species composition and trophic linkages when those attributes are influenced primarily by systems and processes that occur – and should be managed – on a much larger spatial scale.

4.1.3 No evidence of potential adverse effects of fishing

118. The fishing industry is concerned that, in the absence of any evidence of actual effects of fishing on the aquatic environment, DOC and FNZ may seek to justify the establishment of Type 2 MPAs on the basis of 'potential' adverse effects of fishing.

119. This was the approach adopted by the agencies in 2015 when seeking to justify the establishment of Type 2 MPAs on the West Coast of the South Island. After observing that *there is little, if any, Danish seining, bottom trawling or dredging undertaken in the three areas* (and, therefore, presumably no actual adverse effects of fishing), the authors of the Regulatory Impact Statement concluded that *the maintenance of biodiversity in the proposed MPAs* ***could be threatened if these fishing methods were used there***.[56]

[56] Ministry for Primary Industries (2015). West Coast South Island: Proposed Marine Protected Areas (using fisheries regulations) Regulatory Impact Statement. July 2015.

120. This conclusion is contrary to the limited definition of 'effect' in the Fisheries Act, which includes potential effects only if they are (a) of high probability, or (b) of low probability with a high potential impact.[57] There are therefore four scenarios that may apply in relation to a fishing method not currently used at a site:

- If there is a *high probability* that a particular fishing method would be used at the site in future (i.e., fish stocks are present in commercial quantities that can be harvested efficiently using the method and there are no regulatory barriers to the use of the method) and the effects of that fishing method are adverse at a regional scale (as discussed above), then there may be a potential adverse effect of fishing;
- If there is a low-medium probability that a method would be used at the site but, if it were to occur, it would have a *high potential impact,* then there may be a potential adverse effect;
- If there is a low-medium probability that a method would be used at the site and the impact of that method is not 'high', then there is unlikely to be a potential adverse effect; or
- If there is zero or a negligible probability that a method could be used at the site (e.g., because it is technically or environmentally impractical or no fish stocks are present that can be taken by that method), then there is no potential adverse effect.

121. When prohibiting a fishing method because of its *potential* adverse effects, decision-makers must still act in a manner that is consistent with the purpose of the Fisheries Act, including the obligation to provide for utilisation, and with the requirements in section 10 relating to the use of the best available information. In summary, and as discussed further in **section 4.2**, we consider that the proposed Type 2 closures cannot rationally be justified on the basis of the potential adverse effects of fishing unless the potential adverse effect is of high probability or high potential impact.

4.1.4 Contrary to Minister's obligations under the Fisheries Settlement

122. As noted in **section 3.1.9**, Fisheries Act s.5(b) requires the Minister of Fisheries to act in a manner consistent with the provisions of the TOW(FC)S Act.

123. The establishment of Type 2 MPAs in the absence of any evidence of actual or potential adverse effects from fishing is contrary to the Minister's obligations under the TOW(FC)S Act as it constrains the utilisation of settlement assets for reasons that cannot be justified under the Fisheries Act. It is a misuse of the Fisheries Act that was not contemplated by the parties to the Settlement and sets a precedent that could undermine the value of all quota, including settlement quota, for New Zealand's inshore fisheries.

[57] Fisheries Act section 2.

4.1.5 Inconsistent with New Zealand's international obligations

124. The Fisheries Act requires decision-makers to act in a manner that is consistent with New Zealand's international obligations relating to fishing.[58] New Zealand's primary international obligations relating to fishing are the United Nations Convention on the Law of the Sea 1982 (UNCLOS), the United Nations Fish Stocks Agreement, various regional fisheries management conventions and arrangements, and the CBD. The SEMPA consultation document refers to the CBD numerous times but does not mention UNCLOS or any other relevant fisheries management obligations.

125. The international context provided in the consultation document is therefore incomplete, unbalanced (for example, it fails to reference the sovereign right to exploit natural resources),[59] and inadequate for the requirements of Fisheries Act s.5(a). Furthermore, as noted in **section 3.1.7**, the CBD does not require New Zealand to establish MPAs and instead recognises a very wide range of ways in which threats to biodiversity can be managed.

4.1.6 Inconsistent with Fisheries New Zealand advice

126. The fisheries restrictions proposed in the Type 2 MPAs are inconsistent with Fisheries New Zealand's advice to Ministers prior to the decision to proceed with Network 1. FNZ advised that:[60]

- Modifications to the Type 2 MPAs are necessary to ensure they can be implemented in a manner that is consistent with the purpose and principles of the Fisheries Act;
- There is no evidence to support prohibiting under the Fisheries Act commercial long-lining, mid-water trawling, purse seining, mechanical harvesting, fyke net fishing and line fishing with more than 5 hooks in the proposed Type 2 MPAs; and
- In relation to set netting, it would be more appropriate to consider restrictions at a regional scale to align with the range of protected species that are impacted by set net use.

127. The fishing industry considers that it is irrational and irresponsible for the government to consult on proposed Type 2 MPAs when agencies are aware that the proposals are inconsistent with the legislation under which the measures are intended to be implemented.

4.2 Opposition to individual Type 2 MPAs

128. The generic reasons for opposing the Type 2 MPAs outlined in **section 4.1** of this submission apply to each of the individual Type 2 MPAs. In addition, the fishing industry opposes each of the individual Type 2 MPAs for the specific reasons set out below.

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[58] Fisheries Act section 5(a).

[59] UNCLOS Article 193: *States have the sovereign right to exploit their natural resources pursuant to their environmental policies and in accordance with their duty to protect and preserve the marine environment*.

[60] Joint agency advice on the South-East Marine Protection Forum recommendations. 19 October 2018. Released under the OIA.

4.2.1 MPA A1 Tuhawaiki

Adverse effects of fishing

129. No commercial dredging occurs at site A1 so there are no actual adverse effects from this fishing method. There is no evidence to suggest that this fishing method will be used at the site in future and the likelihood of any potential adverse effect is therefore very low. Danish seining is already prohibited by regulation out to 3 nm (i.e., the majority of the area of site A1). There are therefore no actual or potential adverse effects of dredging or Danish seining at the site.

130. Bottom trawling does occur at the site but there is a voluntary trawl ban in place over part of the area within 1 nautical mile of the coast in order to protect school shark nursery areas and elephant fish spawning areas. No biogenic habitats have been identified at the site and the represented habitat types are extensive in the region. The habitat types are characterised by loose substrates that are unlikely to be adversely affected by the level of trawling intensity in the region or at the site. There is therefore no evidence to demonstrate that it is necessary to close site A1 to bottom-impacting fishing methods in order to avoid, remedy or mitigate any adverse effects of fishing on the identified habitat types or to provide for the maintenance and recovery of the site's physical features and biogenic structures.

131. Commercial set netting is already prohibited in much of the area. Mid-water trawling occurs outside the voluntary trawl ban and there is also some commercial long-lining. However, these three fishing methods have no adverse effects on the maintenance and recovery of physical features and biogenic structures at the site. Any fishing-related threats to dolphins and sea birds are more effectively addressed through broad scale management measures such as those required under Threat Management Plans and National Plans of Action. Therefore, there are no actual or potential adverse effects from set netting, mid-water trawling or longlining and no legitimate basis for prohibiting these methods under the Fisheries Act.

132. The intensity of commercial fishing for any species at the site is unlikely to prevent the maintenance and recovery of ecological systems, natural species composition and trophic linkages. If these matters were to become an issue in future, the appropriate management response would be to adjust the TAC and TACC for the species concerned.

Utilisation impacts

133. The area is important for commercial fishers who operate out of Timaru and target species such as gurnard, flatfish, rig and elephantfish using trawl and set net methods. Further details of these impacts are provided in the SIFMC submission.

Conclusion

134. MPA A1 cannot be justified under the Fisheries Act. Adverse effects of fishing have not been demonstrated and the imposition of MPA A1 would unnecessarily restrict the utilisation of commercial fisheries including gurnard, flatfish and elephantfish.

4.2.2 MPA C1 Moko-tere-a-torehu

Adverse effects of fishing

135. No commercial dredging occurs at site C1 so there are no actual adverse effects from this fishing method. There is no evidence to suggest that this fishing method will be used at the site in future and the likelihood of any potential adverse effect is therefore very low.

136. Bottom trawling does occur at the site, and Danish seining occurs in the seaward part of the area.[61] Bottom trawling and Danish seining may have effects on biogenic habitats at the site, should these habitats exist.[62] DOC and FNZ have not assessed (or, have not made available any assessment of) whether these effects are *adverse* in relation to the regional distribution of kelp and rhodolith beds. There is therefore no evidence to demonstrate that it is necessary to close site C1 to bottom-impacting fishing methods in order to avoid, remedy or mitigate any adverse effects of fishing on the region's kelp and rhodolith beds, or to provide for the maintenance and recovery of the site's physical features and biogenic structures.

137. Commercial set netting and mid-water trawling occur in parts of the area, but these two fishing methods have no adverse effects on the maintenance and recovery of physical features and biogenic structures at the site. Any fishing-related threats to dolphins and sea birds are more effectively addressed through broad scale management measures such as those required under Threat Management Plans and National Plans of Action. Therefore, there are no actual or potential adverse effects from set netting or mid-water trawling and no legitimate basis for prohibiting these methods under the Fisheries Act.

138. The intensity of commercial fishing for any species at the site is low and is unlikely to prevent the maintenance and recovery of ecological systems, natural species composition and trophic linkages. If these matters were to become an issue in future, the appropriate management response would be to adjust the TAC and TACC for the species concerned.

Utilisation impacts

139. The area is utilised by commercial set netters targeting school shark and rig. Utilisation impacts from proposed MPA C1 will be cumulative with those of the adjacent proposed marine reserve at site B1. Further details are provided in the SIFMC submission.

Conclusion

140. MPA C1 cannot be justified under the Fisheries Act. Adverse effects of fishing have not been demonstrated and the imposition of MPA C1 unnecessarily restricts the utilisation of commercial fisheries for school shark and rig.

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[61] Danish seining is prohibited by regulation out to 3 nm from the coast.
[62] Evidence is anecdotal only.

4.2.3 MPA E1 Kaimata

Adverse effects of fishing

141. No commercial dredging or Danish seining occurs at site E1,[63] and there are no actual adverse effects from these fishing methods. There is no evidence to suggest that these two fishing methods are ever likely to be used at the site and the likelihood of any potential adverse effect is therefore very low.

142. A small amount of bottom trawling occurs in the northwest corner of proposed MPA E1, but a voluntary trawl ban is in place over part of the bryozoan beds at the site. As far as we are aware, DOC and FNZ have not assessed whether bottom trawling may have an *adverse* effect on habitat forming bryozoans at a regional scale. However, the protection currently provided by the voluntary closed area and the fishers' practice of avoiding all bryozoan beds outside the voluntary closure[64] indicates that it is unlikely that the bryozoan beds are experiencing adverse effects from bottom trawling. There is therefore no evidence to demonstrate that it is necessary to close site E1 to bottom-impacting fishing methods in order to avoid, remedy or mitigate any adverse effects of fishing on the region's bryozoan habitats, or to provide for the maintenance and recovery of physical features and biogenic structures.

143. Purse seining does not occur in the area. Commercial set netting and mid-water trawling occur at the site, but these three fishing methods have no adverse effects on the maintenance and recovery of physical features and biogenic structures at the site. Any fishing-related threats to sea lions and sea birds are more effectively addressed through broad scale management measures such as those required under Threat Management Plans and National Plans of Action. Therefore, there are no actual or potential adverse effects from purse seining, set netting or mid-water trawling and no legitimate basis for prohibiting these methods under the Fisheries Act.

144. The intensity of commercial fishing for any species at the site is unlikely to prevent the maintenance and recovery of ecological systems, natural species composition and trophic linkages. If these matters were to become an issue in future, the appropriate management response would be to adjust the TAC and TACC for the species concerned.

Utilisation impacts

145. Several commercial fishers utilise the area for setnetting and trawling, as described in the SIFMC submission.

[63] Danish seining is prohibited in part of the site.
[64] As noted in the submission of SIFMC.

Conclusion

146. MPA E1 cannot be justified under the Fisheries Act. Adverse effects of fishing have not been demonstrated and the imposition of MPA E1 unnecessarily restricts the utilisation of set net and trawl fisheries.

4.2.4 MPA L1 Whakatorea

Adverse effects of fishing

147. Bottom trawling and Danish seining are already prohibited at site L1 and there are therefore no actual or potential adverse effects from these two fishing methods. No dredging occurs at the site, nor is there any evidence to suggest that dredging is ever likely to occur (or is even physically possible) at the site. Therefore, there are no actual or potential adverse effects from dredging and no legitimate basis for prohibiting dredging under the Fisheries Act.

148. Commercial set netting and line fishing do not occur at the site, and there is no evidence to suggest that these fishing methods are ever likely to be used in the estuary. Even if they were to occur at the site in future, the use of these fishing methods has no adverse effects on the maintenance and recovery of physical features and biogenic structures at the site. Commercial harvesting of shellfish by mechanical means does not take place at the site, and it will never occur as the site would be unable to support a shellfish sanitation programme. There is therefore no legitimate basis for prohibiting the commercial use of these three fishing methods under the Fisheries Act.

149. While commercial eel fishing occurs in the site, the use of fyke nets has no adverse effects on the maintenance and recovery of physical features and biogenic structures at the site. Furthermore, prohibiting eel fishing at the site is likely to result in localised depletion in other areas of the eel fishery, particularly as many estuaries in the region are already closed to commercial eel fishing (or are proposed to be closed as MPAs).

150. The intensity of commercial fishing for any species at the site is unlikely to prevent the maintenance and recovery of ecological systems, natural species composition and trophic linkages. If these matters were to become an issue in future, the appropriate management response would be to adjust the TAC and TACC for the species concerned.

Utilisation impacts

151. Impacts on the commercial utilisation of eels are addressed in the submission of the South Island Eel Industry Association.

Conclusion

152. MPA L1 cannot be justified under the Fisheries Act. Sustainability is already ensured as there are no adverse effects of fishing on the site's identified values, and utilisation of the eel fishery would be needlessly prohibited.

4.2.5 MPA Q1 Tahakopa

Adverse effects of fishing

153. Bottom trawling and Danish seining are already prohibited at site Q1 and there are therefore no actual or potential adverse effects from these two fishing methods. No dredging occurs at the site, nor is there any evidence to suggest that dredging is ever likely to occur (or is even physically possible) at the site. Therefore, there are no actual or potential adverse effects from dredging and no legitimate basis for prohibiting dredging under the Fisheries Act.

154. Commercial set netting and line fishing do not occur at the site, and there is no evidence to suggest that these fishing methods are ever likely to occur in the estuary. Even if they were to occur at the site in future, the use of these fishing methods has no adverse effects on the maintenance and recovery of physical features and biogenic structures at the site. Commercial harvesting of shellfish by mechanical means does not take place at the site, and it will never occur as the estuary would be unable to support a shellfish sanitation programme. There is therefore no legitimate basis for prohibiting the commercial use of these three fishing methods under the Fisheries Act.

155. While commercial eel fishing occurs in the site, the use of fyke nets has no adverse effects on the maintenance and recovery of physical features and biogenic structures. Furthermore, prohibiting eel fishing at the site is likely to result in localised depletion in other areas of the eel fishery, particularly as many estuaries in the region are already closed to commercial eel fishing (or are proposed to be closed as MPAs).

156. The intensity of commercial fishing for any species at the site is unlikely to prevent the maintenance and recovery of ecological systems, natural species composition and trophic linkages. If these matters were to become an issue in future, the appropriate management response would be to adjust the TAC and TACC for the species concerned.

Utilisation impacts

157. Impacts on the commercial utilisation of eels are addressed in the submission of the South Island Eel Industry Association.

Conclusion

158. MPA Q1 cannot be justified under the Fisheries Act. Sustainability is already ensured as there are no adverse effects of fishing on the site's identified values, and utilisation of the eel fishery would be needlessly prohibited.

5. Opposition to proposed kelp protection area

159. The fishing industry recognises that kelp plays a vital ecological role and provides important biogenic habitat for a range of marine species, including species of commercial importance. However, we oppose the proposed T1 kelp protection area for the following reasons:

a) The proposed management measure is not an MPA and therefore should not have been consulted on as part of the proposed SEMPA network;

b) The kelp protection area is not consistent with the purpose of the Fisheries Act, which is to ensure sustainability while providing for utilisation. In particular:

- The proposed prohibition is not justified on the basis of risks to the sustainability of kelp, or the adverse effects of kelp harvesting on marine biodiversity or the aquatic environment, particularly as no commercial harvest of bladder kelp is currently taking place within the region; and
- The proposal would have a significant impact on commercial property rights, including quota allocated under the Fisheries Settlement, and would severely restrict opportunities to sustainably utilise kelp, as outlined in the submission of the Giant Kelp 3G Quota Owner Group; and

c) Other far more significant threats to kelp habitat (in particular, runoff of terrestrial sediment which has been recognised as the number one threat to kelp habitat)[65] are not effectively managed in the region.

160. We note that in advice provided to Ministers, FNZ opposed the proposed ban on commercial harvest of bladder kelp as it is unjustified. FNZ advised that rather than pre-emptively banning harvest and risking legal action from affected quota owners, a more appropriate course of action for addressing the Forum's concerns about sustainability of future harvest would be to review the TACC and other harvest controls that are in place.[66] The fishing industry concurs with this view. We consider that it is irrational and irresponsible for the government to consult on the proposed kelp protection area when agencies are aware that it is inconsistent with the Fisheries Act.

6. Process concerns

161. The fishing industry considers that it is not in the public interest to establish marine reserves that are the outcomes of a flawed and divisive process (see **section 3.1.11**) and we object to the proposed Type 2 MPAs for the same reasons.

162. We are concerned that the Government is now *relying* on the mandate and consultation undertaken by the South-East Marine Protection Forum (the Forum). The Ministers of Conservation and Fisheries informed Cabinet that *we decided to progress Network 1 in its entirety* ***in order to respect the integrity of the Forum process.***[67] The Minister's reliance on the historic Forum process is also evidenced by the fact that DOC and FNZ have not undertaken any active consultation (i.e., public meetings and widespread education and publicity) on the current Government proposals. However, the Ministers' faith in the Forum process is misplaced as it has been apparent for several years that, in spite of the best will and efforts of the Forum's participants and chair, the outcomes of the Forum process did <u>not</u> have

[65] MacDiarmid et al (2012). Full reference above.
[66] Joint agency advice on the South-East Marine Protection Forum recommendations, 19 October 2018. Released under the OIA.
[67] Cabinet paper – South-East Marine Protected Area Network Recommendations Date: 14 March 2019 Author: Office of the Minister of Conservation, Office of the Minister of Fisheries.

integrity: no consensus was reached, differences in policy interpretation were never resolved, and four members withdrew their support before the final report was presented to Ministers. Two independent reviews identified significant procedural and policy flaws.

163. We consider that (a) the Government cannot rely on the integrity of the Forum process or the mandate and consultation undertaken by the Forum, and (b) in light of that, the current consultation by DOC and FNZ is patently inadequate to inform Ministerial decisions (as discussed in **section 6.2**).

6.1 Ministers should not rely on the Forum's mandate and consultation process

6.1.1 Forum lacked mandate

164. While we respect and appreciate the dedication and huge amounts of time put into the Forum by its members and chair over many years, the fishing industry considers that the Forum lacked mandate for the following reasons:

- Forum members were not appointed by the sectors that they were intended to represent, but by government;
- Not all representatives had good links with the sectors they were representing, and not all representatives had a formal mandate from their sectors;
- Some fishing industry interests who were significantly affected by the Forum's proposals were not directly represented on the Forum – for example, the pāua and eel fisheries; and
- Because so much of the Forum's work was in committee, there were limited opportunities for representatives to confer with the sectors they were supposedly representing.

165. In the absence of a strongly mandated membership, comprehensive sectoral representation, or opportunities to confer with the wider sector, the Forum cannot be regarded as a valid platform for making inter-sectoral tradeoffs. For Forum members who represented fishing sectors (commercial, recreational, customary), the expectation that tradeoffs would be made was particularly unfair as the livelihoods and wellbeing of fishers and fishing communities were directly at stake. For other sectoral representatives on the Forum – for example science or environmental representatives – this was not the case as the livelihoods of their colleagues would not be harmed and may even be enhanced by the establishment of MPAs.

6.1.2 Forum process inadequate

166. The Forum did not apply the MPA Policy in a structured manner, as set out in the 2016 fishing industry submission.[68] For example, no account was taken of existing habitat protection and

[68] *Fishing Industry Submission on Proposed Marine Protected Areas for the South Island South-East Coast* (20 December 2016).

MPAs were proposed for reasons outside the scope of the MPA Policy (e.g., to safeguard protected species such as yellow eyed penguins, or for fisheries management purposes).

167. The Forum had no clear mechanism for resolving differing interpretations of the MPA Policy and, as a result, Forum members continued to hold irreconcilable views about how the MPA Policy should be applied. This failing had a significant impact on the integrity of the Forum's work, and was highlighted in two independent reviews.

168. The Forum undertook the task of identifying a network of MPAs in isolation of the wider marine management regime. In particular, fishing industry Forum members felt that the Forum did not develop an adequate understanding of the fisheries management regime or the adverse effect that MPAs have on the sustainability of surrounding fisheries through displacement of fishing effort.

169. The large number of submissions received on the Forum's proposals resulted in a chaotic and inefficient process for summarising submissions involving numerous iterations and complex, difficult-to-access databases. As a result, we are not confident that all Forum members read and understood the full range of submissions on their proposals, or that they were able to take the submissions into account adequately in their final recommendations. [69]

170. The boundaries of seven of the eleven MPAs in Network 1 were extended beyond those consulted on by the Forum, denying stakeholders the opportunity to submit on the new boundaries. Some of these extensions were very significant – for example, the offshore boundary of MPA D1 was extended from 6km to 10km, significantly increasing the impact of the marine reserve on rock lobster fishers. The Forum did not assess the impacts of the boundary changes on existing fishing activity and was not in a position to claim community support for Network 1 as the full proposal had never been consulted on.

171. The concerns listed above are not new, but were raised throughout the Forum process by industry members. However, attempts to resolve the concerns within the Forum were consistently rebuffed. The lack of any 'off-line' dispute resolution process was a significant failing of the SEMPA planning process and it resulted in disagreements being perpetuated rather than resolved.

6.1.3 Forum process resulted in division, not consensus

172. Because of the procedural failings described above, the Forum was unable to reach consensus and presented two options in its final recommendations – i.e., Network 1 and Network 2.

173. The fishing industry and industry Forum representatives were dismayed that the Forum's final report consistently misrepresented the industry's approach to biodiversity protection,

[69] More than 2,800 submissions were received, plus many additional "template" submissions. The summary of submissions was a massive 365 pages, plus a separate 70 page summary of "science submissions".

significantly understated the benefits of Network 2, overstated the benefits and support for Network 1, and used biased and emotive language to describe the two options.[70]

174. Most critically, instead of resolving the different underlying interpretations of the MPA Policy that had arisen in the Forum's deliberations, a single interpretation was presented in the Forum's final report to Ministers – even though this interpretation was disputed by four of the Forum's members. As a result, the Forum's report concluded that Network 1 achieved the MPA Policy requirements and Network 2 fell short. The equally valid alternative conclusion – i.e., *that Network 2, in combination with existing management measures, protects the same number of habitats with around one third of the cost to commercial fishing and less impact on other existing users* – was not included, resulting in a biased presentation of the two networks and lack of balance in the Forum's report.

175. In an effort to clarify these differences before the Forum made its recommendations public, industry members of the Forum raised their concerns directly with the Forum and with Ministers, but the lack of balance in the report was not addressed. As a result, four members withdrew their support for the Forum's report. The reasons behind the withdrawal of support were misrepresented by DOC officials, who provided their Minister with the following 'key message' to use in the media and other communications: [71]

> ***Fishers say the Forum's report was biased against the fishing industry****, is that true? The Forum strived to take all views into account when determining what marine protection options would be recommended. The fishing industry was represented and fully involved in the Forum and had opportunity to present their opinions on the process. The fishing industry representatives and one recreational fishing representative are the proponents of one of the two Networks, and therefore their recommendation forms a key part of the Report.*

176. The members did not claim that there was 'bias against the fishing industry', but instead objected to the unbalanced presentation and analysis of the two networks in the Forum's report – which was a direct consequence of the failure to resolve underlying differences in the interpretation of the MPA Policy. By mis-stating the fishers' concerns in this and in numerous other communications, officials once again avoided the need to address the substance of the industry members' complaints.

177. The concerns noted above have been perpetuated rather than rectified in subsequent Ministerial decisions. For example, in a March 2019 Cabinet paper the Ministers of

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[70] These concerns are outlined in detail in a letter from four Forum members to the Ministers of Conservation, Fisheries and the Environment (19 February 2018).

[71] Information released under the OIA by the Department of Conservation to Kate Hesson, Otago Rock Lobster Industry Association, 25 June 2020.

Conservation and Fisheries describe Network 2 as *encompassing three marine reserves and two Type 2 areas, covering 366 km^2 (4.1% of the Forum region)*[72] – a description that:

- Ignores the existing measures that already help protect biodiversity in the region and that were integral to the design of Network 2; and
- Omits a critical component of Network 2 – i.e., that support for the Network was conditional upon the Forum recommending that the government take steps to 'rebalance' affected fisheries in order to manage the effects of displaced catch and ensure sustainability. The Forum did not make this recommendation in their final report (in spite of it being a key component of Network 2), and neither was it ever subsequently acknowledged by Ministers.

178. Ongoing misrepresentations of this nature caused the fishing industry lose faith in the integrity of the Forum process and reject its outcomes.

6.1.4 Two independent reviews identify serious policy and procedural flaws

179. Two independent reviews have endorsed the industry's concerns about the SEMPA Forum and process, and point to serious procedural flaws.

Caravel 'Lessons Learned' Review

180. Independent reviewers were commissioned by DOC in 2018 to prepare the 'Lessons Learned Report'.[73] The reviewers highlighted the inconsistencies in the MPA Policy and the challenges the Forum had in interpreting and applying it:

> *Forum members found the policy and associated guidance difficult to follow and difficult to apply, particularly in the face of differing interpretations by agencies. Comments were that it was **unclear, contradictory in places, and insufficiently specific in places**. The consequence of the lack of clarity was that **differences of opinion were almost impossible to reconcile**, which affected the Forum over the entire process. This created a very long initial engagement while relationships were built, understandings clarified, and consensus sought, but ultimately the **fractures dominated** and the Forum was unable to agree on a single network.*

181. The reviewers noted that *consensus was not achieved, and it is unlikely that it will be achieved in any other MPA forum while meeting the requirements of [the MPA Policy].* They recommended that:

> *MPA policy needs to be made much clearer if it is to be used in forums such as this. It needs to be very clear about what is in scope and what is not (eg marine protection tools); identify*

[72] Cabinet paper – South-East Marine Protected Area Network Recommendations Date: 14 March 2019 Author: Office of the Minister of Conservation, Office of the Minister of Fisheries.
[73] Lessons Learned Report: South-East Marine Protection Forum Department of Conservation July / October 2018. The review was completed by Pat Thorn, Caravel Group (NZ Ltd) and Sue Powell, Tregaskis Brown Ltd.

what minimum standards or bottom lines are; and clearly articulate expectations and expected benefits.

Auditor General's Review

182. The second review was published by the Office of the Auditor General (OAG) in 2019.[74] The OAG compared the processes adopted by the SEMPA Forum and Te Korowai o Te Tai ō Marokura. In contrast to a positive review of Te Korowai, the reviewer identified many problems with the SEMPA Forum.

183. The OAG highlighted how *aspects of the guidelines for implementing the Marine Protected Areas policy are* ***not supporting the achievement of New Zealand's marine biodiversity objectives***. The OAG reviewer observed that:

> *Some members of the South-East Forum did not feel that the process allowed them to adequately minimise the adverse effects on their stakeholders. In some instances, members proposed marine management tools that did not meet the protection standard in the implementation guidelines but would have addressed their concerns about the adverse effects on existing users of the marine environment… As a result, some of the South-East Forum members* ***did not feel that recommendations to the Ministers adequately addressed the concerns of the people they represented. This undermined their participation and confidence in the South-East Forum*** *and contributed to members forming into factions according to their different points of view. These different factions appeared to operate in an adversarial way at times.*

184. The OAG's main recommendation to DOC and FNZ was to *consider how any reform to marine biodiversity protection legislation, policy, or planning could support greater collaboration between parties, and ultimately provide more timely, appropriate, and sustainable protection for New Zealand's unique marine biodiversity*.

6.1.5 No regulatory impact assessment

185. In spite of the acknowledged short-comings of the process, no regulatory impact assessment was prepared prior to the Ministers making a decision on the Forum's recommendations. Ministers were therefore not able to accurately and transparently assess the costs and benefits or alternative approaches prior making a decision to proceed with and consult on Network 1.

6.2 Current consultation process is inadequate

6.2.1 Lack of timely access to relevant information

186. Throughout the SEMPA process the fishing industry's efforts to obtain information so as to understand what was being proposed and why, and the consequences for our members of the

[74] Using different processes to protect marine environments, Office of the Auditor General, June 2019.

proposals, has been frustrated and delayed by officials. In particular, responses to our requests under the Official Information Act 1982 (OIA):

- Have been denied without justification and responded to only once the scope of the original request has been repeatedly narrowed to very specific categories of information;
- Even then, have typically been provided well beyond the statutory timeframe to the extent that the requested information, once provided, is no longer useful. For example, a very specific request to the office of the Minister of Fisheries for *"Copies of emails (and their attachments) authored by, copied to, and/or received by [the Minister]… in relation to the proposed SEMPA Network"* lodged by ORLIA on 9 June 2020 should have been provided by 7 July. Instead, the deadline was extended to 31 July – which is of limited utility in light of the closing of submissions the following working day; and
- On occasion have attracted prohibitive charges. For example, in March 2017 in response to a request for copies of submissions, DOC sought to charge PauaMAC5 $66,044.50 for a hard copy of the submissions or $37,924.00 for an electronic copy. These charges effectively denied our access to the requested information, but without reference to the statutory criteria for declining to release information under the OIA. The situation was resolved only when PauaMAC 5 asked the Ombudsman to investigate.

187. We have noted elsewhere in this submission the failure of FNZ to gather and make available accurate information on recreational catch in the SEMPA region, even though there was ample opportunity to do so. The lack of timely access to fisheries information was also highlighted in the two independent reviews of the SEMPA process.

6.2.2 Consultation material is inappropriately leading

188. It is clear from the consultation material that DOC and FNZ are encouraging submitters to use the online consultation website in preference to other ways of making a submission. For example, under the heading *Consultation document and ways to make a submission* FNZ informs submitters that '*an external website has been developed where you can: find the consultation document… [and] make an online submission*'. Further down the page, submitters are advised '*while we would prefer to get online or email submissions, you can also post your feedback'*.[75] The questions asked on the online consultation site are therefore of critical importance, as they will inform the scope and content of the majority of submissions. This is unfortunate because the online website does not encourage submitters to independently assess the merits and costs of the proposed MPAs.

[75] https://www.fisheries.govt.nz/news-and-resources/consultations/establishing-south-eastern-south-island-marine-protected-areas/

189. Instead, the online consultation tool asks submitters whether or not they agree with the agencies' assessment of the proposals. Specifically, submitters are asked whether they agree with the 'initial analysis' of costs and benefits of the proposed SEMPA network in section 3.2 of the consultation document. As set out in **section 3.1.5** of this submission, the 'benefits' in the consultation document are overstated and/or speculative, even though they are presented as absolutes – for example, '*establishment of the proposed network would allow the marine biodiversity in the southeast of the South Island to be explicitly protected and maintained or allowed to recover*'. In contrast, the 'costs' – which are undoubtedly real – are presented as if they were somehow hypothetical or avoidable. For example, submitters are informed that the network would '*potentially be associated with*' negative cultural, social and economic impacts on affected fishers and would have '*potential*' impacts on Māori interests. Aside from a high-level and partial assessment of economic impacts on commercial fishing, no other costs are quantified or described in at any level of detail (**section 3.1.4**).

190. In relation to individual marine reserve proposals, submitters are first directed to consider and respond to the analysis of costs and benefits in the consultation document. Only after reading the applicant's own opinions are they asked what they think of the MPA proposals.

191. In relation to the network as a whole and the individual MPAs, the analysis that submitters are being directed to read and respond to is incomplete and partisan. We consider that this is a clear attempt to inappropriately influence the content of the submissions received rather than to seek submitters' genuine reactions to the proposals.

6.2.3 Boundaries of a notified marine reserve cannot be changed

192. The consultation document asks submitters in relation to each proposed marine reserve '*what **changes to the site or activity restrictions** would you like to see?*' – thereby actively encouraging submitters to make submissions on matters that are arguably not within the scope of Ministers' powers under the MRA. The marine reserves application also implies that Ministers are prepared to consider changes to the proposed marine reserves in order to 'balance' marine protection objectives and the concerns of Ngāi Tahu and affected fishers.[76] The consultation website explicitly indicates that '*decisions about the proposed network may include …implement[ing] some or all of the proposed protection measures, **with amendments** and/or conditions*'. Submitters are then invited to say whether '*you oppose or support the site (**or have suggested changes**).*' [77]

193. The fishing industry has received legal advice that the Minister of Conservation does not have the power to adjust the boundaries of a notified marine reserve. As there is no legal basis for amending the boundaries, the information to the contrary in the consultation material potentially misleads submitters. Submitters who actually oppose a particular marine reserve

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[76] *The Ministers of Conservation and Fisheries are interested in the views of submitters about **how the marine reserve proposed for site D1… could be progressed** to balance these concerns against marine protection objectives.* Proposed southeast marine protected areas. Appendices to consultation document, page 70.
[77] https://survey.publicvoice.co.nz/s3/semp-consultation

because of its adverse effects may have mistakenly supported it (with recommended amendments) on the belief that Ministers were prepared to consider boundary changes or other amendments to mitigate the adverse effects as part of the approval process.

194. It should be noted that the fishing industry's position as set out in this submission is a response only to the particular proposal currently being consulted on. If Ministers subsequently wish to consider a different proposal (for example, a marine reserve with different boundaries or with conditions that differ significantly from those consulted on), we would expect that (a) the new proposal would be formally notified and (b) the industry would have an opportunity to consider and provide our response at that time.

6.2.4 Type 2 MPAs inconsistent with case law on consultation

195. The SEMPA consultation document provides no information on how the proposed Type 2 MPAs proposals can be justified under the Fisheries Act, hindering submitters' ability to understand and submit on these proposals. In particular, the consultation document contains:

- No analysis of whether the proposals are consistent with the purpose and principles of the Act; and
- No information on how the proposed regulations will be implemented, for example as sustainability measures under s.11/s.298 or under the general regulation making powers of s.297.

196. Several of the proposed Type 2 MPAs may have impacts on recreational fishing – but specific recreational controls cannot be readily determined from the consultation material, hindering submitters' ability to understand which activities will be prohibited in which areas. The most obvious example is in relation to site Q1 Tahakopa where the narrative description of the proposed prohibitions includes dredging, mechanical harvesting and fyke net fishing, but the accompanying Table 12 mentions only that recreational set netting will be prohibited. It is therefore unclear whether recreational dredging, mechanical harvesting and fyke net fishing will be prohibited at site Q1. Similar inconsistencies apply in the narrative descriptions and associated tables for each of the proposed Type 2 MPAs, with the result that it is unclear which recreational fishing methods will be prohibited at these sites.

197. Information on the impacts of the proposed Type 2 MPAs on customary fishing is also poor. For the majority of sites, the consultation material provides a description of customary fishing activity but no information on whether customary fishing would be prohibited at the site. We presume (although this is not stated), that customary fishing is unaffected by Type 2 MPAs as the customary fishing regulations prevail over other regulations made under the Fisheries Act. However, for the Tahakopa estuary MPA, Table 12 states that set net and fyke net prohibitions would affect the ability of tangata whenua to gather kaimoana using these methods. This is confusing and not consistent with our understanding of the customary fishing regulations.

198. The lack of explanatory material for the proposed Type 2 MPAs brings the quality of the consultation into question. Case law confirms that statutory consultation obligations <u>cannot</u>

be fulfilled simply by discussing something in generalised terms. Providing sufficient information to enable the person you are consulting with to be adequately informed so they are able to make intelligent and useful responses is a key element of consultation case law in New Zealand.

6.2.5 Impact of COVID-19

199. The COVID-19 pandemic has major implications for the progression of the SEMPA Network, but these implications have not been addressed or acknowledged – other than in a belated and half-hearted way – by DOC, FNZ or Ministers.

Fishing industry submitters disadvantaged and subject to unnecessary stress

200. Submitters on the SEMPA proposals, including the fishing industry, were severely disadvantaged by the failure of the Government to act decisively to withdraw the notified marine reserves once it became apparent that the consultation obligations under the MRA could not be complied with. Submitting on a proposal comprising six marine reserves, five Type 2 MPAs and a kelp protection area is not a trivial task and affected parties had a reasonable expectation that agencies would act in a clear and in a timely manner.

201. It was apparent from early February 2020 that COVID-19 would cause significant disruption to New Zealand, well before the National State of Emergency was declared and Level 4 lockdown began on 25 March. However, in spite of numerous requests from the fishing industry – dating from as early as 18 February – to withdraw the SEMPA proposals, DOC did not halt consultation until 9 April, 51 days after officials were asked to act and just four working days prior to the original closing date for submissions (17 April). The delays and dithering caused unnecessary stress for fishers and fishing communities, many of who were struggling with significant uncertainty and other pressures as they sought to operate essential businesses providing food for New Zealanders during the lockdown.

202. Even once the decision to halt consultation was made, the announcement was unclear and confused. DOC and FNZ provided conflicting information about when consultation would re-start,[78] and provided no information (until requested under the OIA) on whether the notification had been withdrawn or 'paused' and, if paused, under what legal mechanism.

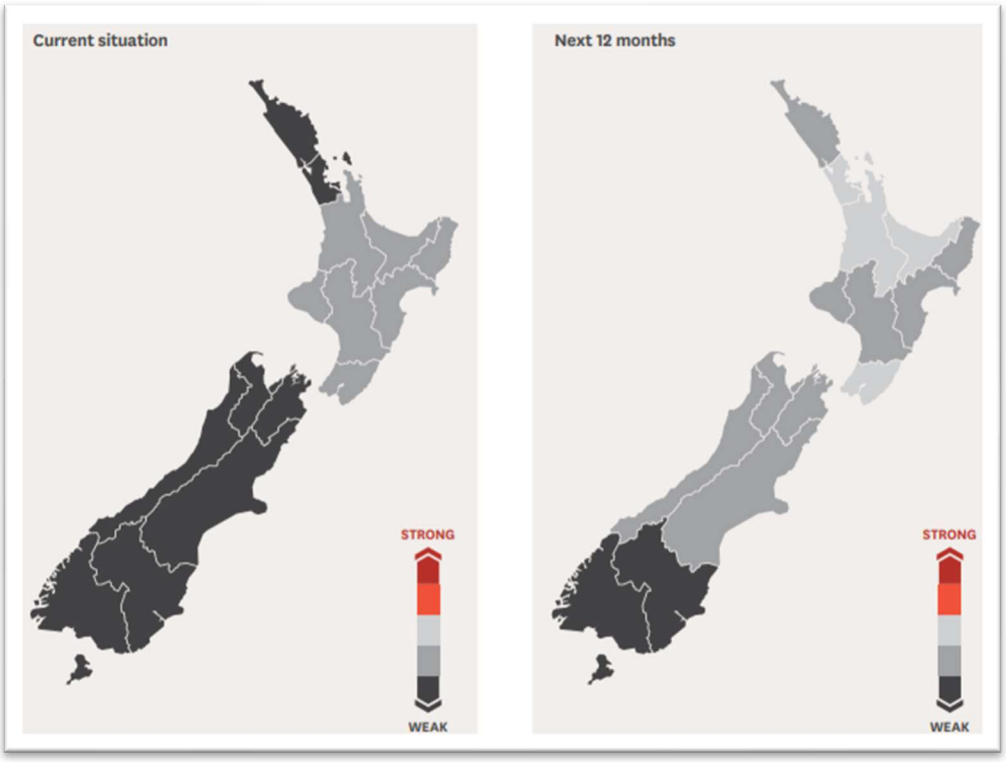
Implications for assessment of proposed MPAs

203. The fishing industry considers that once Ministers became aware of the significant and long-term social and economic impact of COVID-19 on New Zealand they should have immediately reconsidered their decision to proceed with Network 1.

204. The regional economies of Otago and Southland have declined dramatically in the wake of COVID-19 and the economic prospects for these two regions are particularly grim relative to the rest of New Zealand (see map below summarising current and future economic growth by

[78] DOC stated that consultation would be res-started *when COVID-19 restrictions have eased* and FNZ said it would be *once COVID-19 restrictions have been lifted.*

region over the next year).[79] The cost and benefit analysis (to the limited extent that this was undertaken) that informed the Ministers' decision to proceed with Network 1 is clearly no longer valid.



205. We note that while all of New Zealand will experience a deep recession and rising unemployment this year through to late 2021/early 2022, the scale of the impact and the speed of recovery is predicted to vary significantly across regions. Otago and Southland have been identified as having the weakest regional outlooks. A recent economic report notes that:[80]

- In tourism-dependent Otago, economic activity has been badly affected by border closures and restrictions on domestic travel. Normally a top performer, Otago has already been among the hardest hit regions in New Zealand. The outlook for Otago is that economic activity will continue to be severely impacted by a ban on international tourists, making it ***the hardest hit region*** in the coming recession, and possibly ***the slowest to recover***; and
- In Southland, economic activity has been hit hard by a loss of tourism, although this has been mitigated by the strong performance of the region's agricultural sector. However, the outlook is that Southland will experience a ***severe recession*** in coming quarters and is set for a ***slow recovery*** because of the region's heavy exposure to

[79] Westpac Regional Roundup, June 2020. https://www.westpac.co.nz/assets/Business/Economic-Updates/2020/Bulletins-2020/Regional-Roundup-June-2020-Westpac-NZ.pdf
[80] Westpac Regional Roundup, June 2020.

tourism. These impacts will be exacerbated by the effects of weaker prices for dairy, meat and aluminium – and further exacerbated by the recently-announced closure of the Tiwai Point smelter.

206. These current and future economic conditions will severely worsen the adverse financial impacts of the SEMPA proposals on individuals, businesses and regional communities. They also highlight a disconnect between the Government's recent policy responses to COVID-19 (actively trying to protect existing businesses) and the SEMPA proposals, which will harm commercial fishing businesses, perhaps even bankrupting some.

207. The fishing industry cannot comprehend the blinkered view that has led the Government to press ahead with such potentially harmful proposals at a time when sustainable primary production exports such as seafood are even more critical to New Zealand's economic survival and to the recovery and long-term wellbeing of the Otago and Southland regions.

6.3 Expectations of next steps

6.3.1 Additional analysis of fisheries impacts

208. Throughout this submission we have noted the lack of information on recreational fishing impacts, the extremely limited analysis of economic impacts on all fishing sectors, and the absence of evidence of adverse effects of fishing. We therefore expect FNZ to:

- Gather additional information on the location and scale of existing recreational fishing in the region, and the impacts of the proposed MPAs on non-commercial fishing;
- Commission a comprehensive economic analysis, particularly in relation to commercial fishing, with the direct involvement of affected fishing enterprises and representative organisations; and
- Analyse and provide evidence of the actual and potential adverse effects on the region's biodiversity of all fishing methods, particularly in relation to the proposed Type 2 MPAs.

209. This analysis must be completed prior to advising Ministers on any further decisions on the SEMPA network or on individual MPA proposals.

6.3.2 DOC response and independent report on objections to marine reserves

210. As DOC is the applicant for the proposed marine reserves, the fishing industry expects that DOC will answer each of the objections to the proposed marine reserves within one month of the closing date for submissions, as provided in MRA s.5(4).

211. We also expect that, consistent with its past practice and MRA s.5(6), DOC will commission an independent report to the Minister of Conservation on the objections prior to any decisions being made on the marine reserve proposals. We note that as the SEMPA process has been so polarising, it will be challenging to select a reviewer who has relevant expertise in marine

biodiversity protection and fisheries management and who is seen as 'independent' by all affected parties.

6.3.3 Concurrence

212. The Court of Appeal in the CRA3 decision describes the concurrence role of the Minister of Fisheries as requiring an independent assessment. The Minister must consider all of the relevant grounds for objection and the wider picture (including the public interest), while having regard to the particular expertise of his Ministry and his statutory functions. The Court observed that it was appropriate that the Minister considered his obligations under the Fisheries Act and the TOW(FC)S Act when deciding whether or not to concur. [81]

213. Throughout this submission we have identified – in a non-limiting way – a number of issues that we consider are relevant to the Minister of Fisheries' concurrence role. In particular, we note that the utilisation of fisheries resources, ensuring sustainability, using the best available information, and obligations under the TOW(FC)S Act are all permissible relevant considerations that the Minister can take into account in making a wider determination about whether or not to concur with the proposed SEMPA marine reserves.

6.3.4 Regulatory impact assessment

214. The fishing industry expects agencies to prepare a formal Regulatory Impact Assessment (RIA) with a comprehensive and accurate costing of the costs and benefits of alternative approaches is prior to any further decisions to progress individual marine reserves or Type 2 MPAs. This is particularly important as no RIA was prepared prior to the Ministers' decision to proceed with Network 1 or the release of the consultation document. Given the significant costs that the proposals will impose on individuals and on the Otago and Southland regions, we also expect the Treasury Regulatory Quality Team to undertake quality assurance of the RIA.

215. As noted elsewhere in this submission, a marine reserve or Type 2 MPA must be consistent with, and justified in relation to, the purposes of the statute under which it is implemented. It is not sufficient to justify establishing an MPA simply on the basis that it is consistent with the objectives or principles of the non-statutory MPA Policy – any such analysis would be circular, self-serving, and not open to the consideration of lesser-cost alternatives consistent with good regulatory practice. The RIA must therefore be undertaken in light of the objectives and purposes of the relevant legislation – i.e., the MRA for the marine reserves, and the Fisheries Act for the Type 2 MPAs – and the criteria for assessing options must also be directly consistent with the relevant statutes.

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[81] CRA3 Industry Association Inc v Minister of Fisheries [2001] 2 NZLR 345 (CA).

6.3.5 Further information

216. For further information in support of any matters raised in this submission, please do not hesitate to contact the identified representatives of the NZ Rock Lobster Industry Council, the Pāua Industry Council or Fisheries Inshore New Zealand.

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