Seafood New Zealand

Submission to the Environment Select Committee
on
The Natural and Built Environments Bill

3 February 2023

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1. Seafood New Zealand Ltd welcomes the opportunity to submit to the Committee on the Natural and Built Environments Bill.

2. Seafood NZ is a professional organisation delivering industry-good services for the wider benefit of the seafood industry, an industry that generates $5.2 billion annually in economic output and employs some 16,500 kiwis. Seafood NZ plays a role in developing and presenting responses on legislative and regulatory proposals affecting the industry.

3. We work closely with several other bodies that also represent the interests of specific parts of the seafood industry: Sector Representative Entities. These include NZ Rock Lobster Industry Council, the Paua Industry Council and Fisheries Inshore NZ.[1] This submission has been developed with those groups.

Our Submission

4. We are concerned that the Bill has not specifically or adequately considered the impact of the Bill on New Zealand's fisheries, its management regime, quota owners, fishers, or on the Fisheries Settlement with Māori.

5. We highlight these issues in the attached submission and provide recommendations to resolve these.

6. Seafood NZ requests the opportunity to be heard on this matter and looks forward to discussing the Bill with the Committee.

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[1] A recent amalgamation has seen Fisheries Inshore New Zealand and Seafood NZ combine into a new entity, also called Seafood NZ.

Submission to the Environment Committee on the Natural and Built Environment Bill

Summary

The fishing industry considers that the Natural and Built Environment Bill (the Bill), in its current form, does not provide a workable framework for achieving its stated purpose in the coastal marine area (CMA). In particular:

- The Bill's outcomes seek the preservation and protection of the CMA, without provision for sustainable use and development, resulting in unbalanced decision-making. The outcomes do not support the wellbeing of fishing interests and other users of the CMA and seriously constrain the ability of marine sectors to contribute to New Zealand's economic recovery;
- Although the CMA comprises over a third of the jurisdiction covered by the Bill, decision-makers are not required to have any expertise or experience in marine matters;
- The Bill is poorly integrated with other marine management regimes, including the Fisheries Act 1996 and marine biodiversity protection policy and legislation;
- The explicit inclusion of '*managing the adverse effects of fishing*' in the Bill directly duplicates Fisheries Act functions in a manner that is highly uncertain, costly, unnecessary, and contrary to the Maori Fisheries Settlement;
- The Bill's biodiversity protection tools (significant biodiversity areas and highly vulnerable biodiversity areas) are poorly considered in their application to the marine environment and potentially threaten the sustainable management of fisheries; and
- The Bill will not enhance environmental outcomes in relation to fisheries – instead it will increase fisheries sustainability risks (by displacing fishing effort) and detract from improving the environmental performance of fisheries under the Fisheries Act.

Our primary recommendation is that fishing should be removed from the scope of the Bill so as to reduce the complexity and cost of New Zealand's resource management regime, honour the Crown's obligations under the Maori Fisheries Settlement, and enable fishing and fisheries resources to be managed effectively using the fit-for-purpose provisions of the Fisheries Act. However, if fishing remains within the scope of the Bill, the scope of controls that may be placed on fishing should be more clearly defined so as to reduce uncertainty and dispute.

Irrespective of the extent to which fishing is included within the scope of the Bill, it is critical that the Bill provides a workable management regime for the CMA. We therefore provide recommendations to ensure that:

- Marine resources are able to be used sustainably, within environmental limits;
- Appropriate expertise is required when decisions are made about the marine environment;
- The Bill and the Spatial Planning Bill are effectively integrated with the Fisheries Act;
- Marine biodiversity protection provisions are reconsidered; and
- Decisions under the Bill do not undermine the sustainable management of fisheries or the Crown's obligations under the Maori Fisheries Settlement.

Contents

Introduction

1. This submission is made jointly by the NZ Rock Lobster Industry Council (**NZ RLIC**), the Pāua Industry Council (**PIC**) and Fisheries Inshore New Zealand (**FINZ**) (**the fishing industry submitters**). We welcome the opportunity to submit on the Natural and Built Environment Bill (**the Bill**) and wish to be heard in support of our submission.

2. This submission should be read in conjunction with the fishing industry submission on the Spatial Planning Bill.

Who we represent

3. NZ RLIC, PIC and FINZ are national representative bodies for the rock lobster, pāua and inshore finfish sectors of New Zealand's fishing industry. Our submission is made on behalf of our members who are quota owners, fishers and affiliated seafood industry personnel in rock lobster, pāua and inshore finfish fisheries. Collectively we directly represent commercial interests in all major inshore fisheries in New Zealand.

Our interest in the Bill

Healthy marine environment

4. Rock lobster, pāua and inshore finfish fisheries are managed under the Fisheries Act 1996. Management measures under the Fisheries Act are designed to provide for the utilisation of fisheries resources by customary, commercial and recreational fishers while ensuring sustainability – which includes not only the sustainability of fish stocks, but also avoiding, remedying and mitigating any adverse effects of fishing on the aquatic environment.

5. Although fisheries sustainability is managed under the Fisheries Act, fish stocks and fish habitats are critically dependent on the quality of the surrounding marine environment. We therefore have a strong interest in ensuring that the Bill provides an effective regime for improving the quality of the marine environment by managing terrestrial and marine activities which harm important fisheries habitats or contribute to sediments, nutrients and other contaminants entering the coastal environment.

Workable framework for sustainable resource use in the coastal marine area

6. The coastal marine area (**CMA**) comprises well over a third of the geographic jurisdiction covered by the Bill, but the Bill has a disproportionately strong terrestrial focus and does not, in its current form, provide a sound framework for managing the marine environment.

7. To the extent that the Bill seeks to enable development, its focus is purely terrestrial – i.e., the Bill's 'system outcomes' provide for urban and rural land use, housing, infrastructure and terrestrial primary production. In contrast, the CMA is identified as an area for protection and preservation only, rather than as an area that supports a range of uses and values and economically important activities. This imbalance needs to be rectified so that the CMA can continue to contribute in a sustainable manner to the economic, social and cultural wellbeing of New Zealanders.

8. The Bill should provide a CMA management regime that is fit for purpose and not simply an extension of the management regime for terrestrial environments. To that end, we include in our submission recommendations to ensure that the Bill:

   - Interfaces effectively with the Fisheries Act 1996; and
   - Requires appropriate experience, skills and expertise relevant to marine management when matters relating to the CMA are under consideration.

Support for seafood's contribution to economic recovery

9. The commercial fishing sector provides jobs in regional communities and contributes to New Zealand's ongoing prosperity by generating annual exports valued at $1.4 billion. The Bill will play an critical role in determining whether the seafood industry and other primary production sectors are able to contribute effectively to New Zealand's economic recovery, as flagged by Agriculture Minister Damien O'Connor in a recent press release:

   > *Accelerating our export growth is a major cornerstone of the Government's economic recovery plan… We know this is a tough time for Kiwis who are experiencing cost of living pressures and rising interest rates but continuing our export growth means New Zealand is even better placed in a challenging global environment*.[2]

10. For the fishing industry, two aspects of the Bill significantly undermine the Government's desire for our sector to contribute to export growth and economic recovery – the first is the Bill's characterisation of the sea as 'preservation' environment rather than a 'sustainable use' environment, and the second is the significant cost, complexity and uncertainty created by the Bill's unclear interface with the Fisheries Act, particularly in relation to the inclusion in the Bill of a capacity for regional councils to manage the effects of fishing.

11. These two aspects of the Bill are also contradictory to the objectives of the Government's proposed Fisheries Industry Transformation Plan which is intended to *increase the value created from fishing* and *improve the environmental performance of commercial fisheries*. We consider that the inclusion of fishing within the scope of the Bill is a significant distraction – in terms of costs, effort and time – from efforts by the industry and regulators to improve the environmental performance of fishing using the purpose-built tools of the Fisheries Act.

Protecting the integrity of the fisheries management regime and Fisheries Settlement

12. In order to achieve its purpose, the Bill needs to work alongside, and not undermine, the purpose of the Fisheries Act. The fishing industry's desire to protect the integrity of the fisheries management regime – including the Quota Management System (**QMS**) – and the Maori Fisheries Settlement is central to all aspects of this submission.

13. The main way in which the Bill may interfere with the effective operation of the fisheries management regime and the rights enshrined in the Fisheries Settlement is by enabling the making of rules which prohibit or restrict fishing activities in the CMA. The prohibition of fishing in an area invariably displaces fishing effort and catch into other neighbouring areas – a process

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[2] Government press release, 1 December 2022. https://www.beehive.govt.nz/release/exports-tracking-towards-new-record-high-growth

known as 'displacement'. The effects of displacement on fisheries sustainability can be very significant and are explained in **Box 1** below. We refer back to this explanation throughout our submission.

Box 1: Fisheries displacement effects

It is widely understood that displacement of fishing effort from an area closed to fishing has a negative effect on the abundance of surrounding fish populations.[3] 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 closure is established, the same amount of catch will continue to be taken, effectively guaranteeing that fishing will become more intense outside the closed area. Increased intensity of fishing effort – whether by commercial, customary or recreational fishers – can reduce the local abundance of neighbouring fish populations and, depending on the fishing method, can also place additional pressures on marine biodiversity outside the closed area.

The closure of an area to fishing – for whatever reason, under any statute – therefore *always* has potential fisheries management implications. These implications will be more significant for species that have limited movement or localised populations (such as rock lobster, pāua or blue cod), and for popular fisheries that are fully utilised. The types of impacts that need to be considered and assessed whenever an area is proposed to be closed to fishing include:

- Increased risk of local depletion of affected fish stocks in neighbouring areas;[4]
- Slower rebuilding rates for fish stocks that have been depleted;
- Increased fishing-related pressure on marine biodiversity values outside the closed area;
- Increased competition and spatial conflict between fishing sectors;
- Increased costs of fishing for individual fishers (e.g., increased travel times);
- Increased risk of a cascade of future prohibitions on fishing. For example, the impacts of displaced catch may prompt an iwi or hapū to seek to protect areas of importance for customary fishing by establishing new closures under customary fishing regulations. In turn, these measures may result in further displacement of fishing effort and additional sustainability risks; and
- Increased risk to fish stock sustainability, particularly if the displacement from the closed area is significant, either in itself or cumulatively with other closed areas. Stock sustainability threats require a fisheries management response such as a TAC reduction, which would have adverse social and economic impacts on affected customary, commercial and recreational fishers and quota owners, including iwi owners of Fisheries Settlement quota.

All of these effects are <u>contrary</u> to the purpose of both the Bill and the Fisheries Act.

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[3] 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.

[4] It is sometimes claimed that area closures improve the abundance of surrounding fisheries through mechanisms such as spillover. This *may* be true only where an area closure is deliberately designed to provide fisheries management benefits. It is not possible to implement such a closure under the Bill because the Bill restricts the purpose of rules to manage fishing (i.e., rules cannot be made for Fisheries Act purposes such as providing fisheries management benefits).

14. In summary, we consider that the Bill in its current form will not improve the management of the environmental effects of fishing. To the contrary, the inclusion of fishing within the scope of the Bill is:

    - Incompatible with sustainable fisheries management;
    - A distraction from improving the environmental performance of fisheries under the Fisheries Act; and
    - Contrary to the Maori Fisheries Settlement.

Structure of submission

15. The fishing industry submission is structured around six key issues. We recommend amendments that will:

    A. Enable sustainable use of the coastal marine area;

    B. Remove (or, alternatively, clarify) duplication with the Fisheries Act;

    C. Improve integration between the Bill and the Fisheries Act;

    D. Enable informed decisions to be made for the CMA;

    E. Clarify the marine biodiversity protection provisions; and

    F. Tidy up the provisions for aquaculture zones.

A) Enabling sustainable use in the coastal marine area

16. Clause 5 sets out a list of 'system outcomes' which the national planning framework (**NPF**) and natural and built environment plans (**NBE plans**) must provide for. The outcomes are intended to assist in achieving the purpose of the Act, which includes enabling *the use, development, and protection of the environment*. The outcomes therefore include matters related to protection of the environment – e.g., outcome (a) – and outcomes that enable use and development – e.g., outcome (c) in relation to development of urban and rural areas, and outcome (d) in relation to land-based primary production.

17. However, in contrast to the balanced outcomes for terrestrial environments, no 'use and development' outcome applies explicitly to the CMA.[5] The only outcome of direct relevance to the CMA is outcome (a) which is purely a 'protection' outcome, i.e.:

> *(a) the protection or, if degraded, restoration, of—*
> *(i) the ecological integrity, mana, and mauri of—*
> *(A) air, water, and soils; and*
> *(B) the coastal environment, wetlands, estuaries, and lakes and rivers and their margins; and*
> *(C) indigenous biodiversity:*

[5] Outcomes that relate to specific activities such as infrastructure provision and reduction of greenhouse gas emissions may also apply in the CMA.

(ii) outstanding natural features and outstanding natural landscapes:
(iii) the natural character of the coastal environment (including the coastal marine area), wetlands, and lakes and rivers and their margins:

18. The absence of a 'use' outcome in the CMA has significant consequences for all users of the marine environment, including the aquaculture sector and customary, commercial and recreational fishing interests. Unlike the existing 'matters of national importance' in the Resource Management Act 1991 (**RMA**),[6] the outcomes in clause 5 provide *active direction* for all other elements of the Bill (and the Spatial Planning Bill).[7] This means that in the CMA, the NPF, regional spatial strategies (**RSS**) and NBE plans will be focused primarily on achieving protection and not on achieving sustainable use of marine resources. The absence of a 'use' outcome for the CMA will promote unbalanced decision-making in the CMA and will prevent the purpose of the Bill – i.e., *to enable the **use, development** and protection of the environment* – from being achieved with respect to the CMA.

19. We consider that the addition of a 'use' outcome for the CMA would better achieve the Government's reform objectives, including the primary objective of *better enabling use and development within environmental biophysical limits*. The absence of a 'use' outcome for the CMA is also contrary to the Government's objective to give effect to the principles of te Tiriti o Waitangi, particularly with respect to the Maori Aquaculture and Fisheries Settlements which depend on the sustainable utilisation of resources in the CMA. Adding a 'use' outcome would not in any way detract from the current 'protection' outcome in clause 5(a) as there is no hierarchy among the outcomes and decision makers have discretion in how the outcomes are pursued *once any limits and targets are met*.

Recommendation
Amend clause 5 to add a 'use' outcome for the CMA. This could be achieved by:

Either amending existing outcome (c) to include the CMA, as follows:
(c) well functioning urban, ~~and~~ rural and coastal marine areas that are responsive to the diverse and changing needs of people and communities in a way that promotes—
(i) the use and development of land and resources for a variety of activities, including for housing, business use, and primary production; and

(ii) …

Or adding a separate outcome for the coastal marine area – e.g., *the sustainable use of the coastal marine area within environmental limits.*

6 Decision makers must recognise and provide for matters of national importance under RMA s.6.

7 The NPF must include strategic direction on how decision makers are to achieve the system outcomes; regional spatial strategies are to assist in achieving the system outcomes (SP Bill cl 3(a)(ii)); a target may be designed to achieve a system outcome (cl 48); and NBE plans must provide for system outcomes (cl 102(2)(d)).

B) Removing duplication with Fisheries Act

20. The RMA and the Fisheries Act contain significant duplications of responsibilities between regional councils and the Minister for Oceans and Fisheries, particularly with respect to protecting marine biodiversity from the adverse effects of fishing. The overlapping statutory regime has necessitated the fishing industry to become increasingly involved in planning processes and litigation under the RMA, particularly following the Court of Appeal ruling in the *Motiti* decision.[8] The uncertain and highly contested interface between the Fisheries Act and the RMA has proven to be extremely costly for all parties.

21. In our previous input during the development of the Bill, the fishing industry consistently sought to remove, reduce, or at least clarify, the extent of this statutory overlap. Instead the Bill exacerbates the current overlap with the Fisheries Act by explicitly including fishing within its scope.[9]

22. Our reasons for recommending the removal or clarification of the Bill's provisions for the control of fishing are discussed further below and include:

    - The scope of the statutory overlap is poorly defined and creates significant uncertainty;
    - Regulatory duplication adds cost and complexity to the resource management system;
    - Controlling fishing under the Bill threatens fisheries sustainability by displacing catch into neighbouring areas;
    - Controlling fishing under the Bill is contrary to the Maori Fisheries Settlement;
    - No other activity is regulated twice like this – and the duplication is unnecessary as any desired improvements in the environmental effects of fishing can and should be achieved under the Fisheries Act;
    - The provisions significantly alter the impact of the Marine and Coastal Area (Takutai Moana) Act 2011 (**MACA Act**) on fisheries management and fisheries users in ways that were unanticipated when the MACA Act was enacted; and
    - The inclusion of the provisions in the Bill has not been adequately considered in the policy development process to date.

Uncertain scope of statutory overlap

23. Clause 105(1)(f) provides that NBE plans may *include provisions that manage the effects of fishing in the coastal marine area*, subject to the restriction in clause 124(9). Clause 105(1)(f) is a new provision not currently included in the RMA. It directly duplicates the Minister for Oceans and Fisheries' responsibilities under the Fisheries Act for *avoiding, remedying or mitigating any adverse effects of fishing on the aquatic environment* (FA s.8).

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8 *Attorney-General v The Trustees of the Motiti Rohe Moana Trust & ors* [2019] NZCA 532 [4 November 2019].

9 Clause 105(1)(f).

24. The restriction on managing the effect of fishing in clause 124(9) is essentially identical to that currently provided in RMA s.30(2) and relates not to the nature or effect of the control, but to its purpose. Clause 124(9) provides that:

> *in relation to the functions exercised by a regional council or unitary authority under section 644(b)(i), (ii), and (viii),*[10] *a plan must not include rules that place controls on taking, allocating, or enhancing fisheries resources in the coastal marine area* ***for the purposes*** *of managing fishing or fisheries resources controlled under the Fisheries Act 1996* (clause 124(9)).

25. The effect of clauses 105(1)(f) and 124(9) is highly uncertain because nearly all controls that manage the effects of fishing are able to be imposed for Fisheries Act purposes, and are therefore potentially excluded from the scope of NBE plans by clause 124(9). This is because:

- The purpose of the Fisheries Act includes *avoiding, remedying or mitigating any adverse effects of fishing on the aquatic environment* (FA s.8);
- 'Aquatic environment' is very broadly defined – it *(a) means the* ***natural and biological resources*** *comprising any aquatic ecosystem [any system of interacting aquatic life within its* ***natural and physical environment****]; and (b) includes* ***all aquatic life*** *[any species of plant or animal life that, at any stage in its life history, must inhabit water, whether* ***living or dead****, including seabirds] and the* ***oceans, seas, coastal areas, inter-tidal areas, estuaries, rivers, lakes, and other places where aquatic life exists*** (FA s.2);
- Decision-makers under the Fisheries Act must *take into account the following environmental principles: (a) associated or dependent species*[11] *should be maintained above a level that ensures their long-term viability: (b)* ***biological diversity of the aquatic environment should be maintained****: (c)* ***habitat*** *of particular significance for fisheries management* ***should be protected*** (FA s.9); and
- The Fisheries Act includes operational provisions that give effect to its purpose and environmental principles, including sustainability measures (s.11), fisheries plans (s.11A), catch limits (s.13-14C), controls on fishing related mortality of marine mammals and other wildlife (s.15), emergency measures (s.16), record keeping and reporting requirements (Part 10), and other regulation-making powers (s.297 and s.298).

26. The scope of controls that are excluded from NBE plans by clause 124(9) is arguably very broad, encompassing all of the purposes that are within scope of the Fisheries Act, as described above. In our view, the only legitimate purposes for which controls on fishing might be imposed under an NBE plan are those clearly outside the Fisheries Act such as controls on noise or odour from

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[10] The relevant council functions in clause 644(b) are, in relation to the coastal marine area, management of (i) the use of land and its associated natural and built resources; (ii) the occupation of space and the extraction of sand, shingle, shell or other natural materials from the common marine and coastal area; (viii) activities in relation to the surface of water.

[11] i.e., *any non-harvested species taken or otherwise affected by the taking of any harvested species* (FA s.2)

fishing vessels. However, the Court of Appeal in the *Motiti* decision[12] adopted a narrower interpretation of the purpose of the Fisheries Act, leaving scope for *a regional council to control fisheries resources in the exercise of its [RMA] … functions… provided it does not do so to manage those resources for Fisheries Act purposes.* Significantly, the Court of Appeal did not set a 'bright line' rule for when RMA s.30(2) (i.e., clause 124(9) of the Bill) would be triggered – instead it found that the two acts overlap and that the legitimacy of controls on fishing will be an issue to be objectively assessed on a case-by-case basis.

27. This level of uncertainty is highly unsatisfactory and will be a recipe for unnecessary and costly litigation in the preparation of NBE plans.

Duplication adds cost and complexity

28. The statutory overlap between the RMA and the Fisheries Act – if not rectified in the Bill – will continue to create significant and unnecessary complexity and costs for the fishing industry, Iwi and hapū with customary and commercial fisheries interests, regional planning committees (**RPC**s) and other decision-makers under the Bill, the Ministry for Primary Industries, and all parties with an interest in fisheries management or the marine environment. Examples of real costs are provided in fishing industry submissions.

Adverse effects on fisheries sustainability

29. As described in **Box 1** of this submission, rules prohibiting fishing in an area result in displaced catch which, in turn, can increase threats to the sustainability of affected fish stocks and the surrounding marine environment.

30. Shifting fishing effort around using rules in an NBE plan, without altering the overall level of fishing effort (a core Fisheries Act function), will invariably have adverse effects on sustainable fisheries management. These effects are contrary to the purpose of the Fisheries Act and the purpose of the Bill.

Contrary to the Maori Fisheries Settlement

31. The inclusion in NBE plans of rules controlling fishing contravenes the Fisheries Deed of Settlement, in which Maori endorsed the QMS (not the Bill or the RMA) as the legitimate fisheries management regime. Rules controlling fishing in NBE plans would:

    - Adversely affect the exercise of Maori commercial fishing rights that were allocated as a full and final settlement of Maori commercial fishing claims;

    - Undermine the Crown/Iwi partnership in the management of fisheries resources that is prescribed in the Deed of Settlement; and

[12] Attorney-General v The Trustees of the Motiti Rohe Moana Trust & ors [2019] NZCA 532 [4 November 2019].

- Interfere with customary non-commercial rights to utilise fisheries resources in accordance with tikanga.[13]

32. Enabling fisheries controls under the Bill would therefore be inconsistent with the Bill's own requirement for decision makers to give effect to the principles of te Tiriti (clause 4).

33. It is particularly inappropriate from a Treaty compliance perspective that rules in NBE plans are determined not by a Minister on behalf of the Crown, but by an appointed RPC whose members are not accountable to either Iwi or the Crown.

No other activity is regulated twice

34. Clause 105 specifies a long list of general provisions that a plan may include, but no other activities – aside from fishing – are specifically mentioned as being subject to provisions in NBE plans.

35. We are not aware of any other activity, whether on land or in the CMA, for which adverse effects on the environment are regulated under two separate statutes. The duplication of controls imposes additional sector-specific costs on commercial, customary and recreational fishers that are entirely unwarranted.

36. There is no need for the Bill to address adverse environmental effects of fishing or protection of biodiversity from fishing-related impacts, as management of these effects is fully addressed in the scope and operative provisions of the Fisheries Act, as discussed above. The 2021 report of the Prime Minister's Chief Science Advisor, Professor Dame Juliet Gerrard, confirms that the Fisheries Act requires the consideration of ecosystem impacts to be taken into account in fisheries management decisions.[14] Any desired improvements to the environmental performance of fisheries therefore can and should be achieved under the Fisheries Act, not under the Bill.

Unanticipated effects of MACA Act on fishing rights

37. The explicit inclusion of fishing in clause 105(1)(f) significantly increases the risk that fishing activities may be prohibited in customary marine title (**CMT**) areas determined under the MACA Act. The prohibition of fishing in CMT areas was – with the sole exception of wāhi tapu – not anticipated at the time the MACA Act was enacted and, in our view, is contrary to provisions in the MACA Act which seek to:

- Preserve existing fishing rights;[15] and

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13 Fisheries Act s.6: *No provision in any regional plan … is enforceable to the extent that it provides for… the allocation to 1 or more fishing sectors in preference to any other fishing sector of access to any fisheries resources in the coastal marine area.*

14 Office of the Prime Minister's Chief Science Advisor (2021). *The Future of Commercial Fishing in Aotearoa New Zealand.* February 2021.

15 MACA Act s.28(1) *Nothing in this Act prevents the exercise of any fishing rights conferred or recognised by or under an enactment or by a rule of law*.

- Exclude fisheries matters from the scope of the Act.[16]

38. The mechanism for potential prohibition of fishing in a CMT area is via the preparation by a CMT group of a planning document which identifies issues relevant to the regulation and management of the CMT area and sets out the group's objectives and policies. The planning document can only include matters regulated under specified statutes, including (currently) the RMA – but not including the Fisheries Act.[17]

39. Schedule 15 of the Bill amends the MACA Act to replace references to the RMA with the NBE Act and Spatial Planning Act. Planning documents prepared by CMT groups under the MACA Act will now have far greater implications for fishing than were understood or anticipated at the time the MACA Act was enacted for three main reasons:

    - Clause 105(1)(f) explicitly brings *managing the effects of fishing* within the scope of the Bill and, therefore, within the scope of CMT planning documents. This contrasts with the situation in 2011 when the MACA Act was passed as, at that time, there was no expectation that CMT planning documents would include matters related to fisheries or fishing because the prevailing legal interpretation was that fisheries controls were not able to be imposed under the RMA;

    - In comparison to the RMA, the Bill further expands the scope of matters that CMT planning documents may contain, including protecting marine biodiversity (via the mechanism of significant biodiversity areas or highly vulnerable biodiversity areas) and other – as yet undefined – matters associated with achieving the Bill's purpose of upholding te Oranga o te Taiao. These new matters expand the scope of matters in a CMT planning document that may affect the exercise of existing fishing rights; and

    - In comparison to the RMA, the Bill strengthens the weight given to CMT planning documents and expands the type of decisions that a CMT planning document can influence:

        - An RPC must *actively consider* CMT planning document matters to the extent that they relate to the common marine and coastal area outside the CMT area (where the group exercises kaitiakitanga) [18] – a stronger legal weighting than the current requirement to take such matters into account; and

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16 See, for example, MACA Act s. 51(2)(a)-(c) [protected customary right does not include commercial or non-commercial Maori fishing rights or interests or any activity regulated under the Fisheries Act], s.79(2) [wāhi tapu conditions must not prevent fishers from taking their lawful entitlement], and s.91 [CMT group not able to include fisheries matters in a planning document].

17 MACA Act s.85.

18 The RPC must amend its NBE plan in order to *recognise and provide for* the matters in the planning document inside the CMT area and *actively consider* the matters in the wider area where the CMT group exercises kaitiakitanga (clause 116). The RPC must also *recognise and provide for* or *take into account* matters in the CMT planning document during the preparation of the RSS (SP Bill clause 26).

- The responsible Minister must *consider* a CMT planning document when setting an environmental limit or target that applies to a management unit that includes a CMT area – a new requirement.[19]

40. Currently, and under the Bill, the Minister of Fisheries must *have regard to* a CMT planning document when setting or varying sustainability measures under the Fisheries Act.[20] We consider that the scope of statutory overlap between the Bill and the Fisheries Act is significant enough to contravene and undermine MACA Act s.91(2), which makes it clear that the requirement to have regard to a CMT planning document under the Fisheries Act *does **not** … give a CMT group the right to include fisheries or other matters in a planning document*.

41. Up until now, the potential implications of the MACA Act in relation to prohibitions on fishing have been restricted to the ability to prohibit fishing at wāhi tapu sites, provided any restrictions do not prevent fishers from taking their lawful entitlement.[21] With the Bill as it currently stands, there is a significant risk that, contrary to the clear original intent, CMT planning documents will contain matters that relate to fisheries and fishing and these matters will be given greater statutory weight. This outcome would:

- Have significant and unanticipated adverse effects on the exercise of fishing rights, including fishing rights allocated under the Maori Fisheries Settlement; and
- Potentially threaten fisheries sustainability as a result of the fisheries displacement effects descried in **Box 1**.

Lack of proper policy consideration

42. We appreciate that clauses 105(1)(f) and 124(9) are a tiny part of the Bill – but they nevertheless have an extremely significant effect on the fishing sector and on fisheries management, as discussed above and in Part E of this submission (marine biodiversity protection).

43. It is particularly disturbing that the fisheries provisions have been given very little active consideration by policy makers during the preparation of the Bill. In spite of the serious concerns that the fishing industry has raised over the last two years, we have not been provided with any justification for the inclusion of the fisheries provisions in the Bill. In particular the inclusion of fishing within the scope of the Bill:

- Was not addressed in the Select Committee's report on its inquiry on the Exposure Draft of the Bill, in spite of being raised in industry submissions;
- Is not mentioned at all in the Bill's Supplementary Analysis Report (prepared in place of a Regulatory Impact Statement) or the Departmental Disclosure Statement; and

[19] Clause 52.

[20] MACA Act s.91.

[21] MACA Act s.79.

- Is not mentioned in any of the voluminous initial advice provided to the Committee by the Ministry for the Environment and released via the Committee's Interim Report of 16 December 2022.[22]

44. A request lodged on behalf of the fishing industry under the Official Information Act for information and advice related to the decision to include fishing in the Bill was initially declined on the basis that the request was too broad and would require 'substantial collation and research'. A revised (but substantially identical) request had not been responded to at the time this submission was prepared.[23]

Preferred solution – remove fishing from scope of Bill

45. The fishing industry's preferred solution to the concerns identified above is to establish a 'clean line' between the Fisheries Act and the Bill with respect to managing the effects of fishing. Persons exercising functions under the Bill should be able to manage adverse effects of fishing only if those effects are not able to be managed under the Fisheries Act – e.g., odour or noise.

46. Removing the overlap between the Bill and the Fisheries Act will better achieve the Government's reform objectives than the Bill as introduced – in particular, it will improve system efficiency and effectiveness, reduce complexity, and give better effect to the principles of Te Tiriti o Waitangi.

Recommendation (preferred solution)
Delete clause 105(f)
Delete clause 124(9) and replace with:
A plan must not include rules that place controls on taking, allocating, or enhancing fisheries resources in the coastal marine area.

Alternative solution – clarify the scope of statutory overlap

47. If the fishing industry's preferred solution is not acceptable, amendments should be made to the Bill in order to clarify the scope of overlap between the two statutes so as to minimise uncertainty and cost. The aspects of the clause 124(9) restriction that contribute to uncertainty are:

- The 'purposive' nature of the restriction – the purpose of a rule is open to assertion and argument and a purposive justification is particularly unhelpful in light of the overlapping purposes of the two statutes;[24]

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22 https://www.parliament.nz/en/pb/sc/reports/document/SCR_130339/interim-report-natural-and-built-environment-bill-and

23 The request was made to the Ministry for the Environment, Ministry for Primary Industries and Department of Conservation on 8 December 2022. The 20 working day limit for responses expired on 26 January 2023. On that date all three agencies notified that the timeframe for responding to the request had been extended.

24 For example, an identical fishing prohibition may be described by the RPC as being 'for biodiversity protection' (an NBE Bill purpose) but by the fishing industry as being 'for managing the adverse effects of fishing on biodiversity' (a Fisheries Act purpose).

- The partial nature of the restriction, which refers only to selected council functions, and is silent with respect to whether other council functions may or may not be exercised for Fisheries Act purposes; and

- The negative formulation of the restriction (i.e., describing what a rule may not do), which creates more uncertainty than a factual description of what a rule can do.

48. Moving from a partial, purposive restriction to an objective, factual justification for the inclusion of rules about fishing in a plan would significantly reduce uncertainty, litigation risk, and costs. Consistent with existing case law, we recommend that:

    - Controls on fishing should be able to be applied only in discrete areas for which significant biodiversity values have been identified. This is consistent with the 'indicia' which the Court of Appeal suggested may provide objective guidance when assessing whether a given control would contravene RMA s.30(2) – i.e.:[25]

        Scope: a control aimed at indigenous biodiversity is likely not to discriminate among forms or species;
        Scale: the larger the scale of the control the more likely it is to amount to fisheries management;
        Location: the more specific the location and the more significant its biodiversity values, the less likely it is that a control will contravene s 30(2);
    - Rules must relate to the *adverse* effects of fishing, not to any other type of effects (e.g., trivial effects or positive effects); and

    - The nature of controls that may be placed on fishing should only be prohibition – if a rule were to require a resource consent to be obtained for a fishing activity, that would amount to council involvement in fisheries management.

Recommendations (alternative solution)
Amend clause 105(1)(f) to read: *include provisions that manage the adverse effects of fishing in the coastal marine area (but see section 124(9)).*

Delete clause 124(9) and replace with:
(9) Despite section 105(1)(f), a rule in a plan must not place controls on taking, allocating, or enhancing fisheries resources in the coastal marine area unless the control –
(a) is in a significant biodiversity area or highly vulnerable biodiversity area; and
(b) is necessary to protect the attributes of the area that are relevant to the classification of the area from the adverse effects of fishing; and
(c) prohibits an activity; and
(d) does not allocate access to fisheries resources between fishing sectors.

[25] *Attorney-General v The Trustees of the Motiti Rohe Moana Trust & ors* [2019] NZCA 532 [4 November 2019], paragraphs 64 and 65.

C) Improving integration with the Fisheries Act

49. Irrespective of the extent to which fishing is included within the scope of the Bill, the Bill and the Fisheries Act both help manage activities in the CMA, including avoiding, remedying and mitigating adverse effects of resource use. In order to achieve the purpose of both the Bill and the Fisheries Act, it is therefore essential that the two statutes 'talk to each other' through effective interface provisions.

Fisheries Act interface provisions

50. Two provisions in the Fisheries Act (as amended in Schedule 15 of the Bill) interface with the Bill – i.e.:

    - Amended s.6 Application of Natural and Built Environment Act 2022; and
    - Amended s.11 Sustainability Measures.

51. Existing Fisheries Act s.6 (application of RMA) is essentially unchanged, aside from some technical amendments to update references to the NBE Act. The fishing industry submitters support this approach, but we note two drafting errors that should be corrected.

52. The Bill updates Fisheries Act s.11 to require the Minister of Fisheries, before setting or varying any sustainability measure under the Act, to have regard to the provisions of *any national planning framework, natural and built environment plan, or proposed natural and built environment plan under the Natural and Built Environment Act 2022*. The fishing industry submitters support this approach, but we note that the provision could be drafted more efficiently by making use of the abbreviation 'NBEA plan' which will be defined in the Fisheries Act.[26]

Recommendations (drafting errors and technical amendments)
In Schedule 15, amendments to Fisheries Act 1996:

- insert an amendment to Fisheries Act s.6(1) to replace 'regional plan' with 'NBEA plan';
- correct the amendment to Fisheries Act s.6(2)(a) so that it refers to NBE Act section 644 (rather than section 643 as currently drafted);
- Amend the replacement s.11(2)(a) as follows: *(a) any national planning framework, <u>NBEA plan, or proposed NBEA plan</u>. ~~natural and built environment plan, or proposed natural and built environment plan under the Natural and Built Environment Act 2022.~~*

NBE Bill interface provisions

53. Although the Fisheries Act requires decision-makers to have regard to planning documents (including the NPF) under the Bill and the Spatial Planning Bill, there is no reciprocal provision in the Bill for an RPC to have regard to fisheries planning documents or regulations. Effective statutory integration should work in both directions, not in a unidirectional way that places one

[26] The amendments to the Fisheries Act in Schedule 15 of the Bill include the insertion of a new definition '***NBEA plan*** *means a plan for a region under the Natural and Built Environment Act 2002'*.

statute above the other in terms of influence on decision-making. This is particularly important during the preparation of an NBE plan, the purpose of which is *to further the purpose of [the NBE Act] by providing for the* ***integrated management of the natural and built environment*** *in the region that the plan relates to*.

54. RMA s.66(2)(c) currently requires regional councils, when preparing regional plans, to have regard to *(i) management plans and strategies prepared under other Acts,* and *(iii) regulations relating to ensuring sustainability, or the conservation, management, or sustainability of fisheries resources (including regulations or bylaws relating to taiapure, mahinga mataitai, or other non-commercial Maori customary fishing).*

55. This provision has a positive practical effect on integrated decision making between the two Acts. For example, fisheries plans approved under s.11A of the Fisheries Act may identify areas as 'habitat of particular significance for fisheries management'. The requirement for councils to have regard to fisheries plans increases the likelihood that significant fisheries habitats will be protected from the adverse effects of activities managed under the RMA. Similarly, customary fishing areas identified in fisheries regulations can be acknowledged in regional coastal plans and protected from the adverse effects of RMA activities. A requirement for the RPC to have regard to plans and instruments under the Fisheries Act is consistent with the Crown's obligations under the Maori Fisheries Settlement.

Recommendation
Amend clause 107 – Considerations relevant to preparing and changing plans – by adding two new matters to subclause (2) which an RPC must have particular regard when preparing an NBE plan, as follows:

- *management plans and strategies prepared under other Acts*
- *instruments made under the Fisheries Act 1996 relating to ensuring sustainability, or the conservation, management, or sustainability of fisheries resources (including instruments relating to taiāpure, mahinga mātaitai, or other non-commercial Maori customary fishing).*[27]

D) Making informed decisions for the coastal marine area

56. One of the fishing industry's main concerns about the RMA has been that although regional councils' functions and responsibilities can significantly affect the sustainability of fisheries resources and users of marine resources, councils tend to focus primarily on the terrestrial environment and have limited expertise and experience in marine management – particularly with respect to the outer reaches of their jurisdiction at 12 nautical miles from the coast. Some councils have made rules to control fishing activity in the CMA but we are not confident they have the tools or resources to adequately monitor compliance and exercise enforcement functions in the CMA.

57. We describe in **Box 1** how fisheries prohibitions implemented under the Bill may have significant adverse effects on fish stock sustainability and on marine biodiversity beyond the

[27] Note that this wording is taken directly from RMA s.66(2)(c) but could be worded more efficiently while still having the same effect.

area of the prohibition. These serious fisheries management implications require careful consideration by experts in the field.

58. However, currently under the Bill, decisions that affect the CMA can be made by bodies whose members have no knowledge, expertise or skills related to the marine environment.[28] This contrasts with the approach adopted for other environmental domains – for instance, urban and rural interests must be represented on an RPC, and freshwater expertise must be included in an Independent Hearings Panel. We note that the inclusion of marine skills need not increase the size of a decision-making or advisory body, but it is nevertheless relevant when considering the appropriate mix of representation and experience for each body, particularly in regions with well utilised marine areas.

59. Furthermore, NBE decision makers are not accountable for the impacts of their decisions on the sustainability of fisheries resources – instead, the consequences (and real costs) of decisions under the NBE Act that affect fisheries will be borne directly by fishing sectors. Any adverse effects on fisheries sustainability of poorly-informed decisions under the NBE Act would need to be 'mopped up' through the adoption of additional constraints and controls under the Fisheries Act.

60. The Minister for Oceans and Fisheries is responsible for achieving the purpose of the Fisheries Act, which is to provide for the utilisation of fisheries resources while ensuring sustainability. This role is directly relevant to achieving the outcomes of the Bill in relation to the CMA. The Minister for Oceans and Fisheries is also responsible, on behalf of the Crown, for upholding the integrity of the Maori Fisheries Settlement. It is therefore essential that the Minister for Oceans and Fisheries is actively involved in any decisions by the 'responsible Minister' in relation to all Ministerial responsibilities under the Bill that may affect either fisheries management or the Maori Fisheries Settlement.[29] While the Bill provides for some limited consultation with 'any relevant Minister' in relation to plan changes,[30] there is no equivalent consultation requirement in relation to the preparation of the NPF. If fishing is included within the scope of the Bill, then the Minister for Oceans and Fisheries should have a role that is more active than 'consultation' and more akin to joint decision-making responsibility.

61. The fishing industry submitters therefore recommend that decision-making for the CMA would be significantly improved by:

    - If the NPF or NBE plan addresses CMA issues, requiring the relevant decision-making and/or advisory bodies to have expertise, skills and knowledge related to marine environmental management; and

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28 This includes regional planning committees, Boards of Inquiry, the Limits and Targets Review Panel and Independent Hearing Panels.

29 The 'responsible Minister' in the CMA is usually the Minister of Conservation but may in some cases be the Minister for the Environment. See cl 94 in relation to the NPF and cl 636 in relation to other functions of the Minister of Conservation, including in relation to NBE plans.

30 The responsible Minister must consult 'any relevant Ministers' before directing the preparation of a plan change or variation (cl 633(2)(c)) or directing a review of a plan to be commenced (cl 634(3)(c)).

- If the NPF or NBE plan has implications for fisheries management or the Maori Fisheries Settlement, providing for the active involvement of the Minister for Oceans and Fisheries in order to protect the integrity of the fisheries management regime and uphold the Crown's obligations under the Maori Fisheries Settlement.

A marine perspective in the development of the NPF

62. If, contrary to our preferred solution in Part B of this submission, fishing is included within the scope of the Bill, the Minister for Oceans and Fisheries should have joint responsibility with the 'responsible Minister' in relation to any matter related to the NPF that has implications for fisheries management or the Maori Fisheries Settlement.

63. At the very least (and irrespective of whether fishing is included within the scope of the Bill), the 'responsible Minister' should be required to consult with the Minister for Oceans and Fisheries in relation to any matter related to the NPF that has implications for fisheries management or the Maori Fisheries Settlement.

Recommendation
If fishing is included within the scope of the Bill:
Amend clause 94 – responsible Minister [for the NPF] – by adding a new subclause at the end:
(*5) The Minister for Oceans and Fisheries has joint responsibility with the responsible Minister in relation to any provision that has implications for fisheries management under the Fisheries Act 1996 or for the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992.*

Alternatively:
Amend clause 94 – responsible Minister [for the NPF] – by adding a new subclause at the end:
(5) The responsible Minister must consult the Minister for Oceans and Fisheries before exercising or performing a power or function conferred by this Part or Schedule 6 that relates to a provision that has implications for fisheries management under the Fisheries Act 1996 or for the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992.

64. If an NPF proposal relates to the CMA, both the Board of Inquiry and the Limits and Targets Review Panel should be required to have knowledge and expertise in relation to the management of marine resources.

Recommendations
Amend Schedule 6 clause 9(4) to read:
When appointing members of the board, the responsible Minister or convenor (as the case may be) must be satisfied that the board collectively have knowledge and expertise in relation to –
(a) Resource management issues and processes; and

(b) te Tiriti o Waitangi and its principles; and

(c) Tikanga Maori and mātauranga Maori; and

(d) If the NPF proposal contains provisions that apply to the whole or part of the coastal marine area, marine resource management issues and processes.

Amend Schedule 6 clause 3(3) to read:
When appointing members of the panel, the responsible Minister must be satisfied that the panel collectively have knowledge and expertise in relation to –
[(a) – (e)…]
(f) If the limits or targets apply to the whole or part of the coastal marine area, marine science and marine resource management.

A marine perspective in the development of NBE plans and RSS

65. The 'composition arrangement' for RPC membership should ensure that marine interests are effectively represented.

Recommendation
Amend Schedule 8 clause 3(2)(b) to read: *(b) regional, district, urban, rural, marine, and Maori interests are effectively represented.*

66. The role of the Ministerial appointee on the RPC is to communicate the government's strategic priorities in relation to the Spatial Planning Act. The appointee will require different skills if a review of an RSS is directed by the Minister of Conservation (i.e., in relation to the CMA) than if a review of urban planning provisions is directed by the Minister for the Environment. The Bill should therefore require the responsible Minister to consult other relevant Ministers before making an appointment to the RPC. [31]

Recommendation
Amend Schedule 8 clause 2(6) to read: *The responsible Minister may, after consulting other Ministers with an interest in the issues relevant to the regional spatial strategy, appoint 1 member to participate in the functions of the committee under the Spatial Planning Act 2022*.

67. If a proposed NBE plan relates to the CMA, the Independent Hearings Panel should be required to have skills, knowledge and expertise in relation to the management of marine resources.

Recommendation
Amend Schedule 7 clause 93(2) to read:
The Chief Environment Court Judge must appoint members who collectively have skills, knowledge, and experience of -
[(a) – (g)…]
(ga) marine resource management, if the proposed plan or plan change relates to the coastal marine area; and
(h) relevant legal processes.

68. The RPC should be required to formally notify the Minister for Oceans and Fisheries of a proposed plan and provide the Minister with a copy of an operative plan.[32] This is necessary because the Minister is required to *have regard to* proposed and operative NBE plans under

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[31] ***Responsible Minister*** *means the Minister of the Crown who… is responsible for the administration of the Spatial Planning Act 2022* – i.e., the Minister for the Environment (Schedule 8 clause 1)

[32] The Bill currently provides that the RPC must consult the Minister for Oceans and Fisheries during the preparation of an NBE plan if a proposed plan or plan change relates to the CMA (Schedule 7 clause 22(2).

s.11 of the Fisheries Act (as amended by Schedule 15 of the Bill) when making sustainability decisions.

Recommendations

Amend Schedule 7 clause 31(1) – RPC to notify proposed plan – to read:

(1) If a regional planning committee decides to proceed with a proposed plan, it must provide a copy of the proposed plan and the associated evaluation report to –

(a) the Minister for the Environment; and

(b) the Minister of Conservation and each appropriate regional conservator in the Department of Conservation; and

(ba) any other affected Ministers of the Crown, including the Minister for Oceans and Fisheries if the proposed plan applies in the coastal marine area; and

(c) any affected local authorities….

Amend Schedule 7 clause 42(2) – availability of operative plan – to read:

(2) The regional planning committee must also provide a copy of the operative plan to –

(a) the Minister for the Environment; and

(b) the Minister of Conservation; and

(ba) any other affected Ministers of the Crown, including the Minister for Oceans and Fisheries if the plan applies in the coastal marine area; and

(d) any affected local authorities…

Amend clause 45(3) – proportionate process must use targeted or limited notification – to read:

(3) If either limited or targeted notification is given, the regional planning committee –

(a) must provide a copy of the proposed change or variation, without charge, to –

(i) the Minister; and

(ii) the Minister of Conservation, the Minister for Oceans and Fisheries, and the Director of Conservation, in the case of a change or variation that relates to the coastal marine area;

(iii) …

Maritime compliance and enforcement

69. The fishing industry remains concerned about the absence of any credible maritime compliance and enforcement capacity in regional councils. If NBE plans are able to include rules related to fishing, this concern will be exacerbated. We recommend that regional councils should be required to give explicit consideration to how they will exercise compliance and enforcement functions in the CMA because this is directly relevant to the selection, in RSS and NBE plans, of the most appropriate tools to achieve the Bill's 'system outcomes'.

Recommendation

Amend clause 649 – local authorities to prepare compliance and enforcements strategy – by adding a new subclause to read:

(3) A compliance and enforcement strategy prepared by a regional council or unitary authority must set out how the matters in subsection (2)(a), (c), (d) and (e) will be undertaken in the coastal marine area.

E) Clarifying the marine biodiversity protection provisions

70. Part 8 of the Bill (matters relevant to NBE plans) contains in subpart 3 a series of provisions related to the protection of places of national importance, including significant biodiversity areas (**SBA**) and highly vulnerable biodiversity areas (**HVBA**).

Lack of clarity about intent and effect of provisions

71. The fishing industry's ability to submit effectively on these provisions is hindered by the lack of clarity in the provisions and their relationship to other parts of the Bill. In particular:

- The relationship between HVBAs and SBAs is unclear and the policy justification for including two separate types of biodiversity protection areas in the Bill is not readily apparent;
- It is not clear whether an HVBA is a 'place of national importance' or not – the heading of subpart 3 suggests that it is, but the definition of 'place of national importance' in clause 555 does not include HVBA. It is therefore unclear whether HVBAs are identified at a national level (as we assume would be the case if they are places of national importance) or at a regional level. If HVBAs are identified at a regional level, then it is inconsistent that exemptions can only be made in the NPF (clause 564);
- It is not clear whether SBAs and HVBAs are tools to implement regional councils' responsibilities for *the maintenance and enhancement of indigenous biodiversity* (clause 644(f)), or whether the council responsibilities are separate from and in addition to the identification of SBAs and HVBAs;
- The relationship, if any, between SBAs/HVBAs and the mandatory limits for indigenous biodiversity (clause 38(1)) is unclear;
- It is not clear why the 'effects management framework' applies to SBAs but not to HVBAs. It is also unclear how the 'effects management framework' (clause 61) can be applied to SBAs given that any activities that have more than a trivial adverse effect on the attributes of the area *must not be allowed* (clause 559(1)); and
- The exemptions framework is opaque and inconsistent – in particular:
    - the exemptions for SBAs referred to in clause 559(1)(a) and clauses 64-67 are presented as exemptions from the 'effects management framework', but do not exempt an activity from the prohibition of activities with non-trivial adverse effects in clause 559(1). In contrast, the equivalent provisions for HVBAs provide a direct exemption to the prohibition on activities with non-trivial adverse effects (clauses 563 and 564);
    - exemptions to HVBAs for fishing may be made only *in areas that* ***have not been identified*** *as HVBAs* (clause 565(vii)) rendering the exemption meaningless; and

- the drafting of clause 559(4) is confusing as it is unclear what the exemption for fishing relates to;[33] and

- There is provision for the Minister of Conservation to declare an area to be 'critical habitat' if it is an area essential for the long-term viability of a nationally critical species (clause 567), but the operational relationship between such a declaration and an SBA or HVBA is not at all clear because 'critical habitat' does not feature in the definition of an SBA or HVBA.

72. For the CMA, it is also not clear how the identification and protection of SBAs and HVBAs relates to other government policy initiatives such as the Marine Protected Areas (**MPA**) Policy[34] or ongoing policy work to replace the outdated Marine Reserves Act 1971. The exclusion of the criterion of 'representativeness' for identifying SBAs in the CMA (clause 558) suggests that a superficial attempt is being made to differentiate the marine protection regime in the Bill from that in the MPA Policy which includes, but is not limited to, the protection of representative areas. Nevertheless the fishing industry is concerned that the inclusion in the Bill of SBAs and HVBAs amounts to the establishment of a parallel marine biodiversity protection regime that:

    - Has not been properly considered (as evidenced by the uncertainties identified above);

    - Has not been subject to any consultation with the fishing industry or other affected parties; and

    - Is not effectively integrated with existing marine biodiversity protection regimes.

Potentially significant (but uncertain) impact on fishing

73. The impact of the Bill's SBA and HVBA provisions on the activity of fishing is highly uncertain but potentially significant.

74. While fishing is theoretically eligible for exemption from SBA prohibitions under several criteria in the Bill,[35] there is no certainty that an exemption for fishing would be made in the NPF. As noted above, there is no ability to exempt fishing activities with non-trivial adverse effects from prohibitions imposed in an HVBA. Exemptions in the CMA are made by the Minister of Conservation, without any requirement for the Minister for Oceans and Fisheries to be consulted even though a decision to prohibit fishing in an SBA or HVBA has significant

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33 Clause 559(3) requires consent authorities to establish whether an area subject to a consent application includes an area of significant biodiversity, but subsection (4) exempts the activity of fishing from this requirement. The purpose of subsection (4) is obscure as fishing does not typically require a resource consent, so subsection (3) does not apply to fishing in any case.

34 Marine Protected Policy and Implementation Plan (2005) and the Marine Protected Areas Classification, Protection Standard and Implementation Guidelines (2008) – both documents prepared by the Department of Conservation and the Ministry of Fisheries.

35 E.g.: fishing *must be located, for functional or operational reasons, in the particular place* (cl 64(2)(a)), fishing is a lawfully established activity (cl 66(1)(h)), and fishing is *managed under other legislation* which may *provide an appropriate level of protection* (cl 66(1)(l)).

implications for sustainable fisheries management and for the Maori Fisheries Settlement (see **Box 1**).

75. Our concerns about the uncertain impact of SBAs and HVBAs in the CMA are further exacerbated by:

    - The provision for additional areas to be identified as SBAs after an NBE plan has been approved (clause 561), resulting in an evolving and expanding list of places from which fishing may be excluded by rules in NBE plans;
    - The requirement that rules in proposed plans have immediate legal effect if the rule protects areas of significant indigenous vegetation or significant habitats of indigenous animals (clause 130(4));[36]
    - The ability for an RSS to include areas previously identified as having biodiversity values, without further scrutiny or opportunity to challenge the validity of the classification of the area;[37] and
    - The reliance on the non-statutory and untransparent New Zealand Threat Classification System to identify 'nationally critical species' (clause 567).

Further policy consideration is required

76. In light of the significant policy concerns and uncertainties identified above, the fishing industry submitters **recommend** that the provisions for SBAs and HVBAs – at least insofar as they apply within the CMA – should be reconsidered and be subject to further policy development and consultation with affected parties.

77. If, contrary to this recommendation, provisions for SBAs and HVBAs continue to be included in the Bill, the fishing industry submitters make the following recommendations.

Recommendations

a) A single type of biodiversity protection tool should be included in the Bill – i.e., HVBA should be incorporated into the criteria for SBA rather than forming a separate category of area.

b) The relationship between SBAs/HVBAs and the responsibility of councils for indigenous biodiversity (clause 644(f)) should be clarified.

c) The exemptions framework for SBAs should be amended to provide an exemption from the prohibitions in the SBA (not from the effects management framework) and the exemptions framework for HVBAs should be amended to include an ability to exempt fishing *within* areas that have been identified as HVBAs.

d) The Minister of Conservation and the Minister for Oceans and Fisheries should have joint decision-making responsibility for any matters related to 'places of national importance' (SBAs/HVBAs) in the CMA that may result in controls being placed on fishing, in order to:

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[36] We note, however, that clause 130(4) does not refer explicitly to SBAs or HVBAs – it is not clear whether this is a drafting error or intentional.

[37] Spatial Planning Bill, clause 29 and Schedule 1 clause 2.

allow effects of fisheries displacement to be assessed; uphold the Maori Fisheries Settlement; and ensure that the most appropriate tools are used to control any fishing-related impacts on places of national importance.[38]

e) The RPC should be required to consider submissions on historically-identified areas that may be SBAs because at the time the areas were identified a different statutory regime applied and expectations of controls that would be placed on activities in the areas were different (this recommendation amends the Spatial Planning Bill and is addressed in more detail in the fishing industry submission on that Bill).

F) Tidying up the provisions for Aquaculture Zones

78. The fishing industry submitters support the concept of 'aquaculture zones' provided that existing statutory tests that protect the integrity of the fisheries management regime and the Maori Fisheries Settlement are retained when an 'aquaculture zone decision' is made.

Matters to be considered in an aquaculture zone decision

79. The new provisions relating to aquaculture zone decisions are found in Subpart 3 of Part 7 of the Bill and in amendments to the Fisheries Act in Schedule 15 of the Bill (Fisheries Act Part 9A new Subpart 1A). New Fisheries Act s.186JE sets out the matters that must be considered by the chief executive before an aquaculture zone decision is made. These matters replicate the matters in existing Fisheries Act s.186GB in relation to aquaculture decisions, but with the addition of one new consideration – i.e., *(g) the provisions of the NBA plan that relate to the relevant aquaculture zone*.[39] We consider that new matter (g) is inappropriate and unnecessary.

80. The statutory test for the 'aquaculture decision' in s.186GB and new s.186JE is referred to informally as the undue adverse effects (**UAE**) test. The UAE test has been in place in one form or another since 1968 and is therefore an integral part of Fisheries Act's protections for the integrity of the fisheries management regime, including the rights of quota owners and rights allocated under the Maori Fisheries Settlement. Importantly, the test is concerned only with the impacts of aquaculture on fishing – not with the relative benefits of aquaculture or fishing in an area.

81. In 2004, when considering the wording of Fisheries Act s.186GB (which new s.186JE seeks to replicate for aquaculture zones), the Primary Production Committee stated:

> *We consider that the protection of fishers' rights by the use of the undue adverse effects test is appropriate under the Fisheries Act 1996… Its inclusion in the Fisheries Act 1996 rather than the Resource Management Act will also deal with Maori concerns about the Crown*

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[38] See, in Part D of this submission, our recommended amendment to clause 94 to provide joint decision making for the responsible Minister and the Minister for Oceans and Fisheries in relation to any matter related to the NPF that has implications for fisheries management or the Maori Fisheries Settlement.

[39] Note that there is also a drafting error in this clause – it should refer to the 'NBEA plan'

retaining its role of ensuring that planning processes adequately address Crown obligations under the Treaty of Waitangi (Fisheries Claims) Settlement Act.

… several submissions called for the addition of criteria that would allow a comparison of value between fishing and farming use of coastal marine areas. ***That is a balancing test and not the purpose of the test in the bill. The test in the bill is a threshold test****, which is an assessment of the degree to which a new use of coastal space, in this case marine farming, will affect the exercise of fishing rights that already exist in the area.*

82. It is inappropriate to allow the chief executive to have regard to provisions in an NBE plan that are relevant to the aquaculture zone because the plan may include policies and other provisions that promote the development of aquaculture in the aquaculture zone. The inclusion of new matter (g) changes the nature of the test in s.186JE from an objective 'threshold test' relating to an acceptable or unacceptable level of adverse effect on fishing, into a balancing test where policies in support of aquaculture at the site may be considered (but not policies in support of fishing).

83. New matter (g) is also unnecessary, because all relevant provisions of an NBE plan are <u>already</u> incorporated in criteria (a) to (f) of new s.186JE. In particular, rules that apply within the aquaculture zone to control the character, scale, or intensity of aquaculture activities that may take place in the zone are incorporated into criterion (b) – i.e., *the likely effect of* ***the aquaculture activities that may be carried out in the aquaculture zone*** *on fishing of any fishery, including the proportion of any fishery likely to become affected.*

Recommendation
In Schedule 15 of the Bill, delete paragraph (g) from Fisheries Act new s.186JE.

<u>Alternatively</u>: If new matter (g) is retained in s.186JE, it should be clarified so as to restrict its scope to *the <u>rules</u>* ~~*provisions*~~ *of the NB<u>E</u>A plan that <u>apply in</u>* ~~*relate to*~~ *the relevant aquaculture zone*.

Appointment of a negotiator

84. New Fisheries Act s.186ZEA, inserted by Schedule 15 of the Bill, requires the Minister responsible for aquaculture to appoint a negotiator for the purpose of obtaining consent from affected quota owners and registering an aquaculture agreement, or providing compensation to affected quota owners (as determined by an arbitrator) and registering a compensation declaration.

85. The fishing industry submitters have no objection to the appointment of a negotiator for these purposes. However, new s.186ZEA enables the negotiator to be 'a representative body' but does not specify who the body is to be representative of. We consider that any representative body that is appointed as a negotiator should <u>only</u> be a body that is representative of aquaculture interests. In no circumstances would it be appropriate for a fishing industry representative body to be appointed as a negotiator.

Recommendation
In Schedule 15 of the Bill, amend Fisheries Act new s.186ZEA(1) to read:

(1) If an aquaculture zone decision includes a reservation in relation to stocks subject to the quota management system, the Minister responsible for aquaculture must appoint a negotiator (who may be the Minister or a body representative of the aquaculture sector ~~representative body~~) for the purpose of – […]

Technical amendments and drafting errors

86. Clause 478 describes what happens if the chief executive makes an aquaculture zone decision that results in a reservation relating to a fish stock that is subject to the QMS. While the substance of clause 478 is not problematic, the terminology is misleading. The area subject to the reservation is described as the '*QMS part of aquaculture zone'*. This is inaccurate as the entire aquaculture zone, whether there is a reservation in place or not, remains subject to the QMS.

Recommendation
In clause 478, replaces references to 'QMS part of aquaculture zone' with more accurate wording, such as '*QMS reservation part of an aquaculture zone*'.

87. We also recommend the correction of several drafting errors in the Bill's aquaculture provisions.

Recommendations
Amend clause 264(2) in two places to specify that an aquaculture decision is made by the chief executive of the agency responsible for the Fisheries Act (not the chief executive of the Ministry responsible for aquaculture as currently drafted).

Amend clauses 477 to 480 to clarify that the 'chief executive' referred to in Subpart 3 of Part 7 is the chief executive of the agency responsible for the Fisheries Act (not the chief executive of the Ministry for the Environment under the general definitions in clause 7 of the Bill).[40]

[40] Note that clause 479(9) provides that *In this section **chief executive** means chief executive within the meaning given by section 2(1) of the Fisheries Act 1996* – but this definition should be extended across all the clauses in Part 7 Subpart 3.