

COMMUNIQUE – UPDATE ON MOTITI DECISION ON RESOURCE MANAGEMENT ACT FISHING CONTROLS AND NZSFC RESPONSE

This communique:

1. Summarises the decision of the Court of Appeal in support of fishing controls under the Resource Management Act 1991 (**RMA**);
2. Updates on the situation at Motiti;
3. Addresses the ramifications of the Court of Appeal's decision for the rest of New Zealand;
4. Outlines the actions that NZSFC is taking in response to protect and promote the interests of recreational anglers.

Court of Appeal confirms ability for regional councils to regulate fishing

The Court of Appeal's in *Attorney-General v Trustees of the Motiti Rohe Moana Trust* [2019] NZCA 532 has confirmed the ability for Regional Councils to control fishing and fisheries resources under the RMA, provided that they do not do so for Fisheries Act purposes which would be unlawful. The decision found that Regional Council's have an important role and duty in maintaining and enhancing marine biodiversity.

This decision is as a result of appeals brought by the Motiti Rohe Moana Trust (**MRMT**) which seeks prohibitions on fishing, and any other activities that would take or disturb flora and fauna, on certain reefs around Motiti Island.

The Court of Appeal did not lay down a clear rule as to when an RMA fishing control will be lawful. Instead the Court has endorsed the following criteria for providing guidance when assessing whether a given control is for a Fisheries Act purpose:

- a. *Necessity* means whether the objective of the control is already being met through measures implemented under the Fisheries Act;
- b. *Type* refers to the type of control. Controls that set catch limits or allocate fisheries resources among fishing sectors or establish sustainability measures for fish stocks would likely amount to fisheries management;
- c. *Scope*: a control aimed at indigenous biodiversity is likely not to discriminate among forms or species;
- d. *Scale*: the larger the scale of the control the more likely it is to amount to fisheries management;
- e. *Location*: the more specific the location and the more significant its biodiversity values the more likely the RMA control will be lawful.

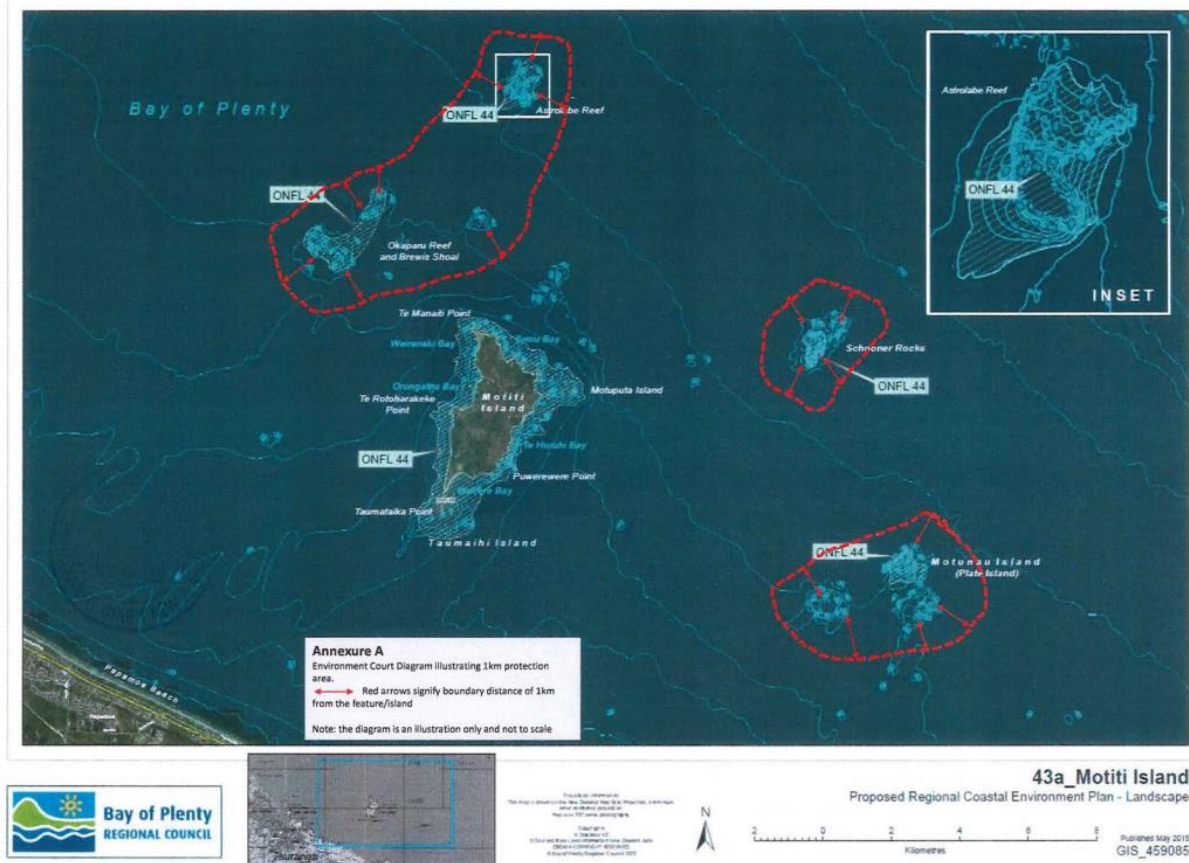
NZSFC considers that these criteria will be the subject of much argument in particular regional contexts. RMA fishing controls are limited to the Regional Council's jurisdiction in the territorial sea.

Update on the Motiti situation

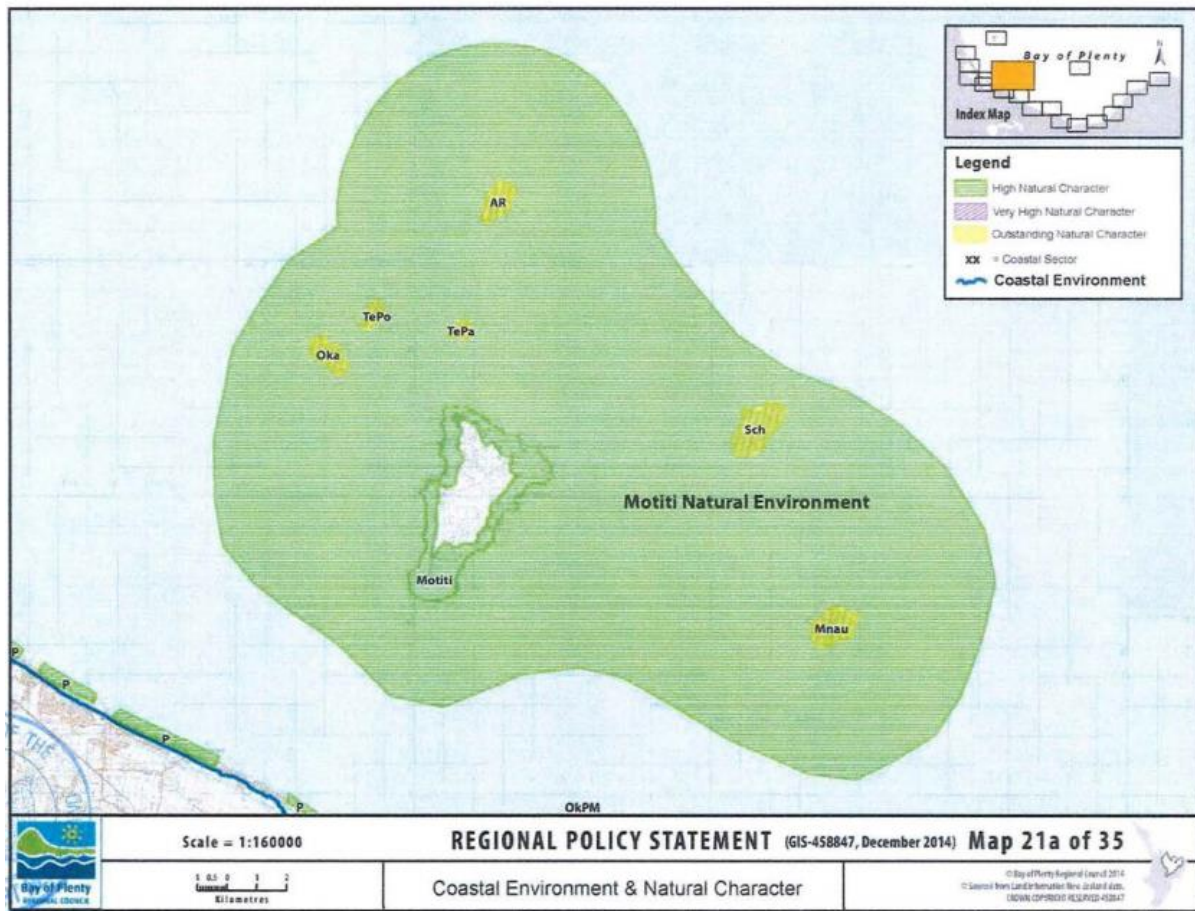
The Court of Appeal's decision has effectively endorsed controls on fishing around Motiti in accordance with the Environment Court's interim decision which can be found here (along with evidence and submissions given at the hearing): <https://www.environmentcourt.govt.nz/cases->

online/marine-spatial-planning-bay-of-plenty/. The Court's decision approved in principle a prohibition on the damage, destruction, removal of flora and fauna within the three Marked Areas of the Motiti Natural Environment Management Area (**MNEMA**) in the Bay of Plenty proposed Regional Coastal Environment Plan (**PRCEP**). The decision also endorsed investigation and reporting in relation to fishing methods that may damage the benthic environment or where they impact particularly on sea birds or other marine mammals within the balance of the MNEMA.

The marked areas which will become marine protected areas are outlined in red below:



The wider MNEMA which is to be the subject to investigation and reporting in relation to fishing methods that may damage the benthic environment or where they impact particularly on sea birds or other marine mammals is shown in green below:



The final wording of fishing controls at Motiti to be included in the PRCEP is to be determined through future Environment Court processes. NZSFC understand that the Bay of Plenty Regional Council and the Crown have submitted a joint position to the Court, and that MRMT have submitted a position which seeks more extensive fishing controls. NZSFC understands that MRMT are seeking a further hearing in support of their position. At this stage there are no controls with legal effect so Motiti remains open to fishing until a further decision of the Environment Court

NZSFC is not a party to this Court process so does not have access to these documents. NZSFC is seeking to work with the Regional Council to obtain further information. NZSFC understand that the MRMT proposed fishing controls would exclude customary fishing by island hapu Te Patuwai which is of great concern to this hapu.

NZSFC has received legal advice that the MRMT Motiti proceedings cannot be effectively challenged by a non-party at this stage and it would be futile to attempt to do so. The best strategy for Motiti is to lobby local politicians and councillors to seek to initiate a future plan change to roll back fishing controls. The Environment Court's interim decision expressly stated:

"The biodiversity, natural character and cultural values of an area in the CMA are able to be recognised by multiple methods under both the RMA and other legislation. It is intended that the Marked Areas are interim measures while various bodies seek to adopt an integrated

approach to the avoidance of adverse effects on those values, and that a plan change or other mechanisms may be introduced in due course, either as part of the review process included in this plan, or by other bodies in conjunction with the Regional Council and other parties.”

NZSFC is seeking further engagement with the regional council and is also seeking to be represented on a technical advisory group to be established to monitor the marine environment at Motiti.

Ramifications for the rest of New Zealand

The Motiti decisions have blindsided the New Zealand fishing public and have potentially significant ramifications. These decisions mean that regional coastal plans under the RMA are a new contested space for management of the marine environment. That people are turning to the RMA to try to manage fisheries resources highlights the failings of the Fisheries Act and a succession of fisheries managers to properly manage fisheries & the marine environment. A reading of the Environment Court’s interim decision shows that the failures of the QMS were a significant factor in the decision to impose RMA controls.

While the Motiti decisions present a risk of New Zealand’s recreational anglers losing access to important fishing spots, the decisions also represent a potential opportunity to prevent destructive high impact commercial fishing methods in the territorial sea. How NZSFC is responding to these threats and opportunities is addressed below.

Actions NZSFC is taking

Subsequent to the Motiti decisions, appeals have been lodged with the Environment Court by groups in Northland and Taranaki regions seeking similar marine closed areas. NZSFC has lodged applications with the Environment Court to join these proceedings and has been granted party status by the Court. NZSFC is now actively engaging in these proceedings to represent and protect recreational fishing interests. NZSFC is adopting the following position on these appeals:

1. Opposing controls on “low impact fishing methods” (predominantly recreational); and
2. Supporting controls on “high impact fishing methods” (predominantly commercial).

Northland

The appeals in Northland seek fishing controls on broad areas which have not been mapped by the appellants. The Northland Regional Council is conducting workshops with councillors to work out what position it will be taking on these appeals and is to advise the Court and the parties of this by the end of March.

Taranaki

The Taranaki appeals also seek fishing controls over broad unmapped areas. The Environment Court has directed that the appellant provide a more specific appeal, but so far the appellant has failed to comply with that direction. The Taranaki appeals will be mediated later this month.

NZSFC will provide regular updates as matters in Northland and Taranaki progress and will be staunchly fighting the corner for recreational interests.

Marlborough

On a more positive note, the Marlborough District Council has released decisions on its proposed plan which includes rules to prevent disturbance of benthic habitats by activities such as trawling and dredging in identified ecologically significant marine sites. This is an example of positive outcomes from the Motiti decisions. These controls were found to be lawful as they had the sole purpose of protecting indigenous biodiversity. NZSFC will be arguing that outcomes in Northland and Taranaki should be modelled on the Marlborough decisions

Inquiries

NZSFC appreciates that members will likely have many questions about these matters. Please direct inquiries to support@legasesea.co.nz