

RESOURCE MANAGEMENT ACT FISHING CONTROLS NZSFC RESPONSE

October 2020

Court of Appeal confirms ability for regional councils to regulate fishing

The Court of Appeal's decision 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 Resource Management Act (RMA), provided that they do not do so for Fisheries Act purposes, which would be unlawful. The decision found that Regional Councils 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 which seeks prohibitions on fishing, and any other activities that would take or disturb flora and fauna, on certain reefs around Motiti Island, Bay of Plenty.

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.

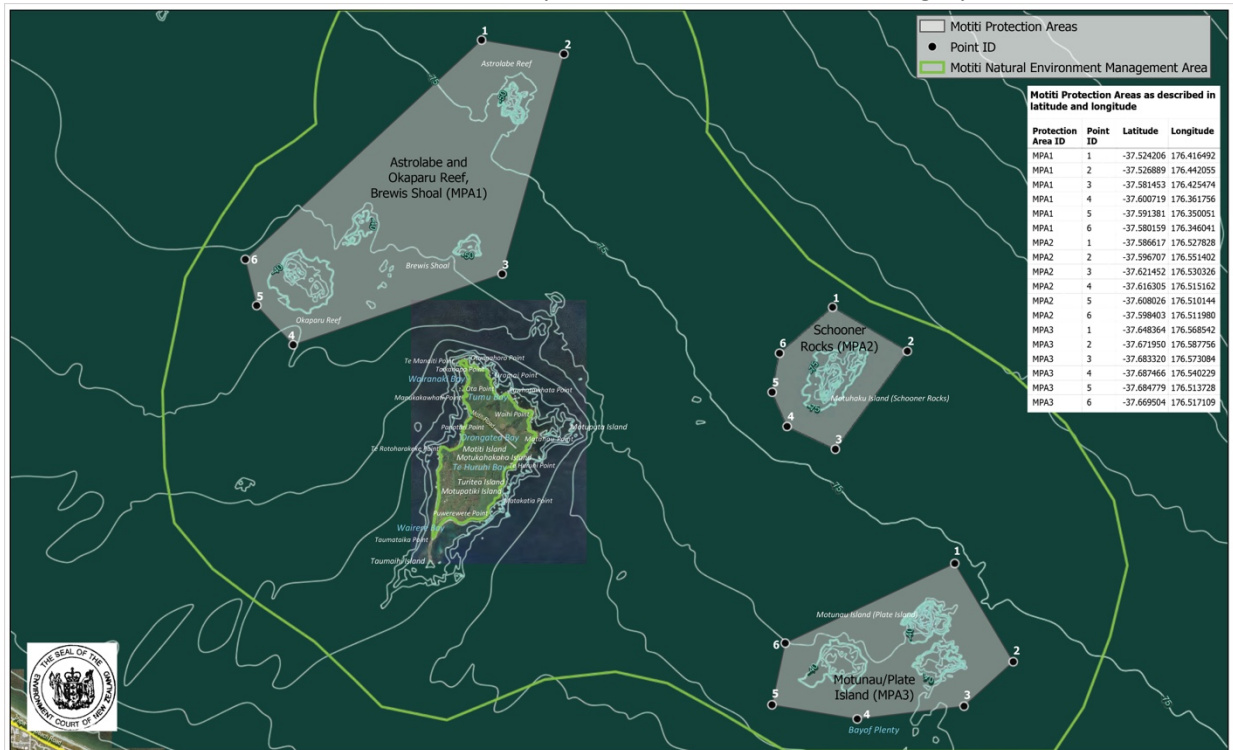
The New Zealand Sport Fishing Council (**NZSFC**) considers that these criteria will be the subject of much argument in particular regional contexts. RMA fishing controls are limited to the Regional Council's jurisdiction in the Territorial Sea.

Update on the Motiti situation

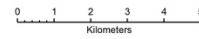
The Court of Appeal's decision has effectively endorsed controls on fishing around Motiti Island in accordance with the Environment Court's interim decision. The Court's decision approved in principle a prohibition on the damage, destruction, removal of flora and fauna within three Marked Areas of the 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 final wording of fishing controls at Motiti to be included in the PRCEP has now been determined through a final Environment Court decision.

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



43d Motiti Protection Areas within Motiti Natural Environment Management Area



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At this stage there are no controls with legal effect so the Motiti area remains open to fishing until the PRCEP is signed off by the Minister of Conservation.

The NZSFC has received legal advice that these Motiti proceedings cannot be effectively challenged by a non-party at this stage, and it would be futile to attempt to do so. At this stage it seems the best strategy is to lobby local politicians and councillors to seek to initiate a future plan change to roll back fishing controls. In the meantime, we are seeking further engagement with the Bay of Plenty Regional Council. We are also seeking to be represented on a technical advisory group to be established to monitor the marine environment around Motiti Island.

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 and the marine environment. A reading of the Environment Court's interim decision shows that the failures of the Quota Management System 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.

Actions NZSFC is taking

The New Zealand Sport Fishing Council has developed the Rescue Fish policy package to address the shortcomings of the Quota Management System that lead to fish depletion and biodiversity loss. We will continue to advocate for fish stocks to be managed at higher levels so people can provide for their social and cultural wellbeing from fishing.

Subsequent to the Motiti decisions, appeals have been lodged with the Environment Court by groups in Northland, Taranaki, and Marlborough regions seeking similar marine closed areas. The 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. The 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. These appeals have been referred to confidential mediation to attempt to reach a resolution without the need for an Environment Court hearing. If no resolution is reached, then these appeals will proceed to a hearing in 2021. Any Environment Court decision in these appeals has the potential for expand upon and reinforce the Motiti precedent.

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 planned mediation for the Taranaki appeals has been delayed due to Covid-19 restrictions. Mediation of these appeals is re-scheduled for 5 November 2020.

Marlborough

On a 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. The NZSFC will be arguing that outcomes in Northland and Taranaki ought to be modelled on the Marlborough decisions.

Appeals have been lodged with the Environment Court against decisions on the Marlborough Plan, including appeals which seek to introduce additional controls to protect biodiversity which may limit recreational access. NZSFC has joined these proceedings to represent recreational interests.

Summary

Grappling in the Resource Management Act realm is new territory for us. The processes are vastly different and challenging. However, the NZSFC is committed to providing regular updates as matters in the Bay of Plenty, Northland, Taranaki, and Marlborough progress. We want to reassure all member clubs and affiliated members that we will be staunchly fighting the corner for recreational interests.