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21 November 2022

## Submission: Habitats of particular significance for fisheries management

### The submitters

1. The New Zealand Sport Fishing Council (**NZSFC**) appreciates the opportunity to submit on the draft guidelines for identifying a habitat of particular significance for fisheries management, and the draft operational proposals for how Fisheries New Zealand (**FNZ**) will take into account those habitats when developing fisheries management advice according to section 9(c) of the Fisheries Act 1996. FNZ advice of consultation was received on 29 June 2022, with submissions due by 18 November 2022.
2. The NZSFC is a recognised national sports organisation of 53 affiliated clubs with over 38,000 members nationwide. The Council has initiated LegaSea to generate widespread awareness and support for the need to restore abundance in our inshore marine environment. Also, to broaden NZSFC involvement in marine management advocacy, research, education and alignment on behalf of our members and LegaSea supporters. [www.legasea.co.nz](http://www.legasea.co.nz).
3. The New Zealand Angling and Casting Association (**NZACA**) is the representative body for its 28 member clubs throughout the country. The Association promotes recreational fishing and the camaraderie of enjoying the activity with fellow fishers. NZACA is committed to protecting fish stocks and representing its members' right to fish.
4. The New Zealand Underwater Association (**NZUA**) is comprised of 43 clubs nationally who represent a cohort of approximately 160,000 participants in underwater activities in New Zealand. These activities include diving, snorkelling, freediving, fin swimming, underwater hockey, spearfishing, underwater photography, underwater rugby, ghost

diving marine clean up and Experiencing Marine Reserves. Through our membership we are acutely aware that the depletion of inshore fish stocks has impacted on the marine environment and our members' wellbeing.

5. Collectively we are 'the submitters'. The joint submitters are committed to ensuring that sustainability measures and environmental management controls are designed and implemented to achieve the Purpose and Principles of the Fisheries Act 1996, including "maintaining the potential of fisheries resources to meet the reasonably foreseeable needs of future generations..." [s8(2)(a) Fisheries Act 1996].
6. Our representatives are available to discuss this submission in more detail if required. We look forward to positive outcomes from this process. We would like to be kept informed of future developments. Our contact is Helen Pastor [secretary@nzsportfishing.org.nz](mailto:secretary@nzsportfishing.org.nz).

## Discussion

7. In this submission we discuss matters relevant to the broader issue of ecosystem based fisheries management, and then we address the specific questions from FNZ.
8. This process purports to support ecosystem based management, however, the biases evident in the FNZ documents makes this goal aspirational. There is no clear description of what ecosystem based management is, how it might be measured, and always pointing to non-fisheries effects such as sedimentation and climate change. The focus on habitats important for juvenile life stages of stocks that support significant fisheries is more evidence that this is another process primarily supporting single species management instead of whole-system management.
9. FNZ's focus is on section 9(c) of the Fisheries Act 1996, now the Fisheries Amendment Act 2022 (**the Act**). Sections 8, 9 and 10 of the Act must be read together as they are the Purpose (s8), and Environmental (s9) and Information (s10) Principles of the Act. The Principles support the Purpose, they are not optional - the Minister of Oceans and Fisheries (**the Minister**) is statutorily obliged to **ensure sustainability** while avoiding, remedying or mitigating **any** adverse effects of fishing on the aquatic environment.
10. Interdependence of species in an environmental context has never been taken seriously, notwithstanding the Minister's recent precautionary fisheries management decisions for single species. Usually we see the obligatory paragraph or sentence about seabirds or habitat, then job done. There doesn't seem to be the willingness nor budget for much else. And while it might be useful to discuss seagrass beds, sedimentation and loss of mussel beds, it is difficult to imagine any remedies without more research funding being made available because current data is limited or contested by commercial fishing interests and not acted on.

11. If FNZ and the Minister are serious about ecosystem based fisheries management then the first change is to accept that increasing stock sizes provides greater ecosystem services, even though we do not fully understand them nor can we easily measure them. We just need to use common sense at the outset because there is plenty of time to refine the system as we learn more; then we stop trying to maximise yield and degrading the environment that sustains healthy ecosystems in all areas, not just pockets of the environment that are allocated as marine protected areas (**MPAs**).
12. To succeed, there needs to be a new standard of abundance. We will only get ecosystem based management by managing for abundance, not yield. We note that Queensland is instituting policies aimed at managing their important fish stocks to a minimum biomass of 60% of estimated original, unfished stock size (B60)<sup>1</sup>.

### **Risks with current approach**

13. Our concern is we do not want FNZ to be wasting time nor resources on a process that is too narrowly focused.
14. We are also concerned that FNZ's approach will mean a few dollars being thrown at a few projects, maybe over a couple of years, then it will become just another workstream competing for budget.

### **What does success look like?**

15. It can be argued that all of the inshore ecosystems form a habitat of significance for fisheries management. Restricting the classification to some spawning areas, early life stage habitat (estuarine and benthic) is not provided for in the Act. All marine habitats of significance are to be protected.
16. Perhaps it might be wiser to start at the other end; what habitats are of no significance to fisheries management? Then the starting point is all the habitat, this then requires the definition and identification of significant habitat for fisheries management.
17. The term habitat is not defined in the Act - It is simply impossible to go through and identify all the habitats considering the general definition of habitat;

#### ***Habitat***

*/'habitat/*

*noun*

1. *the natural home or environment of an animal, plant, or other organism.*

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<sup>1</sup> [https://www.daf.qld.gov.au/?a=109113%3Apolicy\\_registry%2Fharvest-strategy-policy.pdf](https://www.daf.qld.gov.au/?a=109113%3Apolicy_registry%2Fharvest-strategy-policy.pdf)

## Relevance of High Court CRA 1 decision

18. On 11 November 2022 the High Court delivered the decision of Justice Churchman in respect of the application for a judicial review of the Minister of Oceans and Fisheries' March 2021 and March 2022 decisions for the future management of CRA 1, the Northland rock lobster fish stock<sup>2</sup>. Aspects of the decision are relevant to this process.
19. Firstly, the Court has identified that "there are two approaches to fisheries management that are identifiable at international law, being an 'ecosystem approach' and 'precautionary approach'"<sup>3</sup>.

"The ecosystem approach requires decision-makers to incorporate wider ecosystem effects into fisheries management, instead of considering sustainability with a single-species focus. This approach is acknowledged in the Act through the requirement for the Minister to consider the interdependence of species when making a decision as to the TAC, as well as through ss 9 and 11."<sup>4</sup>
20. The Court continues:

"The ecosystems approach requires that decisions as to the:

**Management of fishery resources are considered in the context of the functioning of the wider marine ecosystems** in which they occur to ensure the long-term conservation and sustainable use of those resources and in so doing, safeguard those marine ecosystems."<sup>5</sup> [emphasis added]
21. The precautionary approach stipulates that decision-makers are more cautious where information is uncertain, unreliable or inadequate. This approach is acknowledged in the Act by s 10.<sup>6</sup>
22. The Court also highlights the statutory requirement on the Minister to take into account **any effects** of fishing **on any stock and the aquatic environment**<sup>7</sup>.
23. In the Fisheries Act, 'effect' means the direct or indirect effect of fishing, including any positive, adverse, temporary, permanent, past, present, future and/or cumulative effect.<sup>8</sup> The Court accepted expert evidence that the loss of kelp forests is ecologically damaging for surrounding coastal systems, in fisheries production, biodiversity, and ocean carbon

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<sup>2</sup> Environmental Law Initiative v Minister for Oceans and Fisheries [2022] NZHC 2969 [11 November 2022]

<sup>3</sup> At [15].

<sup>4</sup> At [16]

<sup>5</sup> Convention on the Conservation and Management of High Seas Fishery Resources in the South Pacific Ocean, SPRFMO, art 3(2)(b).

<sup>6</sup> At [18].

<sup>7</sup> Section 11(1)(a) Fisheries Act 1996.

<sup>8</sup> Section 2.

sequestration.<sup>9</sup> This evidence adds support to our submission that all elements of the marine environment need to be considered as habitats of significance.

24. The Court notes that the CRA 1 area is managed to the *minimum* target of the biomass that will produce MSY, referred to as BMSY<sup>10</sup>, an approach that in New Zealand at least, ignores wider ecosystem considerations. Further evidence was put to the Court advising that “The mismatch of BMSY to achieving ecosystem based objectives in fisheries is a well understood problem”.<sup>11</sup>
25. Significantly, Justice Churchman notes that “the purposes of the Act appear to create what could be described as an ‘environmental bottom line, and are accordingly complemented by a scheme that favours precaution. I also consider the fact that the Ministry is currently engaged in developing a greater focus on the ecological approach to fisheries management as a factor weighing heavily in the exercise. I am drawn to this conclusion as it evidences an acknowledgment by the Ministry that it is required to adopt such an approach.”<sup>12</sup>
26. In Aotearoa the solution to having an effective defence of inshore ecosystems requires a broader approach than just identifying a few discrete habitats of particular significance for fisheries management. The natural home and environment of fish is not limited to features or seasonal peculiarities, it includes the means of survival in that environment and as such it requires a two-pronged approach –
  - a. Rebuild fish stocks to a minimum target biomass of 50% of their estimated original, unfished size.
    - i. Rebuild all stocks within 2xTmin. Tmin being the time required to rebuild the stock size to target in the absence of fishing; and
  - b. Apply a Type 2 MPA - a Seafloor Protection Area (SPA) - to enable the Minister to ban all mobile bottom contact fishing methods from the Territorial Sea, within 12 nautical miles of the coastline, and then only permit the use of low impact fishing techniques in this Type 2 MPA inshore zone.

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<sup>9</sup> At [69].

<sup>10</sup> At [25].

<sup>11</sup> At 84].

<sup>12</sup> At [108].

## Our response to FNZ questions (in bold)

### What are your views on the purpose of these guidelines and the working definition to support identification of HoS?

27. Totally unacceptable and unrealistic. The very narrow interpretation of reasons for significance, the application of section 9(c) of the Act and the omission of sections 9(a) and 9(b) makes the rest of the guidelines inadequate, biased and unacceptable.
- a. In CRA 1 the High Court considers **all parts** of section 9 of the Act and makes it clear that “section 9 sets out **mandatory** environmental principles”.<sup>13</sup>
  - b. If the Minister is serious about protecting habitats of significance then the only real solution is to work with the Minister of Conservation to apply a Type 2 MPA - a Seafloor Protection Area (**SPA**) - to enable the Minister to ban all mobile bottom contact fishing methods from the Territorial Sea, within 12 nautical miles of the coastline, and then only permitting the use of low impact fishing techniques in this Type 2 MPA inshore zone.
  - c. The annual research budget of \$22M is hotly contested and often applied to projects that will produce economic benefits for commercial fishing interests. It is highly aspirational and unrealistic in our experience to suggest that any of this limited budget will make its way into funding more than a couple of projects that will contribute to habitat identification or protection.
  - d. Past research has identified that seven of the highest ranking threats to New Zealand marine habitats relate to human activity. The primary threat is sedimentation due to changes in land use. Bottom trawling was the 3rd equal highest ranking threat to marine habitats (alongside invasive species), and shellfish dredging ranked as the 2nd highest threat<sup>14</sup>.
  - e. FNZ need to commit to actively working with, and holding Regional Councils responsible for, avoiding, mitigating and remedying the effects of sedimentation. While there is often talk of engaging with Regional Councils to address sedimentation very little has improved over the years, in most areas the nearshore benthic environment continues to degrade.
28. It is insufficient for FNZ to suggest that sections 9 (a) and (b) of the Act, “will be addressed in other work programmes being developed by Fisheries New Zealand”. It is a mandatory requirement on the Minister to apply the environmental principles in full.

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<sup>13</sup> At [117].

<sup>14</sup> MacDiarmid, A.; McKenzie, A.; Sturman, J.; Beaumont, J.; Mikaloff-Fletcher, S.; Dunne, J. (2012). Assessment of anthropogenic threats to New Zealand marine habitats. New Zealand Aquatic Environment and Biodiversity Report No. 93. 255 p.

29. Section 9 of the Fisheries Amendment Act 2022:

All persons exercising or performing functions, duties, or powers under this Act, in relation to the utilisation of fisheries resources or ensuring sustainability, shall take into account the following environmental principles:

- (a) associated or dependent species 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.

30. FNZ goes on to suggest that “the obligation under s9(c) is to take into account the protection of these habitats in decisions but does not create an obligation to protect them”. The law is clear. The intent of the Principle is to set environmental bottom lines. In 9(a) the standard is to **ensure** (the strongest possible term) associated or dependent species are maintained above a reference point. 9(b) sets a standard of biodiversity that **must be** maintained and 9(c) puts in place protection for the habitat, in this instance described as habitat of particular significance to fisheries management.
31. Read together and in the construct of Part 2 of the Act that describes the Purpose of the legislation, it is clear this Act is an ecosystem based enabling Act. The productivity and maintenance of fully functioning inshore ecosystems is at the centre of the Purpose and Principles.
32. So, what is the point of this exercise if it is not to protect habitats?
33. Habitats of significance to fisheries management are not simply those areas supporting the productivity of fisheries resources, it is much broader.
- a. The Purpose of the Act (s8) obliges the Minister to *ensure sustainability* by “avoiding, remedying, or mitigating *any* adverse effects of fishing on the aquatic environment”.
  - b. Analysis must include all elements of aquatic life, and the biophysical environment must be taken into account when identifying the significance and protection of habitats.
  - c. Sustainability can only be assured if abundance and biodiversity are maintained.
  - d. We just need to accept that there will always be things about the aquatic environment that we don’t, and maybe never will, understand.

- e. We need precautionary management with fish stocks managed at a minimum of B50, some stocks at higher levels. And;
  - f. Provide for area and method controls to achieve B50 for target and associated species.
34. The working definition for habitats of significance (**HoS**) is “an area or areas of particular significance in supporting the productivity of fisheries resources”.
- a. Under this definition, nurseries, spawning sites and egg laying habitats, currently particularly significant in supporting productivity are recognised as a HoS. This definition prioritises what is significant and steps away from the ecosystem as a whole.
  - b. FNZ does not recognise “degraded areas that have been significant in the past” even if they “have the potential to be restored”. The time and funding required to research and identify HoS using an expert-led approach places habitats at risk of degradation. Therefore, the habitat/s will not be applicable as a HoS.
  - c. As mentioned above in 26(b), enabling the Minister to establish an SPA will remove the threats of habitat degradation and loss caused by bottom contact fishing methods.

### **What are your views on the evidence required for habitat areas to be considered HoS?**

35. As above, we think it is highly aspirational and unrealistic to consider that adequate funding from the \$22M annual budget will be made available to enable comprehensive research to identify and protect HoS.
36. Research funding is already limited, is hotly contested, and if there is no clear economic benefit then it’s unlikely FNZ will be able to mount a case for projects supported by a mix of Crown and cost-recovered funding. The contest will be particularly fraught if FNZ tries to recover costs from commercial fishing interests for projects they do not consider to be directly attributable to their activity, such as sedimentation, climate change or pollution.
37. We fully support an ecosystems approach to fisheries management but don’t believe this is achievable using the narrow FNZ interpretation of HoS.
38. HoS can be highly productive areas in terms of fisheries. As we have experienced in earlier fisheries management processes, if commercial interests perceive a threat to their existing or potential fishing access there will be strong opposition to identifying any habitat areas of significance. Ironically, areas that are already degraded may enjoy more support

from the commercial sector due to their low productivity and minimum impact on fishing activity.

39. Mātauranga Māori is an important knowledge system that could help to identify HoS; however, the combination of a degraded nearshore environment and the impacts of climate change now threaten traditional knowledge and practices. This again emphasises the need for a broader ecosystem based approach to managing the marine environment.
40. While FNZ note the Minister is required to have **particular regard** to kaitiakitanga (pursuant to s12 of the Act) this has proven to be a difficult task as often there are conflicting views, from commercial and non-commercial Māori interests, on what the Minister's decision ought to be for the future management of fish stocks. The needs of hapū for local abundance can often differ from the commercial interests of iwi-led fishing businesses.

### **What are your views on the information assessment for identifying HoS and the expert led approach we are proposing to identify HoS?**

41. The assessment for identifying HoS is based on five levels of confidence in the available supporting evidence. Confidence levels range from “None - 0” to “Absolutely certain - 4”.
  - a. The descriptions for the confidence levels include the terms “vague hunch”, “gut feeling” and “extensive” which is unclear and broad. More comprehensive descriptors provide for a deeper understanding of what evidence and how much is required for a habitat to be classified as particularly significant for fisheries management.
42. FNZ will publish HoS on the FNZ website within an up to date HoS register that can be viewed by the public. It has been outlined in the proposed guidelines that a “lower level of confidence regarding the **spatial distribution** of the HoS will not exclude locations from the register”.
  - a. FNZ has stated that where experts have a high or very high level of confidence in available evidence, the proposed HoS will be progressed to a review stage before being allocated as a HoS.
  - b. However, the process for habitat areas or species that have a less than a high level of evidence regarding variables other than spatial distribution has not been made clear.
43. The majority of available empirical evidence is on species that are economically valuable, such as snapper. This begs the question as to how habitats or species that are data deficient or have no available information will be further impacted by the process to identify a HoS.

- a. We are concerned that the current gaps in research of habitat and species dependencies will lead to biases that are in favour of species, habitats or regions that have greater amounts of available research. It has been proposed that the HoS process will highlight where future research is required. This process will take time. **The time to act in favour of abundance and biodiversity is now.**
  - b. Distinguishing a habitat as particularly significant based on available evidence disregards the value of another less researched habitat or species for ecosystem functions.
  - c. A habitat that has been recognised as not benefitting one species may play an unknown fundamental role in the productivity of another.
  - d. The reliance on available information to support the identification of HoS continues to put under-researched biodiversity and ecosystems at risk of exploitation.
44. FNZ has stated that the “recognition of habitats as HoS takes account of the information principles in the Act (s10)”, which defines information as including: (a) scientific, customary Māori, social or economic information; and (b) any analysis of any such information.
- a. The information provided for how the assessment will be carried out is limited and does not reference how it will review supporting evidence that is not empirical work. Empirical work has not been defined in the context of HoS Draft Guidelines. However, the known definition of empirical work is research derived from measured or observed experience, rather than theory or belief; which lightly forms the foundation of social knowledge.
  - b. Will social knowledge of habitats and mātauranga Māori be utilised as supporting evidence, and if so what depth and breadth of knowledge is required to be deemed suitable for the allocation of a HoS?

## **What are your views on the approach proposed to identify adverse effects on HoS?**

45. A 2012 research project identified that “reef, sand and mud habitats in harbours and estuaries and along sheltered and exposed coasts were considered to be the most highly threatened habitats”<sup>15</sup>. Over the past decade there is scant evidence that substantive measures have been taken to avoid, mitigate or avoid the adverse effects of fishing on these habitats as required by s8(2)(b) of the Act.

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<sup>15</sup> MacDiarmid, A.; McKenzie, A.; Sturman, J.; Beaumont, J.; Mikaloff-Fletcher, S.; Dunne, J. (2012). Assessment of anthropogenic threats to New Zealand marine habitats. New Zealand Aquatic Environment and Biodiversity Report No. 93. 255 p.

46. The same report identifies **sedimentation** due to changes in land-use as the **foremost threat to habitats**. FNZ proposes to ‘engage’ with other agencies to identify land-based impacts on fisheries and “influence them to manage these”. This falls short of the statutory requirements set out in s9 of the Act that requires ‘habitats of particular significance for fisheries management **should** be protected’. In legal terms the requirement ‘should’ equates to ‘must’.
47. FNZ’s backstop is to then proceed and only identify specific areas, rather than consider all of the s9 Environmental Principles that expect fish stocks **should** be maintained at a viable level long-term (s9a), and that biological diversity **should** be maintained (s9b). We can only feasibly comply with these Principles if we take an ecosystem based approach to fisheries management and apply a Type 2 MPA Seafloor Protection Area to inshore waters so that destructive fishing methods are banned within the Territorial Sea.
48. The status of many fish stocks has been analysed as being below acceptable levels for years using a similar risk assessment approach as proposed by FNZ for identifying adverse effects on HoS. The colourful charts and percentages are helpful but rarely evolve into a management review unless there is a political will to apply research funding to complete a stock assessment. Our concern is that the proposed risk assessment process to identify adverse effects on HoS will suffer the same fate.
49. Given the inordinate sway that commercial interests have on management decisions and research priorities our preference would be to:
- a. Accept the existing research;
  - b. Apply all the mandatory precautionary principles in s 9 of the Act; and
  - c. Apply a Type 2 Seafloor Protection Area inshore, within 12 nautical miles (**nm**) of the coast, to address the identified threats posed by sedimentation, bottom trawling, shellfish dredging and invasive species.

**What are your views on the approach proposed to establish and publish habitat areas as HoS whose protection must be taken account of?**

50. We don’t have sufficient funds to do the proposed work to an acceptable standard. As above, keep it simple:
- a. Rebuild fish stocks to a minimum target biomass of 50% of their estimated original, unfished size (B50); and
  - b. Apply a Type 2 MPA - a Seafloor Protection Area - to enable the Minister to ban all mobile bottom contact fishing methods from the Territorial Sea, within 12nm of

the coastline, and then only permit the use of low impact fishing techniques in this Type 2 MPA inshore zone.

### **What are your views on the information included in the example register entries of potential HoS?**

51. Sad. The threats to marine habitats have been known for years. The lack of any meaningful action reconfirms the lack of intent or ability of fisheries managers to impose protection measures that are contrary to commercial fishing quota holders' interests.
52. The capture of the regulators has slowed or prevented remedial action to ban destructive fishing techniques inshore, or the application of catch reductions required to rebuild depleted fish stocks.

### **What are your views on how habitat areas can be proposed as HoS?**

53. Keep it simple. Designate the Territorial Sea as a Type 2 MPA Seafloor Protection Area (**SPA**) so destructive, mobile bottom contact fishing methods can be prohibited from marine waters within 12 nautical miles of the coast.
54. Regional Councils or their equivalent Territorial Authorities now have clear directions from the Environment Court that they are responsible for protecting indigenous biodiversity in the Territorial Sea. While they cannot create plans to directly regulate fishing, they do have the responsibility to manage land use and subsequent run-off. In many areas there are insufficient resources applied to avoid, mitigate, or remedy the effects of run-off, and in some areas it continues unabated.
55. If the Territorial Sea is classified as a Seafloor Protection Area then the risks associated with bottom contact bulk harvesting techniques will be immediately reduced, resuspension of sediment will also be reduced, and the entire SPA can be considered a HoS.

### **What are your views on matters that should inform research priorities for HoS?**

56. The Quota Management System empowers quota holders to behave like they own the fish and marine space where they operate. This is evidenced during management reviews of fish stocks. While we would like to think otherwise, we can only envisage this process will be captured by similarly powerful commercial interests who will work hard to ensure that research priorities are directed towards already degraded habitats or unproductive areas.
57. The demise of many intertidal and shallow water shellfish beds in northern New Zealand needs more attention. Toheroa were probably the first to go, now pāua, scallop, pipi, tuatua, large cockle, green lip mussel and horse mussel beds in most areas are a fraction

of the size they once were. While over harvest and sedimentation are issues in some areas there is no common threat. Concern from hapū has generated many of the section 186A and mataitai applications. Yet these, and other closures by fisheries regulation, have not rebuilt stocks. The massive loss of biomass and ecosystem services from the decline in these shellfish species (and likely many more that are less obvious) highlights the need for broad research priorities that take account of multi-species ecosystem, social and cultural significance. Tracking down causes and mitigation measures may need funding from a number of sources and need to be championed by FNZ as habitats of significance.

58. It is not the purpose of this review to find the perfect solution to the matter of protecting HoS. The process risks being engulfed in a quagmire of views that support the minimum interruption from the status quo when applying the law. FNZ must ensure this process makes a substantial improvement in a concise and controlled way while avoiding arguments over legal evidence tests, delay and complexity. The reason this matter has come to a head is that stocks are managed at low levels that put productivity and biodiversity at risk, and the obvious short-term intervention is to reset the acceptable minimum target stock size to B50 and thereby reinvigorate ecosystem resilience and productivity. The problem is obvious, and the immediate response is obvious.