

**BEFORE THE PANEL OF INDEPENDENT HEARINGS COMMISSIONERS  
AT WAIKATO**

**IN THE MATTER** of the Resource Management Act 1991 (**Act**)

**IN THE MATTER** of the Proposed Waikato Regional Council Coastal Plan  
(**Proposed Plan**)

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**LEGAL SUBMISSIONS ON BEHALF OF THE ENVIRONMENTAL DEFENCE SOCIETY  
INCORPORATED**

11 FEBRUARY 2025

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## 1. INTRODUCTION

- 1.1 The Waikato coastal environment is extensive and includes diverse ecosystems, habitats and other important biodiversity values.
- 1.2 Past planning approaches have favoured use and development to the detriment of these values. Dr Kelly in his evidence describes a “*significant legacy of environmental loss and coastal degradation*”<sup>1</sup> on the east coast and a range of pressures facing the wider coastal marine area (**CMA**).<sup>2</sup>
- 1.3 The Proposed Plan provides an important opportunity to strike the right balance between enabling use and development and protecting environmental values into the future.
- 1.4 EDS commends Waikato Council (**Council**) for the approach adopted by the Proposed Plan, which generally recognises the need to protect important environmental values in the CMA. However, there are some significant gaps and certain provisions are too enabling of activities with potentially harmful impacts. Particularly in areas with significant and/or sensitive values.
- 1.5 The s 42A Reports address some of the concerns raised by EDS’s submission. However, the Plan (as recommended) lacks any fishing controls and fails to provide for adequate protection of marine biodiversity, habitats and ecosystem values. Further changes are required to ensure the Plan gives effect to higher order planning documents.
- 1.6 These submissions provide the context and legal basis to support the changes sought by EDS.
- 1.7 For clarity, these submissions address points relating to various hearing topics. Counsel intends to speak to general matters at the whole of plan hearing on 18 February and then to address specific relief as relevant to each topic at future hearings.
- 1.8 In reliance on para 13 of Direction (1) from the Hearing Panel dated 27 June 2024, EDS reserves the ability to file supplementary legal submissions addressing specific relief no later than 5 working days before the particular hearing.<sup>3</sup>
- 1.9 In relation to any matters not specifically addressed in submissions, EDS relies on its original submission.<sup>4</sup>

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<sup>1</sup> Statement of primary evidence of Shane Kelly on behalf of EDS, 8 November 2024, at [1.1].

<sup>2</sup> Ibid at [5.30].

<sup>3</sup> Direction (1) from the Hearing Panel, dated 27 June 2024 at [13].

<sup>4</sup> Submission reference #95 in the Waikato Regional Council Summary of Decisions Requested Report (27 March 2024).

## **2. EVIDENCE**

2.1 EDS is calling evidence from two witnesses:

- (a) Mr David Serjeant, an expert planner and independent hearings commissioner.
- (b) Dr Shane Kelly, an expert marine ecologist and founding director of Coast and Catchment Limited.

2.2 The evidence of other experts is relied on as specified throughout.

## **3. OUTLINE**

3.1 These submissions are structured as follows:

- (a) Overview of EDS;
- (b) Legal framework;
- (c) Section 42A reports and addendums (**s 42A Reports**);
- (d) EDS's remaining concerns by hearing topic; and
- (e) Conclusion.

## **4. OVERVIEW OF EDS**

4.1 EDS is a public interest environmental group, formed in 1971. The focus of its work is on achieving positive environmental outcomes through improving the quality of Aotearoa New Zealand's legal and policy frameworks and statutory decision-making processes. EDS has a long history of advocating for improved environmental outcomes in relation to the Hauraki Gulf and Waikato CMA. EDS's submission and relief draws on that knowledge base.

## **5. LEGAL FRAMEWORK**

5.1 These submissions do not extensively cover the law applying to preparation of regional coastal plans. Aspects are covered in the s 42A Reports and the Council's legal submissions.

5.2 However, there are two matters that EDS wishes to comment on briefly:

- (a) The scope of a regional council's functions under s 30 of the Act; and

- (b) The requirement to “*give effect to*” relevant national policy statements (**NPS**), including ss 7 and 8 of the Hauraki Gulf Marine Park Act 2000 (**HGMPA**),<sup>5</sup> and the Waikato Regional Policy Statement (**RPS**).<sup>6</sup>

*Scope of regional council functions under s 30 of the Act*

- 5.3 A regional council’s power to regulate activities (including fishing) in the CMA is set out in s 30 of the Act. Of relevance is:
- (a) Section 30(1)(d)(i): Control land and associated natural and physical resources;
  - (b) Section 30(1)(d)(ii): Control the occupation of space in, and the extraction of sand, shingle, shell, or other natural material from, the coastal marine area, to the extent that it is within the common marine and coastal area;
  - (c) Section 30(1)(d)(vii): Control activities in relation to the surface of water;
  - (d) Section 30(1)(ga): To establish, implement and review provisions for the purpose of maintaining indigenous biodiversity in their regions.
- 5.4 The Act interfaces with the Fisheries Act 1996. Under s 30(2) of the Act, a regional council must not perform the functions in s 30(1)(d)(i), (ii) and (vii) to control the taking, allocation or enhancement of fisheries resources for the purpose of managing fishing or fisheries resources controlled under the Fisheries Act. Notably, s 30(1)(ga) is not subject to s 30(2) of the Act.
- 5.5 The Fisheries Act has a corresponding provision which prohibits regional plans from providing for the allocation of fisheries resources (e.g. between commercial and recreational fishers).<sup>7</sup>
- 5.6 The Court of Appeal in *Motiti* considered the above provisions and the interface between the two statutes.<sup>8</sup> *Motiti* was concerned with the Bay of Plenty Regional Council’s ability to prohibit fishing in parts of the CMA to protect indigenous biodiversity. Overfishing of important reef predators (i.e. snapper and crayfish) had destroyed kelp forests and resulted in kina barrens, which reflected a degraded ecosystem state.<sup>9</sup> The Council sought to implement controls to protect these species and their role in rocky reef ecosystems in three areas with high environmental values.

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<sup>5</sup> For the coastal environment of the Hauraki Gulf, ss 7 and 8 of the HGMPA must be treated as a New Zealand coastal policy statement issued under the Act - refer HGMPA, s 10(1).

<sup>6</sup> Resource Management Act 1991, s 67(3).

<sup>7</sup> Fisheries Act 1996, s 6.

<sup>8</sup> *Attorney-General v Trustees of the Motiti Rohe Moana Trust* [2019] NZCA 532.

<sup>9</sup> *Ibid* at [5].

5.7 *Motiti* confirmed that both statutes give powers to regional councils to impose controls to protect biodiversity in the CMA.<sup>10</sup> The Court of Appeal found that:

- (a) A regional council may control activities under the Act to maintain indigenous biodiversity (s 30(1)(ga)). When dealing with a fisheries resource, controls needed to maintain indigenous biodiversity are *in practice* likely to require the exercise of functions subject to the s 30(2) restriction. For example, a control to prohibit fishing for the purpose of maintaining indigenous biodiversity will also be a control of land and associated resources. ‘Land’ includes the seabed and ‘natural and physical resources’ includes water.<sup>11</sup>
- (b) Therefore, even though s 30(1)(ga) is not subject to s 30(2), controls established under it can be subject to s 30(2) where specified s 30(1)(d) functions are also invoked. Accordingly, a regional council may control fisheries resources under its s 30 functions if it does not do so to for Fisheries Act purposes.<sup>12</sup>
- (c) A *Fisheries Act purpose* is to control the taking, allocation or enhancement of fisheries resources for the purpose of managing fishing or fisheries resources controlled under the Fisheries Act (i.e. this triggers the s 30(2) restriction under the Act).<sup>13</sup>
- (d) A *Resource Management Act purpose* is to protect indigenous biodiversity. This purpose is broader in scope (i.e. covers all forms of indigenous organisms and their ecosystems); it protects biodiversity not just as a resource but for its intrinsic value; its remedial or protective purpose is not limited to the effects of fishing; and it permits a regional council to set what may be a different baseline for permissible effects on indigenous biodiversity in any given area.<sup>14</sup>

5.8 The Court of Appeal endorsed the following indicia to guide whether a control would be for a *Fisheries Act purpose* and thus contravene s 30(2):<sup>15</sup>

*Necessity* means whether the objective of the control is already being met through measures implemented under the Fisheries Act;

*Type* refers to the type of control. Controls that set catch limits or allocated fisheries resources among fishing sectors or establish sustainability measures for fish stocks would likely amount to fisheries management;

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<sup>10</sup> At [67].

<sup>11</sup> At [32] and [60] to [61].

<sup>12</sup> At [63].

<sup>13</sup> Ibid.

<sup>14</sup> At [52].

<sup>15</sup> At [64].

*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).

- 5.9 Following the Court of Appeal’s decision in *Motiti*, the Environment Court confirmed protection measures to be implemented in the Bay of Plenty Regional Coastal Environment Plan.<sup>16</sup> In summary, the Plan prohibits the temporary or permanent damage, destruction or removal of plants or animals in a mapped Motiti Protection Area.<sup>17</sup> There are specified exceptions (i.e. as ‘permitted activities’) for certain types of environmental monitoring, marine biosecurity investigation, wildlife rescue and scientific research.<sup>18</sup> Key provisions are included in **Attachment A**.
- 5.10 The Environment Court has applied the *Motiti* indicia to assess whether controls on fishing should be applied to protect biodiversity in the proposed Northland Regional Plan.<sup>19</sup> As notified, the Plan did not contain any marine protected areas, policies or rules to control the effects of fishing on the values of significant ecological areas. Such provisions were sought by submitters and the Court decided to identify marine protected areas (“Te Hā o Tangaroa Protection Areas”) in three locations where there were high biodiversity values that warranted protection under the Act. For example, the waters around Cape Brett, including rocky reefs to a depth of 100 m.
- 5.11 Rules were included in the Plan to prohibit the temporary or permanent damage, destruction or removal of fish, aquatic life or seaweed from these areas.<sup>20</sup> Similar to the Bay of Plenty approach, certain low-risk activities are ‘permitted’ in these areas.<sup>21</sup> Key provisions are included in **Attachment A**.
- 5.12 Protective provisions have also been included in the proposed Marlborough Environment Plan. The relevant provisions prohibit dredging and bottom trawling, but not fishing generally, within any listed Category A or B Ecologically Significant Marine Site and impose consenting requirements (as a discretionary activity) on these activities in buffer zones adjacent to the significant areas.<sup>22</sup> Key provisions are included in **Attachment A**.

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<sup>16</sup> *Motiti Rohe Moana Trust v Bay of Plenty Regional Council* [2020] NZEnvC 50

<sup>17</sup> Operative Bay of Plenty Coastal Environment Plan, rule DD 18.

<sup>18</sup> Operative Bay of Plenty Coastal Environment Plan, rule DD 6A.

<sup>19</sup> *Bay of Islands Maritime Park Inc v Northland Regional Council* [2022] NZEnvC 22 at [86].

<sup>20</sup> Proposed Regional Plan for Northland February 2024, rule C.10.2 (operative).

<sup>21</sup> Proposed Regional Plan for Northland February 2024, rule C.10.1 (operative).

<sup>22</sup> Proposed Marlborough Environment Plan, rule 16.6.6 (buffer rule) and rule 16.7.6 (prohibition on category A).

- 5.13 It has been necessary to traverse this context because the Proposed Plan (as notified and recommended) does not include any controls on fishing activities within the Waikato CMA, including areas with mapped significant indigenous biodiversity values.
- 5.14 EDS's evidence demonstrates that this gap in the Proposed Plan leaves areas with significant biodiversity values and / or sensitive taxa and habitats exposed to potentially significant adverse effects from fishing activities.
- 5.15 In EDS's submission, controls on benthic disturbance and other harmful fishing activities must be included in the Plan to provide for adequate protection of indigenous biodiversity in accordance with the Council's functions under s 30 of the Act and the higher order planning documents.
- 5.16 This is addressed further below in relation to relevant hearing topics (i.e. general and whole of plan, ECO and DD) and supported by EDS's evidence.

*Requirement to "give effect to" higher order planning documents*

- 5.17 As the Panel will be well aware, the Proposed Plan must "give effect to" higher order planning documents.<sup>23</sup> Give effect means "*implement*" and it is "*a strong directive, creating a firm obligation on the part of those subject to it*".<sup>24</sup>
- 5.18 Key documents relevant to EDS's submission include the New Zealand Coastal Policy Statement 2010 (**NZCPS**), HGMPA, and RPS.

NZCPS

- 5.19 The NZCPS is the overriding document applying to the CMA.<sup>25</sup> The NPSIB applies to indigenous biodiversity in the "*terrestrial environment*" (which excludes the CMA).<sup>26</sup> However, there is some overlap between these documents because the NPSIB applies to specified highly mobile fauna in the CMA<sup>27</sup> and the NZCPS includes objectives and policies that are focused on the wider "*coastal environment*".<sup>28</sup> Clause 1.4(2) of the NPSIB provides that the NZCPS is to prevail if there is any conflict.<sup>29</sup>
- 5.20 Policy 11(a) of the NZCPS requires adverse effects of activities on aspects of indigenous biodiversity to be "*avoided*". For other indigenous habitats and

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<sup>23</sup> Resource Management Act 1991, s 67(3).

<sup>24</sup> *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd* [2014] NZSC 38 [*King Salmon decision*] at [77].

<sup>25</sup> The CMA is defined in s 2(1) of the Act. The landward limit is generally the line of mean high-water springs while the seaward extent reflects the 12 nm limit.

<sup>26</sup> NPSIB, cl 1.3(1) and definition of "*terrestrial environment*" which incorporates the definition of "*coastal marine area*" from s 2 of the Act.

<sup>27</sup> NPSIB, cl 1.3(2)(b).

<sup>28</sup> NZCPS, policy 4.

<sup>29</sup> NPSIB, cl 1.4(2).

areas, policy 11(b) requires “significant” adverse effects to be avoided, and other adverse effects to be avoided, remedied or mitigated.

- 5.21 The avoid directives in policy 11 of the NZCPS have been the subject of judicial scrutiny. In *King Salmon*, the majority decision of the Supreme Court found “avoid” meant “not allow” or “prevent the occurrence of”.<sup>30</sup> This created a strong directive that could amount to an environmental bottom line.<sup>31</sup>
- 5.22 In the recent *East-West Link* decision, the Supreme Court considered the avoid directives in policy 11 alongside policies related to infrastructure (policy 6) and reclamation (policy 10).<sup>32</sup> While this decision involved applications for resource consents and notices of requirement it includes relevant guidance for decisions on the Proposed Plan. The majority found the “avoid” directives in policy 11 were more directive than policies 6 and 10. However, policy 11 was framed in general terms and therefore included “a margin for necessary exceptions, where in the factual context, relevant policies are not subverted and sustainable management clearly demands it”.<sup>33</sup> The Court made it clear that any “necessary exceptions” to the avoid directives in policy 11 must be narrowly construed. This is addressed further below in relation to proposed policies ECO-P4 and DD-P8.

#### HGMPA

- 5.23 The HGMPA establishes the Hauraki Gulf Marine Park.<sup>34</sup> Sections 7 and 8 of the HGMPA must be treated as a New Zealand coastal policy statement issued under the Act.<sup>35</sup> Therefore, the Plan must give effect to these provisions.
- 5.24 Section 7 of the HGMPA confirms the interrelationship between the Hauraki Gulf, its islands and catchments, and the ability of that interrelationship to sustain the life-supporting capacity of the Gulf are matters of national significance. It recognises that the life-supporting capacity of the Gulf includes the capacity to maintain the soil, air, water and ecosystems.
- 5.25 Section 8 of the HGMPA sets management objectives to recognise the national significance of the Hauraki Gulf. These include the protection and, where appropriate, enhancement of the life-supporting capacity of the environment of the Gulf and its resources (objectives (a) and (b)).

#### RPS

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<sup>30</sup> *King Salmon* decision at [93].

<sup>31</sup> *Ibid* at [96].

<sup>32</sup> *Royal Forest and Bird Protection Society of New Zealand Inc v New Zealand Transport Agency* [2024] NZSC 26 [*East-West Link decision*].

<sup>33</sup> *Ibid* at [110].

<sup>34</sup> Hauraki Gulf Marine Park Act 2000, s 3.

<sup>35</sup> Hauraki Gulf Marine Park Act 2000, s 10(1).



- 5.26 Key aspects of the RPS relevant to EDS's relief include (but are not limited to) the following objectives, policies and methods (as summarised):
- (a) The full range of ecosystem types, their extent and the indigenous biodiversity that those ecosystems can support existing in a healthy and functional state (objective ECO-O1).
  - (b) Promote positive indigenous biodiversity outcomes to maintain the full range of ecosystem types and maintain or enhance their spatial extent as necessary to achieve healthy ecological functioning of ecosystems (policy ECO-P1 – this applies to all indigenous biodiversity across the region).
  - (c) Protect significant indigenous vegetation and significant habitats of indigenous fauna by ensuring the characteristics that contribute to its significance are not adversely affected to the extent that the significance of the vegetation or habitat is reduced (policy ECO-P2 – this applies specifically to significant indigenous biodiversity).
  - (d) Protect indigenous biodiversity in the coastal environment by avoiding adverse effects on aspects including at-risk and threatened taxa and other naturally rare values (policy CE-P2(1)).
  - (e) Protect indigenous biodiversity in the coastal environment by maintaining or enhancing aspects including indigenous habitats and ecosystems that are unique to the coastal environment and vulnerable to modification and impacts of climate change including rocky reef systems, seagrass and saltmarsh (policy CE-P2(2)).
  - (f) Prepare a regional plan that protects marine habitat in the CMA that has been identified as an area of significant indigenous biodiversity; and controls the adverse effects of activities within the coastal environment to protect and enhance indigenous biodiversity (method CE-M5).
  - (g) Support and advocate for a network of marine protected areas that is comprehensive and represents the region's marine habitats and ecosystems (method CE-M6, which relates to implementation of CE-P2 above).
- 5.27 These submissions address EDS's relief in light of this relevant legislative and policy context.

## 6. AMENDMENTS RECOMMENDED BY S 42A REPORTS

- 6.1 The s 42A Reports recommend a number of changes to the Proposed Plan which address some of EDS's concerns. These changes include, but are not limited to, amendments that provide for:
- (a) A precautionary approach to manage effects on ecosystem and indigenous biodiversity values in the coastal environment.
  - (b) Better recognition of the need to protect "*Threatened*" and "*At-Risk*" species, including sharks, rays and other fish.
  - (c) Better recognition of the need to maintain ecosystem resilience to the impacts of climate change.
  - (d) Necessary protection of significant indigenous biodiversity values, including large tube worm (*Galeolaria hystrix*) mounds, around the Western Coromandel Islands. In particular, EDS supports the recommended modification and reclassification of certain Significant Indigenous Biodiversity Areas – B (**SIBA-B**) in Schedule 7B as Significant Indigenous Biodiversity Areas – A (**SIBA-A**) in Schedule 7A.<sup>36</sup>
  - (e) More accurate description of SIBA-B values in Schedule 7. For example, by acknowledging that these are not "*more resilient ecosystem types*".<sup>37</sup>
- 6.2 However, further amendments are required to ensure EDS's concerns are fully addressed and the sustainable management purpose of the Act is met.
- 6.3 The remainder of these submissions address EDS's concerns by hearing topic in the following order:
- (a) General and whole of plan
    - (i) Need to better protect SIBA-B values; and
    - (ii) Need to include fishing controls.
  - (b) IM – Integrated Management | Whakahaere rawa pāhekoheko
    - (i) Greater recognition of terrestrial environment in IM-O1.
  - (c) ECO – Ecosystems and indigenous biodiversity | Te mauri o te taiao me te rerenga rauropi

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<sup>36</sup> Statement of rebuttal evidence of Claire Webb on behalf of Waikato Regional Council, dated 24 January 2025, at [22]-[23]. In particular, SIBA-B16, B17, B18 and B19, which are recommended to be reclassified as SIB-AX3, AX4 and AX5.

<sup>37</sup> Schedule 7, Proposed Plan Recommendations Version.

- (i) Ensuring a narrow gateway test in policy ECO-P4;
    - (ii) The effects management hierarchy in policy ECO-P5;
    - (iii) New High Protection Rule (ECO-X); and
    - (iv) Need to identify Marine Mammal Sanctuary as SIBA-A.
  - (d) DD – Disturbances and deposition | Whakararutanga me ngā waipara
    - (i) Need to ensure a narrow gateway test in policy DD-P8; and
    - (ii) Need to better protect SIBA-B values.
  - (e) AQA – Aquaculture | Ahumoana
    - (i) Need to better protect SIBA-B values.
    - (ii) Need to provide for adaptive management including through deletion of policy AQA-P2AB and retention of AQA-P13.
    - (iii) Information and monitoring requirements in AQA-P18 and AQA-P19 should be retained (with some amendments).
- 6.4 EDS intends to address relief relating to aspects of the WAQ – Water quality | Kounga wai Chapter in separate legal submissions prior to the WAQ hearing.

## 7. GENERAL AND WHOLE OF PLAN

### Application of Policy 11 of the NZCPS

- 7.1 The *NZCPS 2010 Guidance Note* explains that policy 11 of the NZCPS adopts a “*tiered approach*” with the first tier (policy 11(a)) applying to aspects of biodiversity that are “*threatened or most at risk of extinction*” and the second tier (policy 11(b)) applying to aspects that “*are more common or less at risk from imminent loss (i.e. still valuable but not threatened or rare)*”.<sup>38</sup>
- 7.2 In the recent Supreme Court *East-West Link* decision, Glazebrook J (in a dissenting judgment) provided some guidance on the distinction between these ‘tiers’.<sup>39</sup>

It is also helpful to divide the operative components of these policies into “qualified” and “unqualified” avoidance policies. “Unqualified” avoidance policies are those which merely specify that certain adverse effects should be avoided. “Qualified” avoidance policies require a higher threshold of harm before an adverse effect is required to be avoided (for example, “avoid *significant* adverse effects”). Particularly important for this appeal is Policy 11(a), an unqualified avoidance policy, and Policy 11(b), a qualified avoidance policy, relating to the avoidance of adverse effects and significant adverse effects (respectively) on various indigenous biodiversity values.

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<sup>38</sup> Department of Conservation 2010 Guidance Note “Policy 11: Indigenous Biodiversity (biodiversity)” at 19.

<sup>39</sup> *East-West Link* decision at [244].

- 7.3 In the *Port Otago* decision, the Supreme Court described the avoidance directives in the NZCPS (including policies 11, 13 and 15) as establishing “*two levels of protection*”.<sup>40</sup>
- 7.4 It may be appropriate to distinguish between the two ‘tiers’ in policy 11(a) and (b) for the purposes of implementation. However, EDS submits that “*protection*” is an integral component of both directives. In other words, it would not be appropriate to adopt an overly permissive policy and rule framework for policy 11(b) values as this would not implement the protective direction.
- 7.5 Proposed objective ECO-O1 and policies ECO-P1 and ECO-P2 of the Plan seek to implement the RPS and policy 11(a) and (b) of the NZCPS by directing decision makers to (in summary):
- (a) Ensure indigenous biodiversity is maintained and (where appropriate) enhanced and restored and significant indigenous biodiversity areas are protected (objective ECO-O1).
  - (b) Avoid adverse effects on the values of mapped SIBA-A areas, threatened or at-risk species and naturally rare ecosystems (policy ECO-P1).
  - (c) Avoid significant adverse effects and avoid, remedy or mitigate other adverse effects of activities on the values of mapped SIBA-B areas and other aspects including ecosystems and habitats that are particularly vulnerable to modification (ECO-P2).
- 7.6 EDS supports these provisions and the mapped SIBA-A and SIBA-B areas in Schedule 7 as recommended, with some changes sought to identified values.
- 7.7 However, EDS submits that there are some gaps in policy 11 implementation in the policy and rule framework of the plan. The lack of fishing controls is a striking omission but there are other gaps in the ECO, DD and AQA provisions. As outlined in Mr Serjeant’s evidence, several of the proposed rules provide for permitted, controlled or restricted discretionary activities in SIBA-B areas.<sup>41</sup> Other rules apply relatively stringent restrictions to activities in SIBA-A areas (e.g. non-complying or prohibited activity status) but not in SIBA-B areas.<sup>42</sup>
- 7.8 EDS finds this concerning as it could lead to the Council being unable to prevent, or appropriately manage, the effects of activities on SIBA-B values. Particularly as it limits the ability to consider the cumulative effects of

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<sup>40</sup> *Port Otago Ltd v Environmental Defence Society Inc* [2023] NZSC 112 [*Port Otago decision*] at [10]-[11].

<sup>41</sup> Statement of primary evidence of David Serjeant on behalf of EDS, 8 November 2024, at [5.5]-[5.8]; and Statement of rebuttal evidence of David Serjeant on behalf of EDS, 10 February 2025, Annexure A/Rebuttal. For example, AQA-R1, AQA-R2, DD-R3.

<sup>42</sup> For example, DD-R12 and DD-R29.

activities on SIBA-B values. For instance, where ‘small scale’ activities are considered suitable in isolation they may collectively and in context of other activities generate significant cumulative effects.

- 7.9 In his planning evidence, Mr Serjeant describes why each category of indigenous biodiversity “*needs careful assessment*” when it comes to drafting planning provisions and assessing effects of activities.<sup>43</sup> In Mr Serjeant’s opinion SIBA-A and SIBA-B areas “*warrant the same or similar recognition in the policies and rules, but that the effects avoidance or mitigation is varied to reflect their different status*”.<sup>44</sup>
- 7.10 In EDS’s submission, the approach adopted by the Plan does not retain sufficient discretion over activities in SIBA-B areas to provide for “*careful assessment*”. In many respects the Plan treats SIBA-B areas the same as the wider CMA and fails to recognise the need to avoid “*significant*” adverse effects on policy 11(b) values.
- 7.11 Therefore, further changes are necessary to ensure the Plan does actually provide protection for policy 11(b) values. Specific changes are addressed below in relation to the ECO, DD and AQA chapters.

### **Fishing controls**

#### *Amendments requested by EDS*

- 7.12 The Proposed Plan (as notified) did not include any fishing controls. EDS’s submission raised concerns about this gap because it severely limits the ability to manage adverse effects of fishing on biodiversity. These concerns have not been addressed by the s 42A Reports.
- 7.13 Indeed, EDS considers that recommended amendments to the Proposed Plan have made matters worse. This is because the reporting planner has recommended the deletion of policy ECO-P12 and method ECO-M1. These provisions had directed the Council to identify vulnerable areas requiring additional protection. Therefore, deleting these provisions without including additional fishing controls would effectively *widen* the gap in protection for indigenous biodiversity in the Proposed Plan.
- 7.14 EDS seeks the inclusion of appropriate fishing controls as attached to Mr Serjeant’s evidence.<sup>45</sup> In summary, the controls include:
- (a) A rule that prohibits any dredging, trawling that makes contact with the seabed, and Danish seining, in the east coast Waikato CMA, except

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<sup>43</sup> At [4.33].

<sup>44</sup> At [4.34].

<sup>45</sup> Statement of rebuttal evidence of David Serjeant on behalf of the Environmental Defence Society Inc, 10 February 2025, Annexure A/Rebuttal.

in identified ‘benthic access areas’ (**Benthic Disturbance Rule**). This rule covers SIBA areas and other areas with important biodiversity and ecosystem values;

- (b) An associated schedule and definition to clearly identify the ‘benthic access areas’ where the above rule would not apply (i.e. the specified fishing methods could be undertaken); and
- (c) A rule that prohibits certain activities (i.e. “*the catching, taking or harvesting of plants and / or animals*”) in SIBA-A areas unless existing protections of the same nature already apply. The rule would not affect customary (non-commercial) fishing rights (**High Protection Rule**).

7.15 In addition, EDS seeks to retain notified ECO-P12 and ECO-M1 with some amendments for clarity as addressed further in the ECO section below.

#### *Council’s position*

7.16 The s 42A Reports appear to acknowledge that the Council can control fishing activities in the exercise of its functions under s 30 of the Act.<sup>46</sup> However, the reporting planner has recommended that all submission points seeking fishing controls or marine protected areas be rejected. In summary, key reasons for this include:<sup>47</sup>

- (a) There is insufficient information available to identify areas impacted by fishing activities. Specifically, “*WRC does not have a complete dataset on areas affected by fishing pressures*”.<sup>48</sup>
- (b) Waikato can be distinguished from other regions where fishing controls have been implemented through RMA plans (i.e. Northland and the Bay of Plenty) because of gaps in available information. Specifically, “*WRC lacks comparable data for the Waikato CMA, making it challenging to identify areas to be considered for further protection measures under the plan*”.<sup>49</sup>
- (c) There is uncertainty surrounding the regulatory framework in the Hauraki Gulf.<sup>50</sup> In this regard, the reporting planner refers to the Hauraki Gulf / Tīkapa Moana Marine Protection Bill (**HG Bill**) and work undertaken by the Ministry of Primary Industries (**MPI**) on benthic fishing access restrictions.<sup>51</sup>

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<sup>46</sup> General and whole of plan s 42A Report at [219].

<sup>47</sup> General and whole of plan s 42A Report at [234].

<sup>48</sup> General and whole of plan s 42A Report at [230].

<sup>49</sup> General and whole of plan s 42A Report at [220].

<sup>50</sup> General and whole of plan s 42A Report at [230].

<sup>51</sup> Ibid.

- (d) The Resource Management (Consenting and Other System Changes) Amendment Bill (**RMA Bill**) creates additional uncertainty. Specifically, it “*could be contrary to impending statute to include fishing control rules in the proposed plan*”.<sup>52</sup>

7.17 In terms of EDS’s requested fishing controls, the reporting planner concludes:

- (a) The proposed Benthic Disturbance Rule (DD-X) would contravene s 30(2) of the Act because it applies to the “*majority of the east coast CMA of Waikato*”.<sup>53</sup>
- (b) The proposed High Protection Rule (ECO-X) lacks clarity and would frustrate implementation of biosecurity and aquaculture rules in the Proposed Plan.<sup>54</sup>

7.18 EDS disagrees with the points raised by the reporting planner for the reasons set out below and as addressed further in the ECO and DD sections. In summary, EDS submits that:

- (a) There is a sufficiently robust evidence basis to identify areas with high and/or vulnerable biodiversity, habitat and ecosystem values that require additional protection from potential adverse effects of fishing.
- (b) EDS’s evidence confirms that it is necessary and appropriate to include fishing controls in the Proposed Plan to manage potential adverse effects on significant and vulnerable biodiversity, habitat and ecosystem values in the Waikato CMA.
- (c) Uncertainty surrounding aspects of the regulatory framework does not justify delaying or deferring implementation of necessary fishing controls. The Council must continue (not pause) to fulfil its statutory functions by protecting indigenous biodiversity.
- (d) EDS has suggested a benthic disturbance control and high protection/no-take rule to protect indigenous biodiversity from potentially significant adverse fishing effects. These controls are justified by relevant expert evidence and spatially linked to protection of the high and vulnerable values present. Therefore, the controls are

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<sup>52</sup> General and whole of plan s 42A addendum at [34]-[35].

<sup>53</sup> General and whole of plan s 42A addendum at [36].

<sup>54</sup> General and whole of plan s 42A addendum at [37].

not “for a Fisheries Act purpose” and they would not contravene s 30(2) of the Act.

*There is a robust evidence basis to support inclusion of fishing controls*

7.19 EDS submits that there is sufficient scientific information available to identify areas with biodiversity values (including significant biodiversity) that are vulnerable to fishing impacts, exposed to ongoing harmful fishing activities, and which require further protection.

7.20 The impacts of fishing on aspects of biodiversity in the Waikato CMA were considered by the ecologists who attended expert conferencing. The Joint Witness Statement (**JWS**) states:<sup>55</sup>

The ecological experts agree that the adverse effects of mobile bottom contact fishing activities and the adverse effects related to fishing down of key predators on reef systems in the Waikato CMA are significant.

7.21 This makes it clear that certain types of fishing activities are resulting in *significant* adverse effects on important values in the Waikato CMA. In particular, mobile bottom contact fishing activities and overfishing of key predators in areas with reef systems.

Rule required to control mobile bottom contact fishing activities

7.22 In his evidence Dr Kelly identifies certain biogenic habitats that are sensitive to bottom contact fishing methods. He states:<sup>56</sup>

I consider the lack of provisions for managing the adverse effects of fishing on non-target species or habitats to be a major omission. Bottom trawling has been ranked third equal of identified anthropogenic threats to New Zealand marine habitats. In addition to other impacts, bottom-contact fishing methods, including bottom trawling, Danish seining and scallop dredging kill a variety of large species that grow on, or in the seabed. Sessile species growing on the seabed such as corals, horse mussels, bryozoans, sponges and tube-building polychaetes are the most vulnerable, but mobile species including brittle stars, starfish, gastropods, hermit crabs, urchins, and sea cucumbers are also directly impacted.

7.23 Dr Kelly’s evidence is that bottom contact fishing methods have had, and continue to have, a significant impact on indigenous biodiversity over much of the Waikato CMA.<sup>57</sup>

7.24 In his evidence, Dr Kelly refers to scientific information published by Fisheries New Zealand (**FNZ**), which indicates that “*vulnerable taxa*” (i.e. taxa

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<sup>55</sup> Joint Witness Statement (JWS) in relation to: Topic: Ecosystems and Indigenous Biodiversity, dated 26 November 2024 [ECO JWS], at 3.6.1.1.

<sup>56</sup> At [1.10] and [9.5].

<sup>57</sup> At [9.1].



vulnerable to bottom contact fishing methods) are widely distributed across the Hauraki Gulf including the Waikato CMA.<sup>58</sup>

- 7.25 Dr Kelly identifies that existing fishing controls leave some taxa highly exposed to bottom contact fishing activities in the Hauraki Gulf. For example, only 10 percent of rhodoliths, 15 percent of bryozoa (erect/frame building) and cup corals, and 22 percent of corals and seapens are within areas that are currently closed to bottom contact fishing methods.<sup>59</sup>
- 7.26 Dr Kelly considers the lack of fishing controls in the Proposed Plan to be a “*major omission*”. In his opinion, additional controls on specific fishing activities aimed at limiting effects on indigenous biodiversity and habitats are warranted.<sup>60</sup>
- 7.27 Ms Sydney Curtis-Wilson raises similar points in her evidence on behalf of New Zealand Sport Fishing Council (**NZSFC**).<sup>61</sup> Ms Curtis-Wilson notes that the overlap of bottom trawl intensity and sensitive biodiversity is particularly prevalent on the east coast of the Coromandel Peninsula and the deepwater trawl fishery.<sup>62</sup> In her opinion, bottom trawling has contributed to substantial loss of taxa, including rhodolith beds, horse mussel beds, green-lipped mussels, bryozoa, sponges, sea anemones and tubeworm mounds; and this amounts to a *significant* adverse environmental effect.<sup>63</sup> Similar effects have resulted from Danish seining<sup>64</sup> and shellfish dredging.<sup>65</sup> However, shellfish dredging activities impact additional taxa (e.g. scallops and rocky reefs).<sup>66</sup>
- 7.28 In Dr Kelly’s opinion, area-based protections are the most appropriate method for managing adverse effects of bottom contact fishing activities on biodiversity values in the Waikato CMA.<sup>67</sup> In his evidence, Dr Kelly reviews possible restrictions that were developed (but not implemented) by FNZ and explained why he supports ‘Option 4’.<sup>68</sup> In his opinion, this option would provide the highest protection for indigenous biodiversity in the Waikato CMA and potentially reduce impacts on localised scallop habitat.<sup>69</sup>
- 7.29 EDS notes that the Proposed Plan itself acknowledges that bottom contact fishing activities have already generated adverse effects on significant

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<sup>58</sup> At [9.6], [9.7], [9.9]-[9.13] and Appendix 2 to Dr Kelly’s primary evidence.

<sup>59</sup> At [9.12], see table 2.

<sup>60</sup> At [9.13].

<sup>61</sup> Statement of primary evidence of Sydney Lorraine Curtis-Wilson on behalf of New Zealand Sport Fishing Council (marine science and indigenous biodiversity), dated 11 November 2024.

<sup>62</sup> At [10.9].

<sup>63</sup> At [10.10]-[10.11].

<sup>64</sup> At [10.16].

<sup>65</sup> At [10.29].

<sup>66</sup> At [10.29].

<sup>67</sup> At [9.9].

<sup>68</sup> At [9.11].

<sup>69</sup> At [9.11] - [9.12].

biodiversity values in parts of the CMA and additional protections are required to enable impacted habitats to recover.

- 7.30 For example, the description of values for SIBA-A (A15) Fantail Bay to Waikawau Bay states “*these features have been impacted by scallop dredging and trawling, but biogenic habitats are expected to recover if ongoing bottom disturbance is avoided*”.<sup>70</sup> Part of this SIBA-A area overlaps with a future High Protection Area (**HPA**) and Seabed Protection Area (**SPA**) under the HG Bill (which is yet to be passed into law). However, parts of this SIBA-A area are not within existing Danish seine and trawl closures. Therefore, the Proposed Plan would leave it exposed to ongoing impacts from bottom contact fishing activities.
- 7.31 Mr Serjeant in his evidence has recommended the inclusion of a disturbance control to address adverse effects of bottom contact fishing.<sup>71</sup> The Benthic Disturbance Rule put forward by EDS seeks to implement ‘Option 4’ of the benthic restrictions developed by FNZ as supported by Dr Kelly. In his planning evidence, Mr Serjeant has addressed why fishing controls are appropriate and necessary to give effect to higher order planning documents. This rule is addressed further below under the DD section.
- 7.32 Comments included in the s 42 Reports suggest the reporting planner for the ECO Chapter, Ms Palmer, agrees that a disturbance rule may be appropriate. Specifically, the s 42A Report states:<sup>72</sup>

I consider that inclusion of such a no take rule would frustrate the implementation of biosecurity and aquaculture rules, **however I consider a disturbance rule may be more appropriate subject to further evaluation by relevant s 42A authors.**

- 7.33 Therefore, EDS finds it disappointing that no analysis relating to a new DD rule, or EDS’s proposed Benthic Disturbance Rule, could be identified in the s 42A Reports (addendums). The benefits of such a rule must be taken into account in the s 32 assessment of this rule. Particularly as the proposed rule is necessary to give effect to the NZCPS (policy 11) and the provisions of the RPS in relation to indigenous biodiversity and marine protection.

#### Rule required to protect SIBA-A values from effects of fishing

- 7.34 In his evidence, Dr Kelly identifies important values of reef ecosystems and describes indirect effects of fishing on such ecosystems in relation to the Waikato CMA. Key aspects are reproduced below:

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<sup>70</sup> Proposed Plan, schedule 7A.

<sup>71</sup> At [9.11].

<sup>72</sup> Section 42 Addendum Report (ECO) at [11.10.2].

[5.15] Macro-scale habitat and diversity values are therefore high in reefs. Diversity values are much greater, once reef microhabitats are taken into account. For instance, Anderson et al. (2005) obtained 351 taxa from 296 genera, 213 families, 72 orders, 26 classes and 15 phyla from the holdfasts of 80 kelp, *Ecklonia radiata* specimens collected from sites in northeastern (NE) New Zealand, including the Te Whanganui-o-Hei Marine Reserve.

[5.16] Snapper and crayfish are key predators that have a major influence on reef habitats and communities. Fishing has reduced the population sizes of snapper and crayfish in the Hauraki Gulf, including the Waikato Region (Hauraki Gulf Forum 2023). As a consequence of decreased snapper and crayfish predation, numbers of kina (the urchin *Evechinus chloroticus*) have increased on inshore reefs. Kina grazing has resulted in the loss of large areas of kelp forest (particularly *Ecklonia radiata*), with corresponding increases in reef (or urchin) barrens (Babcock et al. 1999, Shears & Babcock 2002).

[5.17] The above example highlights that actions that affect one (or more) species, such as the removal of key predators, can produce a cascade of significant, unforeseen effects due to connections and interactions among species. In the example provided, the direct effects of fishing were reductions in the populations of snapper and crayfish. That produced a secondary effect of increasing population sizes of kina, which had a tertiary effect of reducing the extent of kelp forests. Finally, that leads to a fourth-level effect of reducing the populations of hundreds of indigenous species living in kelp holdfasts.

- 7.35 Ms Curtis-Wilson addresses the *direct effects* of commercial and recreational line fishing in her evidence.<sup>73</sup> In her opinion, hook and line fishing methods “are among the least impactful fishing methods behind hand gathering, due to selectivity and reduced bycatch”.<sup>74</sup> However, Ms Curtis-Wilson’s evidence does not explicitly address cumulative effects of hook and line fishing on ecosystems in the Waikato CMA. Based on the JWS ECO (above) it appears that the experts agree fishing activities that target large reef predator species (e.g. crayfish and snapper) are having significant impacts on ecosystems in the Waikato CMA.
- 7.36 Given the above, EDS submits that there is sufficient evidence to enable the Council to implement fishing controls to protect biodiversity and ecosystem values in the Waikato CMA.
- 7.37 As a starting point, EDS notes that Schedule 7 of the Proposed Plan identifies areas with significant values that the experts have agreed are sensitive to indirect fishing impacts (e.g. reef habitats and ecosystems from overfishing of snapper and crayfish). For example:
- (a) SIBA-A (A19) Mercury Islands: contains “*notable rocky reef systems that support a diversity of reef fish*”;

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<sup>73</sup> For example at [5.8] and [11.1]-[11.11]-[11.13].

<sup>74</sup> At [11.13].

- (b) SIBA-A (A18) Repanga / Cuvier Island: contains “*notable high diversity rocky reef systems*”;
- (c) SIBA-A (A23) Black Rocks, Flat Island, Ohinaiti Island and Ohinau Island group and surrounds: contains subtidal rocky reef and seagrass which supports a high diversity of fish, macroalgae and marine invertebrates;
- (d) SIBA-A (A30) Alderman Islands: contains high diversity of macroalgae beds, marine fish, invertebrates, and rhodolith beds; and
- (e) SIBA-A (A35) Slipper Island (Whakahau), Pauanui/Penguin Island and Rabbit Island: contains extensive shallow reef system with shellfish beds, kelp forests and subtidal seagrass.

- 7.38 The above examples are not intended to provide a comprehensive list but to demonstrate that the Proposed Plan already identifies discrete areas with significant biodiversity and ecosystem values that are vulnerable to overharvesting of large snapper and crayfish (e.g. rocky reef ecosystems with kelp forests).
- 7.39 It is relevant that the above high value areas are not subject to existing or anticipated area-based protections under the Fisheries Act or other legislation.<sup>75</sup> Consequently, the Proposed Plan would enable (by omitting any fishing controls) potentially *significant* adverse effects on the *significant* values in these areas.
- 7.40 EDS submits that failing to provide adequate protection for significant indigenous biodiversity and ecosystem values in SIBA-A areas is inconsistent with the Council’s functions under s 30 of the Act as well as the avoid directives in policy 11(a) of the NZCPS and relevant provisions of the RPS. It is also inconsistent with the proposed policies in the Plan that seek to implement these higher order directives (e.g. ECO-P1).
- 7.41 In EDS’s submission, the Plan must include controls that protect significant biodiversity and ecosystems from potentially significant adverse effects to achieve consistency with policy 11 (a). Given there is evidence that overfishing of large predator species, such as snapper and crayfish, has resulted in adverse effects (e.g. urchin barrens) in the east coast CMA, it is appropriate and necessary to restrict fishing in these areas. As already addressed in relation to the Benthic Disturbance Rule (above) destructive bottom contact fishing activities should also be prohibited in these areas.

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<sup>75</sup> Anticipated changes to the regulatory framework are not (we say) a relevant RM consideration.

- 7.42 Mr Serjeant in his evidence has indicated that a no-take rule could supplement a benthic disturbance restriction based on his review of the Council's s 32 report and Dr Kelly's evidence.<sup>76</sup> The specific provision is addressed further below in the ECO section.

#### Summary of EDS's position

- 7.43 EDS's evidence addresses why fishing controls are necessary and appropriate for managing adverse effects of fishing on indigenous biodiversity values in specific parts of the Waikato CMA. In Mr Serjeant's opinion, the (alleged) "*lack of evidence is not a barrier*" and "*adopting a precautionary approach would justify acting in the face of uncertain or incomplete information when it is necessary and appropriate*".<sup>77</sup>
- 7.44 Mr Serjeant's position is supported by policy 3 of the NZCPS, which requires that a precautionary approach is adopted where the effects of an activity are uncertain, unknown or little understood, but potentially significantly adverse. In terms of implementation, the *NZCPS 2010 Guidance Note* states:<sup>78</sup>

Part of a precautionary approach is where circumstances warrant it, to ensure environmental harm is avoided, not merely remedied and/or mitigated, to the extent possible. If there is uncertainty regarding possible environmental damage arising out of a proposed course of action, then risk avoidance or management becomes appropriate.

...

Where the precautionary approach is relevant, this assessment can involve seeking sufficient evidence that an activity will not create significant adverse effects, despite there being scientific uncertainty, before the activity or modified activity may be approved.

- 7.45 A precautionary approach requires that harmful fishing activities are controlled until there is sufficient evidence that they are *not* creating significant adverse effects. Therefore, limited weight should be given to the reporting planner's desire to wait until there is a "*complete dataset*" that is more "*comparable*" to other regions. If anything, uncertain data points in favour of implementing controls until more information is available. Moreover, there is sufficient evidence as to the significant effects presently being sustained by significant, rare and vulnerable ecosystems and habitat from fishing take methods.
- 7.46 EDS submits that the omission of appropriate fishing controls is inconsistent with the Council's functions under s 30 of the Act (addressed above) and fails to give effect to relevant higher order directives in policy 11 of the NZCPS, the

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<sup>76</sup> Statement of primary evidence of David Serjeant on behalf of EDS, 8 November 2024, at [9.11].

<sup>77</sup> Statement of primary evidence of David Serjeant on behalf of EDS, 8 November 2024, at [9.10].

<sup>78</sup> Department of Conservation Guidance Note "Policy 3: Precautionary approach" at 6-7.

HGMPA, and the RPS. It is not inconsistent with the existing Fisheries Act regime and is necessary to fulfil Council's s 30 functions.

*Uncertainty in the regulatory framework favours inclusion of fishing controls*

- 7.47 The s 42A Reports point to uncertainty in the regulatory framework as supporting the deferral of fishing controls. EDS disagrees.
- 7.48 To the contrary, EDS submits that uncertainty surrounding aspects of the regulatory framework elevate the stakes and make it critical that fishing controls are included in the Proposed Plan, not left to an indeterminate time in the future. The degree of uncertainty is overstated. Sufficient information is available to demonstrate ecosystem and systemic failure with fishing methods being a material contributor. Delaying implementation of controls on fishing to some unspecified future date is unjustified. The *Motiti* decision and related case law on the Regional Council's duties has been common knowledge for some time, and any failure by Council to gather relevant data does not justify continued delay in meeting statutory requirements.

HG Bill

- 7.49 Relevant aspects of the HG Bill are described in the s 42A Reports and are not reproduced here.<sup>79</sup> However, EDS wishes to briefly comment on three points:
- (a) As at the date of writing, the HG Bill is awaiting its second reading in the House. It has not yet passed into law and it is unclear when this may occur.
  - (b) Notwithstanding the above, the HG Bill proposes to establish six new marine protected areas within the Waikato CMA, including four HPAs at Cape Colville, Alderman Islands (North and South), southern Whakahau (Slipper Island), one SPA at Cape Colville and an extension to the marine reserve at Whanganui A Hei (Cathedral Cove). These areas are mapped as SIBA-A areas in Schedule 7A of the Plan.<sup>80</sup>
  - (c) The HG Bill proposes to prohibit certain fishing activities (e.g. bottom trawling and Danish seining) in SPAs<sup>81</sup> and a wider range of activities including commercial and recreational fishing in HPAs.<sup>82</sup>
- 7.50 EDS acknowledges that there is some uncertainty as to when the HG Bill will pass into law. However, that does not justify taking no action to protect vulnerable marine ecosystems from fishing impacts. Unless and until the draft

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<sup>79</sup> General and whole of plan s 42A Report at [225].

<sup>80</sup> These are SIBA-A A16, A17, A26, A31, A32.

<sup>81</sup> HG Bill, cl 14(2)(c) to (e). Some exceptions apply in relation to specific areas that are not within the Waikato CMA.

<sup>82</sup> HG Bill, cl 18(2)(a).

legislation is passed into law, the Council must (as noted) implement its statutory functions.

- 7.51 EDS submits that a better approach would be to include fishing controls in the Proposed Plan with the ability to revisit controls in the event that the HG Bill becomes law, forming part of the methods. This approach would provide interim protection for vulnerable ecosystems in identified SIBA-A areas until the HG Bill is passed into law, including under any transitional provisions that apply.
- 7.52 The HG Bill does not provide protection for the vast majority of vulnerable habitats and ecosystems in the Waikato CMA. Moreover, the HG Bill does not include any statutory levers to enable additional protected areas to be established in the future. Therefore, it is essential that the Proposed Plan includes controls to protect biodiversity and ecosystem values that are sensitive to fishing impacts in the Waikato CMA. The Council's function cannot be delayed or deferred, in light of the available evidence on significant effects.

#### MPI bottom fishing access areas / trawl corridors

- 7.53 The s 42A Reports refer to consultation undertaken by FNZ in November 2023 relating to the development of options for potential bottom fishing access zones (trawl corridors) in the Hauraki Gulf.<sup>83</sup> Four options were released for public consultation under the Fisheries Act framework.
- 7.54 EDS considers it is relevant that:
- (a) The options for potential trawl corridors were announced in August 2023 by the previous Government.
  - (b) Based on publicly available information, no decisions have been made by the Minister for Oceans and Fisheries to progress or adopt any of the options consulted on.
- 7.55 Given the above, it is uncertain whether any of the options will be implemented under the Fisheries Act. Therefore, EDS does not accept that it would be "*premature*" to implement controls to protect vulnerable benthic ecosystem values from harmful fishing methods through the Proposed Plan. For reasons already addressed, EDS submits that appropriate benthic disturbance and other protective controls must be implemented without delay, with scope for review at a future date if and when legislative changes are made.

#### RMA Bill

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<sup>83</sup> General and whole of plan s 42A Report at [229].

7.56 The RMA Bill (as introduced) includes a suite of proposals relating to “*rules that control fishing*” (i.e. defined as any rule that directly controls fishing).<sup>84</sup> Key proposals include:

- (a) A regional council must not include a rule that controls fishing in a regional coastal plan unless it was notified or (subsequently) it is within the scope of the notified rule (i.e. it applies to the same area).<sup>85</sup>
- (b) A regional council must complete a fishing impact assessment<sup>86</sup> and obtain concurrence of the Director-General of MPI *before* notifying a rule that controls fishing.<sup>87</sup> The Director-General must undertake additional steps (e.g. consult with relevant parties) and has an ability to veto fishing rules by refusing to concur.<sup>88</sup>
- (c) A regional council must not accept submissions unless they are within scope of a notified rule that controls fishing. Specifically, the RMA Bill states that a submission cannot seek to enlarge the area to which the rule applies or add any other area.<sup>89</sup>

7.57 The reporting planner refers to the RMA Bill and states:<sup>90</sup>

I consider that it could be contrary to impending statute to include fishing control rules in the proposed plan given the proposed direction in the Bill on this matter, noting that no such rules were included in the notified plan.

7.58 EDS submits that the reporting planner’s concerns relating to the RMA Bill are not relevant considerations for the Hearing Panel because:

- (a) The RMA Bill does not represent the current law. The Bill remains before the Select Committee and amendments could be made to the “*rules that control fishing*” provisions before it is enacted. Indeed, the provisions could be entirely withdrawn.
- (b) Even if the RMA Bill is enacted (as introduced), it does not preclude the Hearing Panel from making decisions to include fishing controls in the Proposed Plan. The Proposed Plan was notified before the Bill was introduced and none of the relevant provisions have retrospective effect. The same position applies to the operative Bay of Plenty and Northland Regional Coastal provisions.

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<sup>84</sup> The Bill, s 5 which proposes to insert new s 2B into the RMA.

<sup>85</sup> The Bill, cl 16 which proposes to insert new s 71(2) into the RMA.

<sup>86</sup> The Bill, cl 70(1) which proposes to insert new cl 4B(1) in the RMA.

<sup>87</sup> The Bill, cl 70(1) which proposes to insert new cl 4B(1)(b) in the RMA.

<sup>88</sup> The Bill, cl 70(1) which proposes to insert new cl 4B(2)-(3).

<sup>89</sup> The Bill, cl 70(1) which proposes to insert new cl 6B.

<sup>90</sup> General and whole of plan s 42A Report addendum at [35].



- (c) The RMA Bill does not preclude the Hearing Panel from including ‘non-rule’ related provisions. For instance, objectives, policies and methods to identify areas that are vulnerable to fishing impacts. This is relevant to EDS’s relief on ECO-P12 and ECO-M1 (addressed below).

7.59 EDS acknowledges that proposals in the RMA Bill may (if enacted) significantly constrain the ability of a regional council to include fishing controls in its coastal plan.

*EDS’s requested fishing controls do not contravene s 30(2) of the Act*

7.60 These submissions have already confirmed that a regional coastal plan can include fishing controls to protect indigenous biodiversity so long as the controls are not for a “*Fisheries Act purpose*” (i.e. restriction in s 30(2)).

7.61 The reporting planner has recommended that EDS’s proposed Benthic Disturbance Rule be rejected because it applies a “*large-scale control*” that would contravene s 30(2) of the Act.<sup>91</sup> This is incorrect: the area identified is justified by relevant expert evidence and spatially linked to protection of the high and vulnerable values present. This is an evidence-based approach. A ‘large’ area is justified, to protect the values present.

7.62 In EDS’s submission, it is important that the *Motiti* indicia are not considered in isolation. For instance, by adopting a narrow focus on ‘scale’ without adequately considering the ‘type’ or ‘necessity’ of control.

7.63 EDS submits that the Proposed Benthic Disturbance Rule would not contravene s 30(2) of the Act because it:

- (a) Applies to a relatively large area of the eastern Waikato CMA out of *necessity*. The ecology evidence of Dr Kelly and Ms Curtis-Wilson confirms that known and probable vulnerable taxa, habitat and ecosystem values are widely distributed across the CMA; and that these values are particularly sensitive to ongoing bottom contact fishing activities. Dr Kelly in his evidence has indicated support for the Benthic Disturbance Rule on the basis that additional controls are necessary and this provides for a high level of protection for vulnerable biodiversity in the Waikato CMA.
- (b) The *type* of control protects biodiversity and ecosystem values from the highest risk fishing activities (i.e. bottom contact fishing methods). The control does not set catch limits or allocate fisheries resources.

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<sup>91</sup> General and whole of plan addendum at [36].

- (c) The *scope* of control is aimed at protecting key biodiversity and ecosystem values in areas vulnerable to bottom contact fishing methods.
- (d) The *scale* of control reflects the high degree of spatial overlap between known and probable vulnerable biogenic habitat and bottom contact fishing activities on the east coast of the Waikato CMA. It is not a blanket restriction and specified 'exemption areas' have been included to enable ongoing bottom contact fishing in discrete locations where they are less likely to generate adverse impacts on biodiversity.
- (e) The rule has been carefully designed to cover *locations* where vulnerable biodiversity values are exposed to bottom contact fishing activities. It includes significant indigenous biodiversity values (e.g. SIBA-A and SIBA-B) that are not adequately protected by existing controls on trawl, dredge or Danish seine methods.

7.64 In short, EDS submits that the proposed Benthic Disturbance Rule (DD-X) covers a relatively large area of the east coast CMA out of *necessity*. The proposed rule protects vulnerable biodiversity and habitat values from the most harmful *type* of fishing activities that are known to result in significant adverse effects. It covers *locations* where vulnerable and significant values are exposed to impacts of ongoing bottom contact fishing activities. Therefore, it would not contravene s 30(2) of the Fisheries Act.

7.65 For completeness, EDS submits that the proposed High Protection Rule applying to SIBA-A areas would not contravene s 30(2) of the Act. This is because the rule is:

- (a) *Necessary* to protect areas with significant biodiversity and ecosystem values from adverse effects of fishing. It is relevant that EDS has proposed a rule that avoids unnecessary regulatory overlap. For instance, proposed ECO-RX excludes existing marine reserves.
- (b) The *type* of control is aimed at prohibiting certain activities (including fishing) that generate adverse effects on ecosystem values. It does not set catch limits or allocate fisheries resources among fishing sectors.
- (c) The *scope* of control does not discriminate among forms or species within the SIBA-A areas it applies to.
- (d) The *scale* of control is limited to discrete and identified areas with significant values that require additional protection from adverse fishing effects.

- (e) The control applies to specific *locations* with the most significant identified biodiversity values (i.e. SIBA-A or policy 11(a) values).

## **8. IM – INTEGRATED MANAGEMENT | WHAKAHAERE RAWA PĀHEKOHEKO**

- 8.1 EDS seeks to amend objective IM-O1 to ensure it gives effect to the RPS and NZCPS. Specifically, EDS seeks to broaden the scope of this objective by including explicit reference to terrestrial environments as follows:

### **IM-O1 Integrated management of resources**

Resources and activities in the coastal environment are managed in an integrated manner that recognises the inter-relationships between resources and people- and between terrestrial and coastal environments.

- 8.2 Mr Serjeant in his evidence identifies the key provisions relating to integrated management in the RPS and NZCPS.<sup>92</sup> In Mr Serjeant’s opinion, the objectives in the IM Chapter of the Proposed Plan do not appropriately address the integration of land and sea and this is a “gap” in the Plan.<sup>93</sup>
- 8.3 The reporting planner has recommended rejecting Mr Serjeant’s addition. A key reason for this is that it:<sup>94</sup>

extends beyond the scope of what can be managed in the proposed plan which is confined to managing activities in the coastal marine area

- 8.4 EDS submits that the concept of integrated management requires the Proposed Plan to adopt a wider lens that provides for consideration of activities that affect *or could affect* the coastal environment. This is explicitly directed by policy 4 of the NZCPS.
- 8.5 In terms of implementation, it does not mean that the Proposed Plan must directly manage activities in terrestrial environments. It simply recognises that upstream activities are relevant considerations when setting limits and associated controls (e.g. water quality limits, consent conditions) applying to the CMA. This reflects the CMA’s function as the receiving environment.
- 8.6 Mr Serjeant’s evidence is that consideration of upstream activities is particularly important in the Waikato context because it relates to sedimentation effects and water quality in the Firth of Thames.<sup>95</sup>

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<sup>92</sup> Statement of primary evidence of David Serjeant on behalf of EDS, 8 November 2024 at [4.4] to [4.13].

<sup>93</sup> Statement of primary evidence of David Serjeant on behalf of EDS, 8 November 2024 at [4.13].

<sup>94</sup> Integrated management s 42A Report addendum at [15].

<sup>95</sup> Statement of primary evidence of David Serjeant on behalf of EDS, 8 November 2024 at [4.7]; Statement of rebuttal evidence of David Serjeant on behalf of EDS, 10 February 2025 at [2.26]-[2.27].

- 8.7 Therefore, EDS submits that the amendments to IM-O1 are necessary and appropriate to give effect to the RPS, HGMPA and NZCPS.

**9. ECO - ECOSYSTEMS AND INDIGENOUS BIODIVERSITY | TE MAURI O TE TAIAO ME TE RERENGA RAUROI**

- 9.1 EDS seeks a suite of amendments to the ECO provisions to provide for appropriate protection of indigenous biodiversity. These include:

- (a) Ensuring a narrow gateway and appropriate effects management hierarchy through amendments to ECO-P4 and ECO-P5;
- (b) Retention of policy ECO-P12 and method ECO-M1 (with some amendments for clarity);
- (c) New High Protection Rule applying to SIBA-A areas (ECO-X); and
- (d) Identification of West Coast Marine Mammal Sanctuary as SIBA-A.

*Consenting pathway for impacts on significant biodiversity values in ECO-P4 / ECO-P5*

- 9.2 EDS's submission raised concerns relating to policies ECO-P4 and ECO-P5 (as notified). A key concern for EDS was that these policies could undermine the values identified in ECO-P1 and ECO-P2 and thus not 'avoid' adverse effects on significant indigenous biodiversity as required by policy 11 of the NZCPS and the RPS.

ECO-P4

- 9.3 This policy establishes a 'gateway' test for specified use and development that may impact significant indigenous biodiversity values (as identified in ECO-P1 and ECO-P2).
- 9.4 The notified version of ECO-P4 received considerable attention in evidence at expert conferencing,<sup>96</sup> with many submitters raising concerns about the perceived impracticality of requiring infrastructure providers to satisfy a "*functional and operational need*" test before locating in a SIBA.<sup>97</sup>
- 9.5 The reporting planner has recommended amendments to key aspects of ECO-P4. In summary, the changes would:
- (a) Apply a 'functional need' test to construction of new regionally significant infrastructure (**RSI**) in SIBA-A areas or where Threatened or At Risk species could be adversely affected;

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<sup>96</sup> JWS Planning at [3.1.2.3].

<sup>97</sup> S 42A Report ECO addendum at [41].

- (b) Apply an 'operational need' test to specified use and development in SIBA-A or SIBA-B areas, including (but not limited to):
  - (i) Construction of infrastructure comprising the National Grid;
  - (ii) Activities relating to existing RSI.
- (c) In either case, it would be necessary to show that:
  - (i) "*There are no practicable alternative land-based locations*"; and
  - (ii) The avoidance of effects required by either ECO-P1 or ECO-P2 (as applicable) is not possible.

#### EDS's remaining concerns

- 9.6 EDS generally supports the changes to ECO-P4 recommended by the reporting planner. However, EDS considers further amendments would achieve better consistency with the relevant avoid directives in the NZCPS and RPS. For clarity, EDS wishes to emphasise that its support for ECO-P4 is conditional on appropriate changes being made to ECO-P5 given the two policies work together.
- 9.7 EDS is primarily concerned with the potential for ECO-P4 to enable use and development within SIBA areas despite other locations in the CMA being more appropriate.
- 9.8 Mr Serjeant in his rebuttal evidence has raised concerns relating to the 'alternatives' criterion in ECO-P4. In his opinion, this does not adequately recognise the need to locate in *appropriate* parts of the CMA.<sup>98</sup> Mr Serjeant recommends that this limb be amended to clarify that the alternatives assessment requires consideration of areas outside of SIBA.<sup>99</sup>
- 9.9 EDS submits that the alternatives criterion should be amended to clarify that it is not appropriate to locate in SIBA areas if other areas *in the CMA* are more suitable. In other words, use and development in SIBA areas should not be enabled if there is no operational or functional need to locate in the SIBA.

#### ECO-P5

- 9.10 This policy establishes an effects management hierarchy for specified use and development that passes the gateway in ECO-P4. In short, decision-makers must ensure that adverse effects on ECO-P1 and ECO-P2 values are avoided,

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<sup>98</sup> Statement of rebuttal evidence of David Serjeant on behalf of EDS, 10 February 2025 at [2.1]-[2.10].

<sup>99</sup> Statement of rebuttal evidence of David Serjeant on behalf of EDS, 10 February 2025 at [2.7].

then remedied, then mitigated, to the extent practicable. Residual effects triggering the relevant avoid directives must either:

- (a) Be avoided; or
- (b) Be experienced over a short-term; or
- (c) Be acceptable given the positive effects of the proposal on indigenous biodiversity values; or
- (d) Can be offset in a manner consistent with specified principles in Schedule 7C of the Proposed Plan; or
- (e) In exceptional circumstances, financial contributions may be considered.

#### EDS's remaining concerns – temporary effects

9.11 Policy ECO-P5 enables residual effects on significant indigenous biodiversity values of any magnitude if they occur “*over a short-term*”.

9.12 In *Port Otago*, the Supreme Court endorsed the concept of material harm in the context of the avoidance directives in the NZCPS:

[65] **This Court in *Trans-Tasman* said that the standard was protection from material harm, albeit recognising that temporary harm can be material.** Although in a different context, the comments are nonetheless applicable to the NZCPS. It is clear from *Trans-Tasman* that the concepts of mitigation and remedy may serve to meet the “avoid” standard by bringing the level of harm down so that material harm is avoided.

9.13 In *Trans-Tasman*, the Supreme Court observed that “*the assessment of whether there is material harm requires qualitative, temporal, quantitative and spatial aspects to be weighed*”.<sup>100</sup> In EDS's submission, proposed ECO-P5 does not provide for temporary effects to be *weighed*. It simply applies a blanket presumption that any temporary effects would be appropriate.

9.14 Mr Serjeant in his evidence has addressed why this approach is not appropriate and recommended the criterion be deleted.<sup>101</sup> EDS submits that this is necessary to give effect to policy 11 of the NZCPS and the RPS.

#### EDS's remaining concerns – offsetting

9.15 It is well established that offsetting *may* be used to reduce effects to an appropriate level for the purposes of policy 11 of the NZCPS.<sup>102</sup> However,

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<sup>100</sup> *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127 at [3].

<sup>101</sup> Statement of primary evidence of David Serjeant on behalf of EDS, 8 November 2024 at [5.18] and Statement of rebuttal evidence of David Serjeant on behalf of EDS, 10 February 2025 at [2.11]-[2.12].

<sup>102</sup> *East-West Link* decision at [176].

offsetting is only appropriate if it will be effectively deployed. Consequently, whether any given offset is consistent with avoid directives “*is a question of fact and degree measured against the terms of the relevant avoid policy*”.<sup>103</sup>

- 9.16 EDS has concerns about the potential for offsetting to be effectively used in the CMA. These concerns are reflected in the ECO JWS, which states:<sup>104</sup>

There are limited or no examples of offsetting within the CMA to date in New Zealand, although the ecologists consider that it is an ‘aspirational’ practice, but it is challenging.

- 9.17 This point was raised in Mr Simon West’s ecology evidence on behalf of marina interests. He indicated “*in a number of marine environments there are currently no practical ways to conduct enhancement of habitats*” and raised concerns about “*how to determine if and when ecological gain has been achieved*”.<sup>105</sup>
- 9.18 Dr Kelly’s evidence is that there has been no natural recovery of mussel beds in the Firth of Thames over the past 50 years since dredging ceased in this area.<sup>106</sup> He observes in his evidence that “*intensive restoration efforts*” have not worked despite best efforts of community organisations, researchers, tangata whenua and practitioners.<sup>107</sup> In his opinion, given there is uncertainty as to the effectiveness of restoration efforts in the CMA, the inclusion of an offsetting criterion in ECO-P5 is not appropriate.<sup>108</sup> Mr Serjeant has recommended the criterion be deleted in reliance on Dr Kelly’s evidence.
- 9.19 Given the above, EDS requests that the offsetting criterion be deleted from ECO-P5. It is relevant that the offsetting principles have been adopted from the NPSIB which were not designed for the *coastal environment*. If the criterion is retained (which EDS does not support) it should be amended to clarify that offsetting can only be considered if effects “*will*” not “*can*” be reduced. This would provide for greater certainty that offsets will have the desired outcome. But it does not address the practical likelihood of offset failure.

#### EDS’s remaining concerns – financial contributions

- 9.20 ECO-P5 provides for consideration of financial contributions to address residual effects.

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<sup>103</sup> Ibid.

<sup>104</sup> JWS ECO at [3.3.1.1].

<sup>105</sup> Statement of primary evidence of Simon Andrew West on behalf of Whangamata Marina Society Inc, Whitianga Marina Society Inc and Tairua Marine Ltd (marine ecology expertise) at [2.11] to [2.12].

<sup>106</sup> Statement of primary evidence of Shane Kelly on behalf of EDS, 8 November 2024, at [5.28].

<sup>107</sup> Ibid.

<sup>108</sup> Ibid.

- 9.21 As outlined in Mr Serjeant’s evidence, the NZCPS does not explicitly provide for financial contributions as a way to address residual effects otherwise engaging the avoid directives in policy 11.<sup>109</sup>
- 9.22 In EDS’s submission, providing for financial contributions threatens to undermine the avoidance directives in policy 11 of the NZCPS as reflected in ECO-P1 and ECO-P2. The approach is particularly problematic because it is difficult (if not impossible) to quantify environmental values in monetary terms.
- 9.23 Mr Serjeant in his evidence addresses why the inclusion of a ‘financial contribution’ criterion in ECO-P5 is inappropriate.<sup>110</sup> In his opinion, the principles in Schedule 7C do not provide for an “*unfettered financial contribution in the sense of ‘writing out a cheque’*” and this criterion should be deleted from ECO-P5.<sup>111</sup> In EDS’s submission, the deletion of ‘financial contributions’ is necessary to give effect to the NZCPS and RPS.

#### *Retention of amended ECO-P12 and ECO-M1*

- 9.24 EDS’s submission raised concerns about the adequacy of protection for indigenous biodiversity located outside of SIBA areas, including highly mobile species.<sup>112</sup> As relevant relief, EDS seeks to retain proposed policy ECO-P12 and associated method ECO-M1 with some further amendments for clarity.

#### ECO-P12

- 9.25 This policy (as notified) directed the avoidance of activities that disturb the foreshore and seabed or adversely affect indigenous biodiversity values.

#### ECO-M1

- 9.26 This method (as notified) directed the Council to identify ecologically significant marine areas vulnerable to disturbance where there is sufficient information to support their protection.

#### EDS’s remaining concerns

- 9.27 The reporting planner has recommended the deletion of these provisions on the basis that it would be more appropriate to develop the policy and rule framework when they are scheduled via a future Schedule 1 RMA process.<sup>113</sup>
- 9.28 EDS strongly opposes the deletion of ECO-P12 and ECO-M1 from the Plan. Particularly given the reporting planner has recommended rejecting the

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<sup>109</sup> Statement of rebuttal evidence of David Serjeant on behalf of EDS, 10 February 2025 at [2.14].

<sup>110</sup> Statement of rebuttal evidence of David Serjeant on behalf of EDS, 10 February 2025 at [2.13]-[2.14].

<sup>111</sup> Statement of primary evidence of David Serjeant on behalf of EDS, 8 November 2024, at [5.20].

<sup>112</sup> At [25].

<sup>113</sup> S 42A Report ECO at [409]-[413].



inclusion of fishing controls. For reasons already addressed in these submissions, EDS considers there is no reason to delay implementing appropriate controls to protect areas with values that are vulnerable to potentially significant adverse effects from fishing activities.

- 9.29 Dr Kelly in his evidence disagrees with the reporting planner's recommendation. In his opinion, ECO-P12 provides for a high level of protection for areas outside of SIBA, while ECO-M1 provides for those areas to be identified. He recommends that both provisions be retained.<sup>114</sup>
- 9.30 Dr Kelly has recommended some amendments to ECO-M1 to provide for greater clarity and support effective implementation.<sup>115</sup> Specifically, he recommends that ECO-M1:
- (a) Provides for the use of ecologically relevant information held by external organisations and individuals; and
  - (b) Permits applications to be made by external parties.
- 9.31 Dr Kelly has also recommended the deletion of "*vulnerable to disturbance activities*" from ECO-M1. In his opinion, this criterion is unhelpful and unnecessary because the relevant activities are specified in ECO-P12.<sup>116</sup> Mr Serjeant's evidence confirms this is an appropriate planning response.<sup>117</sup>
- 9.32 The reporting planner has recommended that EDS's proposed ECO-P12 and ECO-M1 be rejected. The s 42A Report states "*I consider that amending ECO-M1 ... still does not provide enough clarity in demonstrating how these identified areas are different from SIBA*".<sup>118</sup>
- 9.33 With respect, EDS submits that this overlooks the purpose of ECO-P12 and ECO-M1, which is to protect areas with high values that are vulnerable to disturbance and other activities. As previously addressed, EDS considers there is already sufficient information available to implement necessary controls to protect areas vulnerable to bottom contact fishing and other potentially significant adverse effects of fishing. These controls could apply to SIBA as well as additional areas that are known to host vulnerable biogenic habitat.
- 9.34 The Proposed Plan (as notified) fails to adequately protect indigenous biodiversity in the CMA from potentially significant adverse effects. Deleting ECO-P12 and ECO-M1 would widen this gap rather than resolve it. EDS submits that this approach is not consistent with policy 11 of the NZCPS, the HGMPA,

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<sup>114</sup> Statement of primary evidence of Shane Kelly on behalf of EDS, 8 November 2024, at [7.19]-[7.22].

<sup>115</sup> Statement of primary evidence of Shane Kelly on behalf of EDS, 8 November 2024, at [7.22].

<sup>116</sup> Statement of primary evidence of Shane Kelly on behalf of EDS, 8 November 2024, at [7.22].

<sup>117</sup> Statement of primary evidence of David Serjeant on behalf of EDS, 8 November 2024, at [5.25].

<sup>118</sup> S 42A Report addendum ECO at [113].

or the RPS and it is necessary and appropriate for the provisions to be retained in the Plan.

*New High Protection Rule*

- 9.35 EDS seeks to include a High Protection Rule in the Plan to provide for adequate control of fishing activities and associated effects on significant indigenous biodiversity values in mapped SIBA-A areas.
- 9.36 The s 42A Reports recommend rejecting EDS's proposed High Protection Rule on the basis that:
- (a) The wording is unclear and reads as though catching, taking or harvesting of plants and/or animals is not allowed from SIBA-A but appropriate in marine reserves and areas covered by the HG Bill.
  - (b) Including the rule in the Proposed Plan would frustrate the implementation of the biosecurity and aquaculture rules.
- 9.37 The rule was not intended to create confusion. References to the HG Bill and Marine Reserves Act were included to avoid regulatory overlap. For instance, these statutes (including the HG Bill when/if enacted) already prohibit such activities and it would be redundant to include similar controls in the Proposed Plan.
- 9.38 EDS accepts alternative wording of the High Protection Rule might provide for greater clarity. For instance, the Northland Regional Plan prohibits "*the temporary or permanent damage or destruction or removal of fish, aquatic life or seaweed*" in relation to specified protection areas (refer **Attachment A**). The relevant provisions include an Advice Note, which states "*The rules in this section do not apply to aquaculture activities*".<sup>119</sup>
- 9.39 The wording in terms of no "*catching, taking or harvesting*" was designed to complement the proposed benthic disturbance control (addressed below). For example, one rule addresses the benthic disturbance effects of certain bottom contact fishing activities while the other addresses the direct and indirect effects of taking species on significant biodiversity and ecosystem values.
- 9.40 In EDS's submission, an advice note or permitted activity exemption could accompany the High Protection Rule to avoid frustrating implementation of other provisions (i.e. biosecurity and aquaculture chapters) as necessary.

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<sup>119</sup> Refer to the Northland Regional Plan, section C.1.10 Te Hā o Tangaroa Protection Areas in Attachment A.

*Identification of MMS as a SIBA-A area*

- 9.41 EDS's submission raised concerns about the adequacy of protection for aspects of biodiversity on the west coast of the Waikato CMA.<sup>120</sup>
- 9.42 Dr Kelly in his evidence has identified the existing Marine Mammal Sanctuary (**MMS**) applying to the extent of the west coast CMA.<sup>121</sup> In his opinion, the MMS meets the applicable significance criteria in the RPS (i.e. Criteria 1). Therefore, the MMS should be identified as a SIBA-A in the Proposed Plan.<sup>122</sup>
- 9.43 Ms Webb agrees that the MMS meets RPS criteria 1. However, the reporting planner has recommended against the inclusion of the MMS in Schedule 7A for the following reasons (in summary):<sup>123</sup>
- (a) It would be very restrictive given the spatial extent of the MMS;
  - (b) Protection for marine mammals is more appropriately provided for through discrete and targeted provisions in the Proposed Plan.
- 9.44 However, case-law says that the spatial extent of a significant area should not drive the activity classification.<sup>124</sup> The MMS protects the critically endangered Māui dolphin, with an estimated population of between 48 and 64 mature dolphins.<sup>125</sup> Therefore it is particularly important that stringent controls are implemented to achieve consistency with the avoid directives in policy 11(a).
- 9.45 Mr Serjeant in his rebuttal has recommended that the MMS be identified as a SIBA-A in the Plan.<sup>126</sup> In his view, this is consistent with the 'mapping approach' used to identify other areas meeting the RPS criteria in the region.<sup>127</sup> It will also ensure people using the Plan are aware of the values within the area (and any associated responsibilities).<sup>128</sup>
- 9.46 EDS submits that the MMS should be formally identified as a SIBA in Schedule 7 of the Proposed Plan. To address the concerns raised by the reporting planner regarding regulatory overlap, Mr Serjeant has suggested that a bespoke SIBA-A (MMS) category could be adopted in recognition that certain activities may be lower risk because the dolphins are highly mobile. In EDS's submission this could strike an appropriate balance and better recognise policy 11 directives. It should be assessed as part of the s 32 evaluation.

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<sup>120</sup> Statement of primary evidence of Shane Kelly on behalf of EDS, 8 November 2024, at [10].

<sup>121</sup> Statement of primary evidence of Shane Kelly on behalf of EDS, 8 November 2024, at [7.14].

<sup>122</sup> Statement of primary evidence of Shane Kelly on behalf of EDS, 8 November 2024, at [7.14].

<sup>123</sup> Section 42A Report ECO addendum at [146].

<sup>124</sup> For example, refer to *Man O' War v Auckland Council* [2017] NZCA 24 at [61]-[63] and [76].

<sup>125</sup> Department of Conservation *Māui dolphin*, available [here](#).

<sup>126</sup> Statement of rebuttal evidence of David Serjeant on behalf of EDS, 10 February 2025 at [2.28]-[2.29].

<sup>127</sup> *Ibid.*

<sup>128</sup> *Ibid.*

**10. DD – DISTURBANCES AND DEPOSITION | WHAKARARUTANGA ME NGĀ WAIPARA**

- 10.1 EDS’s submission sought additional regulatory oversight of disturbance-related activities in the Proposed Plan.
- 10.2 The reporting planner has recommended changes to certain provisions to enhance protection for SIBA-A areas. For example, by clarifying that discretionary consent is required for small quantity disturbances, deposition or dumping in a SIBA-A (DD-R20) and beach nourishment (DD-R21). EDS supports these changes.
- 10.3 However, EDS seeks further amendments to address remaining gaps in the policy and rule framework for disturbance and deposition activities. In particular:
- (a) Inclusion of appropriate controls on bottom-contact fishing methods (e.g. Benthic Disturbance Rule and associated provisions) in the Proposed Plan;
  - (b) Amendments to policy DD-P8 to protect SIBA values from potential adverse effects of reclamation;
  - (c) Amendments to the General Standards and Terms (**General Standards**) to ensure they provide adequate protection for the range of important ecosystem and biodiversity values not just select values; and
  - (d) Amendments to various policies and rules to provide for appropriate protection of SIBA-B areas.
- 10.4 In EDS’s submission, the above suite of changes is necessary to ensure the Proposed Plan provides for adequate protection of environmental values in a way that gives effect to the RPS, HGMPA, and NZCPS.

*Benthic Disturbance Rule and associated provisions*

- 10.5 As addressed earlier in these submissions, EDS seeks that the Plan include appropriate controls on benthic disturbance associated with certain bottom contact fishing activities. The legal basis for including the controls is set out above. However, additional details of the specific provisions requested by EDS is included as relevant to the DD chapter.
- 10.6 Dr Kelly in his evidence highlights the deficiencies in the Proposed Plan’s recommended disturbance provisions, which omit any controls on bottom contact fishing. For example, Dr Kelly notes that:

- (a) Bottom contact fishing methods have had, and continue to have, a significant impact on indigenous biodiversity over much of the Waikato CMA;<sup>129</sup>
  - (b) Bottom trawling has been ranked third equal of identified anthropogenic threats to New Zealand marine habitats (behind ocean acidification and increasing ocean temperatures);<sup>130</sup> and
  - (c) Bottom-contact fishing methods kill a variety of large species that grow on, or in the seabed, including at-risk coral species; injure species caught in the tow paths; and reduce habitat complexity by removing physical features such as ripples, mounds, shell and gravel.<sup>131</sup>
- 10.7 Given the above, Dr Kelly considers the lack of controls for managing adverse effects of fishing on indigenous biodiversity or habitats to be a “*major omission*” in the Plan.<sup>132</sup> In his opinion, additional controls on specific fishing activities aimed at limiting effects on indigenous biodiversity and habitats are warranted.<sup>133</sup>
- 10.8 Dr Kelly’s evidence is that area closures are the most appropriate method for managing adverse effects on indigenous biodiversity associated with bottom contact fishing.<sup>134</sup> In summary, Dr Kelly in his evidence supports a large area-based closure applying to the east coast CMA as this is predicted to cover the greatest extent of vulnerable biogenic habitat and reduce impacts on localised scallop habitat.<sup>135</sup>
- 10.9 As addressed earlier in these submissions, the area-based closure supported by Dr Kelly reflects ‘Option 4’ in the FNZ documents (which is consistent with EDS’s proposed Benthic Disturbance Rule). This option identifies three “*benthic access areas*” where bottom contact fishing can occur.
- 10.10 To provide for appropriate management of disturbance effects associated with bottom contact fishing activities, EDS seeks:
- (a) A new Benthic Disturbance Rule (DD-RX). This rule would prohibit high risk bottom contact fishing activities (i.e. dredging, bottom trawling

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<sup>129</sup> Statement of primary evidence of Shane Kelly on behalf of EDS, 8 November 2024, at [9.1].

<sup>130</sup> Statement of primary evidence of Shane Kelly on behalf of EDS, 8 November 2024, at [9.4].

<sup>131</sup> Statement of primary evidence of Shane Kelly on behalf of EDS, 8 November 2024, at [9.5]-[9.8].

<sup>132</sup> Statement of primary evidence of Shane Kelly on behalf of EDS, 8 November 2024, at [9.13].

<sup>133</sup> Ibid.

<sup>134</sup> Statement of primary evidence of Shane Kelly on behalf of EDS, 8 November 2024, at [9.9].

<sup>135</sup> Statement of primary evidence of Shane Kelly on behalf of EDS, 8 November 2024, at [9.11].

and Danish seining) in the east coast Waikato CMA except in the “*identified benthic access areas*” as shown in Dr Kelly’s evidence.<sup>136</sup>

- (b) A new schedule (DD Schedule). This schedule would include the coordinates of the three “*benthic access areas*” where bottom contact fishing activities can be undertaken on the east coast of the Waikato CMA.
- (c) New definition for “*benthic access areas*”. This definition would cross reference to the new DD Schedule to provide clarity in terms of what a “*benthic access area*” means for the purposes of the proposed Benthic Disturbance Rule.

10.11 Mr Serjeant has addressed the need for fishing controls in his evidence, including Dr Kelly’s support for ‘Option 4’ of the MPI bottom contact fishing restrictions (i.e. EDS’s Benthic Disturbance Rule).<sup>137</sup> In his opinion, the statutory and planning framework support management of bottom contact fishing impacts; and he recommends that a disturbance control be included in the Proposed Plan to address these impacts.<sup>138</sup>

10.12 The reporting planners have not recommended the inclusion of any benthic disturbance controls to address bottom contact fishing impacts. EDS finds it concerning that no clear or legally sound rationale has been provided in the DD s 42A Report to support this approach. Indeed, the DD s 42A Report includes comments that suggest the reporting planner did not evaluate the possibility of including disturbance controls relating to fishing activities. For example:

- (a) “*The plan cannot legally control fishing activity*”;<sup>139</sup>
- (b) “*I do not consider WRC is required to address Fisheries Act failures, as it is the role of the Ministry for Primary Industries as Fisheries NZ to manage fishing activity*”.<sup>140</sup>

10.13 While these comments were directed at relief requested by other submitters, EDS would like to clarify that it is not asking the Council to “*address Fisheries Act failures*”.

10.14 As outlined by Dr Kelly’s evidence, additional controls are necessary to provide for appropriate management of benthic disturbance impacts on indigenous biodiversity and ecosystem values.<sup>141</sup> The controls requested by

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<sup>136</sup> Refer to Dr Kelly’s primary evidence, figure 6, at 36. The map shows the identified benthic access areas in relation to the east coast CMA and existing controls on scallop dredging.

<sup>137</sup> Statement of primary evidence of David Serjeant on behalf of EDS, 8 November 2024, at [9.1]-[9.12].

<sup>138</sup> Statement of primary evidence of David Serjeant on behalf of EDS, 8 November 2024, at [9.12].

<sup>139</sup> Section 42A Report DD at [126].

<sup>140</sup> Section 42A Report DD at [144].

<sup>141</sup> Statement of primary evidence of Shane Kelly on behalf of EDS, 8 November 2024, at [9.11]-[9.13].

EDS have been designed to protect indigenous biodiversity (i.e. sensitive biogenic habitat and ecosystem values) from activities known to generate significant adverse effects.

- 10.15 This is squarely within the Council's functions under s 30 of the Act. In fulfilling those functions, EDS submits that the Council can consider whether there have been "*Fisheries Act failures*" as this goes to the "*necessity*" limb under the *Motiti* indicia (outlined above).

*Policy DD-P8 does not sufficiently protect SIBA values*

- 10.16 Policy DD-P8 provides for reclamation in the CMA subject to the following criteria being met:
1. There are no practicable alternative ways of providing for the activity, including locating it on land outside the coastal marine area
  2. There is a functional or operational need to be located in, or adjacent to, the coastal marine area
  3. The reclamation will provide significant regional or national benefit
- 10.17 The gateway test in policy DD-P8 operates as a carveout (or 'gate-way test') to the avoid directives in policy 11 of the NZCPS.
- 10.18 EDS does not support the recommended addition of 'operational need' in policy DD-P8 as currently framed. This is because 'operational need' is too enabling in the context of the rules framework applying to reclamation within SIBA areas. In EDS's submission, further amendments to the criteria in DD-P8 are necessary to provide adequate protection for SIBA values and give effect to higher order avoid directives in the NZCPS.
- 10.19 As previously addressed, in the recent *East-West Link* decision, the Supreme Court considered the avoid directives in policy 11 alongside policies related to infrastructure (policy 6) and reclamation (policy 10). The majority decision found the "*avoid*" directives in policy 11 were more directive than policies 6 and 10. However, policy 11 was framed in general terms and therefore included "*a margin for necessary exceptions, where in the factual context, relevant policies are not subverted and sustainable management clearly demands it*".<sup>142</sup>
- 10.20 The Court made it clear that any "*exceptions*" to the avoid directives in policy 11 would need to be narrowly construed. The Court found that a consenting pathway for infrastructure in a significant ecological area (which incorporated

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<sup>142</sup> *East-West Link* decision at [110].

an ‘operational need’ test) was appropriate in the Auckland Unitary Plan (AUP) context because:

[118] Though expressed in different ways, the relevant NZCPS and AUP policies in essence require a proponent seeking to locate significant infrastructure requiring reclamation in a SEA to show that three elements are met:

(a) it is necessary – and not just a desirable – solution by reference to functional or operational need, the regional or national benefit obtained, and the absence of any practicable alternative locations or solutions;

(b) adverse effects that cannot be avoided have been remedied or mitigated to a standard that corresponds with the significance of the environment, ecosystem and/or species that ought to have been protected to an avoid standard; and

(c) the benefits of the solution plainly justify the environmental cost of granting consent.

[119] ... For the purposes of clarity, if a proposal satisfies the requirements of this exceptions pathway in the AUP, we consider it will be a genuine exception to NZCPS Policy 11 which does not subvert its objectives; the proposal will have “thread[ed] the needle” appropriately. As stated above, this pathway is particular to the specific circumstances of this case, although particular considerations within it may be relevant in similar cases.

10.21 EDS notes that the AUP differs from the framework in the Proposed Plan in numerous respects. Of relevance, the relevant infrastructure provisions in the AUP require consideration of (among other things):<sup>143</sup>

(a) Whether the infrastructure has a functional or operational need to be located in or traverse **the particular location**;

10.22 The Supreme Court placed weight on this policy when finding that the infrastructure exception in the AUP was a “*necessary exception*”. For example, the Court observed that the policy:<sup>144</sup>

Requires consideration of a number of constraining factors before a proposal in a SEA can be supported. **Once again, and critically in terms of this appeal, they include the requirement to show functional or operational need to locate within a SEA** and that there are no practicable alternative locations.

10.23 The gateway test established by recommended DD-P8 does not explicitly require consideration of whether “*the particular location*” or the reclamation needs “*to locate within a SEA*”.

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<sup>143</sup> Refer list of objectives and policies in the AUP context in the *East-West Link* decision at [65].

<sup>144</sup> *East-West Link* decision at [67].



- 10.24 EDS finds this concerning because the proposed rule framework applying to reclamation provides for:
- (a) Minor reclamation in SIBA-B areas as a discretionary activity (DD-R27).
  - (b) Reclamation in SIBA-A areas associated with RSI, marinas, electricity generation facilities and public walking access as a non-complying activity (DD-R29). It is relevant that the scope of activities is broader than RSI so the relevant policy directives in the EI chapter relating to “*location*” may not always be engaged by a proposal.
  - (c) Reclamation in SIBA-B areas associated with any activity not provided for as a non-complying activity (DD-R30).
- 10.25 All of the above means that most reclamation activities would not require consideration of the need to locate *in a SIBA area* (unless the activity related to RSI and engaged the EI policies).
- 10.26 In EDS’s submission, policy DD-P8 is too enabling of reclamation in SIBA areas and fails to amount to a “*necessary exception*” in terms of the *East-West Link* decision.
- 10.27 EDS seeks that this policy be amended to ensure appropriate consideration is given to alternative areas *within the CMA* before enabling reclamation in SIBA areas. This would achieve better consistency with policy 11 of the NZCPS and ensure any conflict between policy 6 and policy 11 is narrowly construed. For instance, by only providing for reclamation within a SIBA-A if no alternative locations exist in the CMA, requiring functional or operational necessity (as applicable to the relevant use or development), and avoiding inappropriate locations.

*Gaps in protection of SIBA-B values*

General Standards

- 10.28 These standards apply to various permitted and controlled activities. For example, temporary military training activities (i.e. DD-R4); disturbance, deposition, disposal or dumping of small quantities of materials (i.e. DD-R20); and deposition associated with beach nourishment (i.e. DD-R21).
- 10.29 The reporting planner has recommended changes to notified Standard 1 and 2. EDS’s primary concerns relate to the deletion of “*shellfish beds*” in Standard 2. This standard directs that an activity must not result in damage or destruction of specified values including mangroves, seagrass, saltmarsh, and bird roosting and nesting areas.
- 10.30 As already addressed, the Proposed Plan must give effect to, or ‘implement’ the avoid directives in the RPS and NZCPS. EDS submits that the General

Standards are not consistent with these directives because they do not recognise or provide for adequate protection of significant biodiversity values. For instance, shellfish beds and foraging habitat within SIBA-B areas.

- 10.31 Mr Serjeant in his evidence explains how the amendment to Standard 2 (i.e. deletion of “*shellfish beds*”) shifts the focus to shoreline habitat and fails to recognise that the standards apply to deposition activities.<sup>145</sup> These activities could occur more widely in the CMA and impact on shellfish beds. In his opinion, the standards should be retained generally as notified.<sup>146</sup>
- 10.32 EDS notes that foraging habitat received considerable attention at expert conferencing. The s 42A Reports indicate that Ms Webb, Mr Townsend and Mr West all agree it is important that foraging is recognised.<sup>147</sup> Despite this, no reference to foraging habitat (which includes shellfish beds) has been included in the standards.
- 10.33 EDS queries why the General Standards do not recognise the full range of values protected by SIBA. The s 42A Reports indicate that foraging habitat was excluded from the standards because it gave rise to implementation issues. The spatial extent of SIBA is clearly demarcated and includes some foraging habitat as well as important shellfish beds. EDS submits that SIBA-A and SIBA-B areas could be explicitly recognised in the General Standards to ensure these values are appropriately protected.
- 10.34 In any case, EDS seeks to retain “*shellfish beds*” in Standard 2 to provide for necessary protection of associated ecosystem and biodiversity values. This is particularly important because certain rules that apply the General Standards (e.g. DD-R3, DD-R20 or DD-R21) do not otherwise protect SIBA-B areas.

#### Other gaps in the policy and rule framework

- 10.35 Mr Serjeant has identified various gaps in protection for SIBA-B in the DD provisions, including:<sup>148</sup>

- (a) Policy DD-P4 – Temporary disturbance and deposition by New Zealand Defence Force activities

This policy identifies areas that are inappropriate for the above activities. It omits SIBA-B areas.

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<sup>145</sup> Statement of rebuttal evidence of David Serjeant on behalf of EDS, 10 February 2025, at [2.41].

<sup>146</sup> Ibid.

<sup>147</sup> Section 42A Report ECO Addendum at [106].

<sup>148</sup> Statement of primary evidence of David Serjeant on behalf of EDS, 8 November 2024, at [5.7] and Statement of rebuttal evidence of David Serjeant on behalf of EDS, 10 February 2025, Annexure A/Rebuttal.

(b) Policy DD-P11 – Prospecting, exploration of mining in the coastal marine area

This policy identifies areas that are inappropriate for the above activities. It contains strong direction that prohibits the Council from granting consent for the removal of sand, shell, shingle or any other natural material from such areas. It omits SIBA-B areas.

(c) Rule DD-R3 – Temporary military training activities (permitted activity)

This rule permits the above activities in SIBA-B areas. Discretionary consent is required for such activities in a SIBA-A area.

(d) DD-R12 – Prospecting, exploration or mining in areas of outstanding natural character or significant indigenous biodiversity (prohibited activity)

This rule prohibits the above activities in SIBA-A areas. It does not apply to SIBA-B areas.

(e) Rule DD-R29 – Reclamation associated with specified use and development in areas of significant indigenous biodiversity or outstanding natural character (non-complying activity)

This rule applies to SIBA-A areas. It classifies reclamation associated with new RSI, existing marinas, existing and new electricity generation facilities, and restoration activities as a non-complying activity. Other reclamation within a SIBA-A area is prohibited (DD-R32).

Rule DD-30 treats reclamation ‘not otherwise provided for’ as a non-complying activity. This rule would apply to most reclamation activities within SIBA-B areas. In other words, there is no blanket prohibition on reclamation within a SIBA-B area.

10.36 Mr Serjeant has recommended that SIBA-B values be included in the above provisions.<sup>149</sup> EDS submits that these changes are necessary and appropriate to give effect to policy 11 of the NZCPS and related directives in the RPS.

## **11. AQA - AQUACULTURE | AHUMOANA**

11.1 The Proposed Plan (as notified) provided for aquaculture in spatially defined areas and imposed stringent controls on aquaculture in *significant* areas (e.g. SIBA-As and the Eastern Coromandel). EDS’s submission generally supported

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<sup>149</sup> Statement of primary evidence of David Serjeant on behalf of EDS, 8 November 2024, at [5.7].

this approach but sought further amendments to provide for adequate protection of SIBA-B values.<sup>150</sup>

- 11.2 The reporting planner has recommended a suite of amendments to the aquaculture provisions. However, none of the amendments adequately address the need to protect SIBA-B values. To the contrary, the Plan is now *more enabling* of aquaculture across a *larger area* of the Waikato CMA. This results, in part, from the reduction in extent of the East Coromandel restriction area, making new aquaculture a discretionary (not non-complying) activity in the mid to outer CMA.
- 11.3 EDS seeks further amendments to ensure potential adverse effects of aquaculture are appropriately managed in accordance with the RPS and NZCPS.

*Inadequate protection for SIBA-B areas*

- 11.4 As previously addressed, policy 11(b) of the NZCPS directs that the significant adverse effects of activities be avoided and requires consideration of methods for avoiding, remedying or mitigating other adverse effects of activities. The proposed AQA provisions do not sufficiently recognise or protect SIBA-B values and therefore fail to give effect to policy 11(b).

Deletion of AQA-P3

- 11.5 The Plan (as notified) included policy AQA-P3, which required aquaculture activities to avoid significant adverse effects and avoid, remedy or mitigate other adverse effects on (among other things) SIBA-B areas, marine mammals, seabirds shorebirds and their habitats.
- 11.6 The reporting planner has recommended deleting this policy on the basis that “*the policy duplicates requirements set out elsewhere in the [Plan] including ECO-P1, ECO-P2 ...*”.<sup>151</sup>
- 11.7 However, as explained by Mr Serjeant in his rebuttal evidence, the aquaculture provisions have been largely designed to operate as a self-contained framework.<sup>152</sup> In his opinion, it is desirable to include a specific policy in recognition of the higher planning directives relevant to SIBA-B areas.<sup>153</sup>
- 11.8 EDS submits that it is necessary to retain AQA-P3 because other policies in the AQA Chapter do not adequately recognise or provide for protection of SIBA-B areas (or broader ECO-P2 values). Relying on policies in other parts of the Plan would be inconsistent with the approach adopted for SIBA-A areas, which are

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<sup>150</sup> At [43].

<sup>151</sup> Section 42A Aquaculture Report at [446].

<sup>152</sup> Statement of rebuttal evidence of David Serjeant on behalf of EDS, 10 February 2025, at [2.36].

<sup>153</sup> Ibid.

explicitly recognised as “*inappropriate*” for aquaculture in AQA-P2 and AQA-P2AA.

#### Rule framework

- 11.9 Gaps in the policy framework are not resolved by the rule framework. As identified in Mr Serjeant’s evidence, certain rules provide for aquaculture activities in SIBA-B areas as a controlled or restricted discretionary activity. For example:
- (a) Rule AQA-R1 provides for scientific trials and research as a controlled activity in SIBA-Bs.
  - (b) Rule AQA-R2 provides for spat catching and retention as a restricted discretionary activity in SIBA-Bs.
- 11.10 It is important that sufficient discretion is retained to enable the Council to assess and manage potential adverse effects on SIBA-B values. Therefore, EDS submits that:
- (a) It is inappropriate for controlled activity status to be applied to scientific research and trials in SIBA-B areas (AQA-R1). This could prevent the Council from being able to decline consent for activities that cause adverse effects in the context of sensitive biogenic habitat and ecosystem values. Mr Serjeant has recommended listing SIBA-B areas in the standards,<sup>154</sup> which would elevate the consent status to discretionary.
  - (b) It is necessary for spat catching and retention activities in SIBA-B areas (AQA-R2) to be subject to a high level of scrutiny because they have potential to result in adverse effects on sensitive values. In addressing potential effects of mussel farming (including spat) in her evidence, Ms Giles notes “*if located in sensitive environments and/or not well managed, the effects of farming mussels of any size can be adverse*”.<sup>155</sup> Mr Serjeant has recommended listing SIBA-B areas in the standards,<sup>156</sup> which would elevate the consent status to non-complying.
- 11.11 The mapped SIBA-B areas include sensitive biogenic habitats and (in certain locations) are known to be transited by populations of threatened or at-risk marine mammals. In EDS’s submission, it is necessary for additional restrictions to be imposed on aquaculture in these areas to achieve consistency with the NZCPS and RPS.

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<sup>154</sup> Statement of primary evidence of David Serjeant on behalf of EDS, 8 November 2024, at [5.7(b)].

<sup>155</sup> Statement of rebuttal evidence of Dr Hilke Giles on behalf of Waikato Regional Council at [15].

<sup>156</sup> Statement of primary evidence of David Serjeant on behalf of EDS, 8 November 2024, at [5.7(b)].

*Appropriateness of existing aquaculture*

- 11.12 The reporting planner has recommended the inclusion of new policy AQA-P2AB which identifies existing aquaculture outside of “*significant*” areas as an “*appropriate use*”. EDS opposes this policy.
- 11.13 Past experience from the Marlborough Sounds demonstrates that environmental conditions can rapidly change within the lifetime of a consent, resulting in significant adverse consequences for the productivity of marine farms and ecosystem values.<sup>157</sup> In other words, marine farms that were appropriate in a particular location may become inappropriate.
- 11.14 Moreover, in the Waikato context there is considerable uncertainty as to the ‘appropriateness’ of existing aquaculture. For example, Mr Atchinson’s evidence for the Council confirms that 20 existing farms in the Waikato CMA have never undergone a full consent process under the Act.<sup>158</sup>
- 11.15 Given the above, EDS finds it concerning that AQA-P2AB would direct decision-makers to treat existing farms as ‘appropriate uses’. This could limit the Council’s discretion to recognise and fully assess potential adverse effects in consenting and review processes.
- 11.16 Mr Serjeant has considered the merits of policy-P2AB in his rebuttal evidence. In his opinion, the policy is unnecessary and potentially in conflict with policy-P2AA.<sup>159</sup> Therefore, EDS seeks that this policy be deleted from the Plan.

*New aquaculture activities to be developed in a staged manner*

- 11.17 Policy AQA-P13 (as notified) requires new aquaculture activities throughout the region to be developed in a staged manner, following an adaptive management approach. The staged approach requires baseline information about the environment, a Development Plan detailing the stages, an Environmental Monitoring Plan (including limits and triggers to assess environmental change) and actions to manage effects that exceed the identified limits/triggers.
- 11.18 The reporting planner has recommended deleting this policy on the basis that it overlaps with other provisions including AQA-P5 (precautionary approach), IM-P16 (precautionary approach) and IM-P17 (adaptive management).<sup>160</sup> However, as Mr Serjeant’s evidence identifies, the reporting planner has also recommended deleting AQA-P5.<sup>161</sup> Consequently, the AQA provisions would

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<sup>157</sup> Raewyn Peart (2019) “*Farming the Sea – Marine aquaculture within Resource Management System Reform*” (EDS, August 2019), at 16, available [here](#).

<sup>158</sup> Statement of rebuttal evidence of Mr Christin Atchinson on behalf of Waikato Regional Council, at [24].

<sup>159</sup> Statement of rebuttal evidence of David Serjeant on behalf of EDS, 10 February 2025, at [2.35].

<sup>160</sup> S 42A Report AQA at [670].

<sup>161</sup> Statement of primary evidence of David Serjeant on behalf of EDS, 8 November 2024, at [7.4(c)].

exclusively rely on the policy direction set out in the IM chapter for guidance on these concepts.

- 11.19 EDS notes that adaptive management approaches relating to marine aquaculture have been the subject of considerable case-law.<sup>162</sup> This is because such proposals are often complex and involve inherent uncertainties (e.g. environmental or technical) that make it difficult to assess the effects of the proposal. Therefore, an adaptive management policy is particularly relevant *for aquaculture* activities in the Waikato CMA.
- 11.20 While AQA-P13 and IM-P17 overlap to some extent they are not exact duplicates. For example, IM-P17 is framed more generally and does not explicitly recognise sensitive or significant environmental values. In contrast, AQA-P13 (as notified) directs decision-makers to consider whether “*the sensitivity of the receiving environment to aquaculture activities warrants a precautionary approach*”.
- 11.21 Mr Serjeant’s evidence is that it is most effective and efficient to retain policy AQA-P13 because it will provide for agile responses to climate change and other pressures.<sup>163</sup> In EDS’s submission it also provides necessary clarity as to when an adaptive management approach should be considered in relation to aquaculture. Therefore, EDS seeks that this policy be retained.

*Information and monitoring requirements in AQA-P18 and AQA-P19*

- 11.22 The reporting planner has recommended that policies AQA-P18 and AQA-P19 be replaced with an advice note. These policies include minimum information requirements and environmental monitoring guidelines for aquaculture consents. The proposed new advice note refers to a specific Council technical report or “*successor document*” for guidance on monitoring requirements instead. EDS opposes these changes.
- 11.23 Ms Giles in her evidence for the Council has explained that the intent of these policies is to provide clear expectations and reduce the likelihood of gaps in effects assessments and monitoring requirements.<sup>164</sup> In her experience, Ms Giles describes the quality of some assessments as being “*poor*” and notes “*it is not uncommon for some potential effects to be missed completely or addressed inadequately*”.<sup>165</sup> In her opinion, amended versions of notified AQA-P18 and AQA-P19 would not create additional requirements for applicants (i.e.

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<sup>162</sup> For example, *Sustain Our Sounds Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 40 (applications for plan changes and consents to provide for nine new salmon farms in the Marlborough Sounds); *RJ Davidson Family Trust v Marlborough District Council* [2016] NZEnvC 81 (application for non-complying consent for mussel farm in area that already contained mussel farms and within foraging habitat for threatened and rare king shag).

<sup>163</sup> Statement of primary evidence of David Serjeant on behalf of EDS, 8 November 2024, at [7.4(c)].

<sup>164</sup> Statement of rebuttal evidence of Dr Hilke Giles on behalf of Waikato Regional Council at [35].

<sup>165</sup> Statement of rebuttal evidence of Dr Hilke Giles on behalf of Waikato Regional Council at [34.b].

who were compliant with the technical guidance) but they could provide benefits by clarifying what is required for assessment purposes.<sup>166</sup>

- 11.24 Mr Serjeant has reviewed Ms Giles' proposed amendments to AQA-P18 and AQA-P19. In Mr Serjeant's opinion, retaining these policies in the Plan is appropriate and necessary and he supports Ms Giles' proposed wording.<sup>167</sup> Therefore, EDS seeks that it is most appropriate for these policies to be retained in the Plan.

## **12. CONCLUSION**

- 12.1 EDS considers the Proposed Plan is seriously deficient with respect to marine protection and fishing controls. It does not adequately provide for protection of significant and/or sensitive indigenous biodiversity, habitats and ecosystems in the Waikato CMA. In EDS's submission, the Plan fails to give effect to the NZCPS, HGMPA and RPS in relation to these critical matters. EDS has put forward a number of amendments to ensure these higher order documents are given effect to.

11 February 2025

**T A Turner**

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<sup>166</sup> Statement of rebuttal evidence of Dr Hilke Giles on behalf of Waikato Regional Council at [35].

<sup>167</sup> Statement of rebuttal evidence of Mr David Serjeant on behalf of EDS at [2.38]-[2.40].



**ATTACHMENT A: EXAMPLES OF REGIONAL PLAN PROVISIONS THAT CONTROL  
FISHING ACTIVITIES**

**A) EXTRACTS FROM THE OPERATIVE BAY OF PLENTY REGIONAL COASTAL  
ENVIRONMENT PLAN**

- 2 This rule does not authorise the removal of mangroves. Refer to rules DD 19 25.
- 3 Coastal Wetland Management Agreements are completed by landowners or community groups in partnership with a Regional Council Land Management Officer. Templates for Coastal Wetland Management Agreements are available from the Regional Council, or on Council's website ([www.boprc.govt.nz](http://www.boprc.govt.nz)).
- 4 Refer to Rule BS 6 in Section 7 - Biosecurity for removal of exotic plant species.

**Rule DD 6A Permitted - Specified activities in a Motiti Protection Area identified in Schedule 16**

Unless consent is required under the Plan, the temporary or permanent damage or destruction or removal of plants or animals in a Motiti Protection Area within the Motiti Natural Environment Management Area (as identified in Schedule 16), is a permitted activity for the following purposes:

- (a) Resource consent monitoring undertaken in accordance with resource consent conditions;
- (b) State of the environment monitoring undertaken by the Regional Council, the Department of Conservation or their agents;
- (c) Marine biosecurity incursion investigation and/or response;
- (d) Wildlife rescue;
- (e) Monitoring and enforcement carried out by a regulatory agency;
- (f) Mooring, anchoring and hauling small vessels ashore; carried out by a regulatory agency;
- (g) Scientific research, conservation activities and monitoring undertaken by, under the supervision of, or on behalf of, the following agencies:
  - (i) Crown research Institutes;
  - (ii) Recognised Māori research entities;
  - (iii) Tertiary education providers;
  - (iv) Regional Councils;
  - (v) Department of Conservation;
  - (vi) Ministry for Primary Industries.

**Rule DD 7 Permitted – Vehicle access and use**

Disturbance of the foreshore or seabed by the use of vehicles, where the activity:

- 1 Is associated with the use of a legally authorised structure in, or partly in, the coastal marine area, which provides for or requires vehicle access; or
- 2 Is associated with vehicle access to offshore islands in areas where access points are identified in Schedule 15; or

**Rule DD 18 Prohibited – Specified activities in the coastal marine area**

The following activities are prohibited activities in the coastal marine area unless specifically provided for by another rule in this Plan:

- 1 Construction of new artificial watercourses or modification of natural watercourses in an Indigenous Biological Diversity Area A (as identified in Schedule 2, Table 1) or Outstanding Natural Character area (as identified in Appendix I to the RPS).
- 2 Disturbance of the foreshore and seabed associated with prospecting for, exploration for, and mining of sand, shell, shingle and minerals, dredging and spoil disposal, in an Indigenous Biological Diversity Area A (as identified in Schedule 2, Table 1) or Outstanding Natural Character area (as identified in Appendix I to the RPS).
- 3 Disturbance of the foreshore and seabed associated with prospecting for, exploration for, and extraction of petroleum products in an Indigenous Biological Diversity Area A (as identified in Schedule 2, Table 1) or Outstanding Natural Character area (as identified in Appendix I to the RPS).
- 4 Disposal of any spoil from land-based activities, excluding spoil from the diversion of coastal water, reclamation and beach replenishment.
- 5 Stock grazing and access, excluding horses.
- 6 The removal for profit (mining) of sand, shell and shingle from within the active beach system on the open coast (where the active beach system is that area on the open coast between the 8.5 metre bathymetric contour and mean high water springs).
- 7 Disturbance of, or deposition on, the foreshore or seabed resulting from artillery gunfire, naval gunfire, or aerial bombardment, for military training in areas of Outstanding Natural Character (as identified in Appendix I to the RPS).
- 8 The disturbance of foreshore or seabed by the use of vehicles in an Indigenous Biological Diversity Area A (as identified in Schedule 2, Table 1), except where the activity is permitted by Rule DD 7 or a consent has been obtained in accordance with the requirements of Rules SO 12, SO 15 or Rule DD 15.
- 9 The temporary or permanent damage or destruction or removal of plants or animals in a Motiti Protection Area within the Motiti Natural Environment Management Area (as identified in Schedule 16).

**Advisory notes:**

- 1 In relation to 1 above, the maintenance of existing artificial watercourses or modified watercourses in the Indigenous Biological Diversity areas identified in Schedule 2, Table 1 is addressed by Rules DD 11, DD 12 and DD 14.
- 2 In relation to 5 above, horse access and trekking along the coast may also be regulated by territorial authority bylaws. Compliance with the bylaws is also required.
- 3 For the purpose of this Rule, removal includes the catching, taking or harvesting of plants and / or animals.

**B) EXTRACTS FROM THE PROPOSED REGIONAL PLAN FOR NORTHLAND (FEBRUARY 2024,  
ALL APPEALS RESOLVED)**

## C.1.10 Te Hā o Tangaroa Protection Areas

### Notes:

- 1) *The rules in this section do not apply to aquaculture activities (refer [C.1.3 Aquaculture](#))*
- 2) *Further regulations apply under the Fisheries Act 1996 in relation to kina / sea urchin harvest and mussel re-seeding.*
- 3) *By operation of s 10(d) Treaty of Waitangi (Fisheries Claims) Settlement Act 1992, these rules do not prevent customary (non-commercial) fishing provided for in regulations made in accordance with Part 9 of the Fisheries Act 1996 or regulations 50-52 of the Fisheries (Amateur Fishing) Regulations 2013.*

### C.1.10.1 Temporary or permanent minor damage or destruction or removal of fish, aquatic life or seaweed in a Te Hā o Tangaroa Protection Area – permitted activities

The following activities in a Te Hā o Tangaroa Protection Area involving the temporary or permanent damage or destruction or removal of fish, aquatic life or seaweed are permitted activities, subject to any other applicable rules:

- 1) Te Hā o Tangaroa Protection Areas: Rākaumangamanga Rāhui Tapu; Mimiwhangata Rāhui Tapu; and Ngā Au o Morunga Mai Rākaumangamanga Protection Area:
  - a) kina / sea urchin harvest (or kina / sea urchin management);
  - b) mussel re-seeding;
  - c) resource consent monitoring undertaken in accordance with resource consent conditions;
  - d) marine biosecurity incursion investigation and/or response;
  - e) wildlife rescue;
  - f) monitoring and enforcement carried out by a regulatory agency;
  - g) mooring, anchoring and hauling small vessels ashore;
  - h) scientific research, conservation activities and monitoring undertaken by, under the supervision of, or on behalf of, the following entities:
    - a hapū or iwi;
    - Crown research institutes;
    - recognised Māori research entities;
    - tertiary education providers;
    - Regional Councils;
    - Department of Conservation;
    - Ministry for Primary Industries;
    - an incorporated society having as one of its objectives the scientific study of marine life or natural history, or the study of Mātauranga Māori.
- 2) In Te Hā o Tangaroa Protection Area: Ngā Au o Morunga Mai Rākaumangamanga Protection Area (in addition to those listed in (1) above):
  - a) any activity involving the temporary or permanent damage or destruction or removal of fish, aquatic life or seaweed that is not a prohibited activity in [C.1.10 Te Hā o Tangaroa Protection Areas](#) of this Plan.

**For the avoidance of doubt this rule covers the following RMA activities:**

- Damage, destruction or disturbance of the foreshore or seabed (s12(1)).
- Use of the coastal marine area (s12(3)).

### **C.1.10.2 Temporary or permanent damage or destruction or removal of fish, aquatic life or seaweed in a Te Hā o Tangaroa Protection Area - prohibited activities**

The following activities in a Te Hā o Tangaroa Protection Area involving the temporary or permanent damage or destruction or removal of fish, aquatic life or seaweed are prohibited activities:

1) In Rākaumangamanga and Mimiwhangata Rāhui Tapu areas:

- a) any activity that is not a permitted activity in [C.1.10.1 Temporary or permanent minor damage or destruction or removal of fish, aquatic life or seaweed in a Te Hā o Tangaroa Protection Area – permitted activities](#) of this Plan.

2) In Ngā Au o Morunga Mai Rākaumangamanga Protection Area:

- a) bottom trawling;
- b) bottom pair trawling;
- c) Danish seining; or
- d) purse seining.

**For the avoidance of doubt this rule covers the following RMA activities:**

- Damage, destruction or disturbance of the foreshore or seabed (s12(1)).
- Use of the coastal marine area (s12(3)).

**C) EXTRACTS FROM THE PROPOSED MARLBOROUGH ENVIRONMENT PLAN  
(APPEALS VERSION)**



## [Discretionary activities, rule 16.7.6]

### 16. Coastal Marine Zone

### Volume Two

- (c) pellets containing greater than 10mg/kg (dry) of copper and 0.02 w-% (dry) of chlorine;
- (d) composite wood boards containing formaldehyde or similar adhesives, including but not limited to chip board, fibreboard, particle board and laminated boards;
- (e) metals and materials containing metals including but not limited to cables;
- (f) materials containing asbestos;
- (g) material containing tar or bitumen;
- (h) all rubber, including but not limited to, rubber tyres;
- (i) synthetic material, including, but not limited to motor vehicle parts, foams, fibreglass, batteries, chemicals, paint and other surface-coating materials, or any type of plastics;
- (j) waste oil (excluding re-refined oil);
- (k) peat;
- (l) sludge from industrial processes;
- (m) animal waste (except animal waste generated on production land), medical waste, pacemakers, biomechanical devices or chemical waste.

[C]

**16.7.3.** From 9 June 2022, the discharge of human sewage, except Grade A or B treated sewerage, from a ship within 750m of MHWS or into the coastal marine area identified as a Restricted Area for Discharges from Ships.

[C]

**16.7.4.** From 9 June 2022, the discharge of human sewage, except Grade A or B treated sewerage, from a ship within 1000m of a marine farm.

[C]

**16.7.5.** Discharge of treated or untreated human sewage from land based activities into the coastal marine area, except for the discharge of treated human sewage from regionally significant infrastructure.

[C]

**16.7.6.** Dredging, bottom trawling, anchoring of ships, deposition of dredged material and reclamation within any Category A Ecologically Significant Marine Site listed within Appendix 27.

[C]

**16.7.7** Dredging, bottom trawling, deposition of dredged material and reclamation within any Category B Ecologically Significant Marine Site listed within Appendix 27.

[C]

**16.7.8.** Removal of anti-foul paint from a ship.

[C]

**16.7.9** [deleted]

[C]

**16.7.9A** Marine farming inside an Enclosed Waters CMU or a Near-shore CMU, and not within an AMA, including the associated occupation of space in the coastal marine area, the erection, placement, use of structures, disturbance of the seabed and ancillary discharges to water, and the discharge of feed or medicinal or therapeutic compounds, associated with a marine farm.

**Commented [ 151]:** RESOLVED:  
Te Rūnanga o Kaikōura and Te Rūnanga o Ngāi Tahu  
ENV-2020-CHC-46  
By consent order dated 2 November 2023

**Commented [ 152]:** Friends of Nelson Haven & Tasman Inc  
ENV-2020-CHC-33

**Commented [ 153]:** RESOLVED:  
Marine Farming Assn Inc & Aquaculture NZ  
ENV-2020-CHC-74  
Clearwater Mussels Limited and Talley's Group Limited  
ENV-2020-CHC-55  
By consent order dated 14 March 2024

**Commented [ 154]:** RESOLVED:  
HARO Partnership  
ENV-2020-CHC-40  
Aroma (NZ) Limited and Aroma Aquaculture Limited  
ENV-2020-CHC-45  
The New Zealand King Salmon Co. Limited  
ENV-2020-CHC-51  
Clearwater Mussels Limited and Talley's Group Limited  
ENV-2020-CHC-55  
KPF Investments & United Fisheries (previously AJ King Family Trust and SA King Family Trust)  
ENV-2020-CHC-73  
Marine Farming Assn Inc & Aquaculture NZ  
ENV-2020-CHC-74  
Just Mussels Ltd, Tawhitinui Greenshell Ltd and Waimana Marine Ltd  
ENV-2020-CHC-77  
By consent order dated 15 February 2023

**Commented [ 155]:** Amended to reflect decision of the MEP Hearing Panel  
MEP Update 7 – 04/11/20

**Commented [ 156]:** WITHDRAWN:  
Sanford Limited  
ENV-2023-CHC-73  
By memorandum dated 1 October 2024

**Commented [ 157]:** Marine Farming Association and Aquaculture New Zealand  
ENV-2023-CHC-61

**Commented [ 158]:** Te Rūnanga o Kaikōura and Te Rūnanga o Ngāi Tahu  
ENV-2023-CHC-67  
By consent order dated 20 May 24

## [Prohibited activities, rule 16.6.6]

### 16. Coastal Marine Zone

### Volume Two

[C]

16.6.3. Jetty.

[C]

16.6.4. Boatshed.

[C]

16.6.5. Slipway.

[C]

16.6.6 Any dredging, bottom trawling, or deposition of dredged material within the buffer for any Category A or Category B Ecologically Significant Marine Site specified in Appendix 27.

[C]

16.6.7. Occupation of the coastal marine area, except by a marine farm, not associated with any Permitted Activity in the Coastal Marine Zone.

[C]

16.6.8. Restoration or creation of shellfish reefs.

[C]

16.6.9. Livestock entering into the coastal marine area.

[C]

16.6.10. Any use of the coastal marine area not provided for as a Permitted Activity, Controlled Activity or Restricted Discretionary Activity, or limited as a Prohibited Activity.

[C]

16.6.11. Any take, use, damming or diversion of coastal water not provided for as a Permitted Activity or limited as a Prohibited Activity.

[C]

16.6.12. Any discharge of contaminants to air not provided for as a Permitted Activity, or limited as a Prohibited Activity.

[C]

16.6.13 Marine farming in an Offshore CMU, including the associated occupation of space in the coastal marine area, the erection, placement, use of structures, disturbance of the seabed and ancillary discharges to water.

Note:

Rule 16.6.13 does not apply to replacement consents for existing marine farms in the Offshore CMU that are managed under the National Environmental Standards for Marine Aquaculture.

[C]

16.6.14 Marine farming within an AMA, for which

(a) ~~a) an authorisation is held to apply for a coastal permit to occupy space with the AMA, or~~

(b) ~~b) there is an existing coastal permit to occupy space for marine farming in the same location, including the associated occupation of space in the coastal marine area, the erection, placement, use of structures, disturbance of the seabed and ancillary discharges to water, that is not provided for as a Controlled, Restricted Discretionary Activity or Prohibited Activity.~~

**Commented [ 138]:** Environmental Defence Society  
ENV-2020-CHC-67

**Commented [ 139]:** RESOLVED:  
HARO Partnership  
ENV-2020-CHC-40  
Aroma (NZ) Limited and Aroma Aquaculture Limited  
ENV-2020-CHC-45  
The New Zealand King Salmon Co. Limited  
ENV-2020-CHC-51  
Clearwater Mussels Limited and Talley's Group Limited  
ENV-2020-CHC-55  
KPF Investments & United Fisheries (previously AJ King Family Trust and SA King Family Trust)  
ENV-2020-CHC-73  
Marine Farming Assn Inc & Aquaculture NZ  
ENV-2020-CHC-74  
Just Mussels Ltd, Tawhitinui Greenshell Ltd and Waimana Marine Ltd  
ENV-2020-CHC-77  
By consent order dated 15 February 2023

**Commented [ 140]:** RESOLVED:  
Friends of Nelson Haven & Tasman Inc  
ENV-2020-CHC-33  
Court Decision No [2024] NZEnvC 335 dated 16 December 2024

**Commented [ 141]:** RESOLVED:  
Clearwater Mussels Limited and Talley's Group Limited  
ENV-2020-CHC-55  
By consent order dated 15 February 2023

**Commented [ 142]:** Clause 16

**Commented [ 143]:** Clause 16

**Commented [ 144]:** Clause 16

**Commented [ 145]:** Clause 16

**Commented [ 146]:** Clause 16