Department of Conservation
Te Papa Atawhai

Briefing: Decision on the Hākaimangō-Matiatia marine reserve application

To	Minister of Conservation	**Date submitted**	29 November 2024
Action sought	Seeking your decision on our recommendation to approve an application for a new marine reserve off Waiheke Island.	**Priority**	High
Reference	24-B-0566	**DocCM**	DOC-7786874
Security Level	In Confidence		

Risk Assessment	High A decision to declare or not declare risks public criticism and/or legal challenges against Ministers – e.g. by Ngāti Pāoa, who hold diverging views and may challenge the decision either way, or by the Applicant who may not agree with the decision or process and challenge it.	**Timeframe**	The Marine Reserves Act 1971 imposes no statutory deadline. But we recommend your decisions be made and concurrences sought by 28 February 2025. This is to avoid any risk that the advice becomes out of date over time.
Attachments	**Attachment A:** Departmental report to the Minister of Conservation on the Hākaimangō-Matiatia marine reserve application (Volume 1) **Attachment B:** Departmental report to the Minister of Conservation on the Hākaimangō-Matiatia marine reserve application (Volume 2, appendices to Volume 1) **Attachment C:** A3 summary to support the Departmental report to the Minister of Conservation on the Hākaimangō-Matiatia marine reserve application **Attachment D:** Draft concurrence letters to the Minister for Oceans and Fisheries and the Minister of Transport		

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Contacts	
Name and position	**Phone**
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Executive summary – Whakarāpopoto ā kaiwhakahaere

1. This briefing seeks your decision on an application (the Application) made by the Friends of the Hauraki Gulf Inc. (the Applicant) to create a marine reserve off the northwest coast of Waiheke Island, under the Marine Reserves Act 1971. The name proposed for the marine reserve is 'Hākaimangō-Matiatia Marine Reserve'.

2. The proposed marine reserve contains a range of marine habitats, some of which are not found in any of the ten existing marine reserves in the coastal area from Ahipara around the tip of North Island and down to East Cape. If approved as proposed, this would be the largest marine reserve in this coastal region.

3. The Application is separate to the Hauraki Gulf / Tīkapa Moana Marine Protection Bill (the Tīkapa Moana Bill) process, which may add further marine protection to the Hauraki Gulf.

4. If approved, the marine reserve will advance New Zealand's international biodiversity commitments as well as the marine protection goals set out in Te Mana o te Taiao – Aotearoa New Zealand Biodiversity Strategy 2020.

5. The Departmental report (Attachment A) and its appendices (Attachment B) provide you with background information and advice to support your decision-making on the proposed marine reserve. Your decisions must be made in accordance with the Marine Reserves Act, Hauraki Gulf Marine Park Act, the Crown's obligations in respect of the Treaty of Waitangi and statutory planning instruments. A high-level summary to support the Departmental report is provided in Attachment C.

6. Ngāti Pāoa has been acknowledged as holding mana whenua for Waiheke Island and its surrounding waters, but not to the exclusion of other iwi who also have interests. Internal tensions within Ngāti Pāoa currently manifest as two representative entities exercising separate mandates to represent Ngāti Pāoa interests. The Ngāti Pāoa Iwi Trust and the Ngāti Pāoa Trust Board take opposing positions on this Application and navigating differences in view between these two entities requires your careful consideration, including assessing the views on their own merits.

7. DOC acknowledges the establishment of a marine reserve has the potential to impact on a range of tangata whenua interests, rights, and values. We have developed conditions and other mitigation measures in response to concerns raised in submissions and in our further engagement with tangata whenua groups.

8. In accordance with the two required assessments in the Marine Reserves Act, DOC considers that:

   - subject to our recommended conditions and measures to mitigate the impacts of the proposed marine reserve, no objections under section 5(6) of the Marine Reserves Act should be upheld
   - pursuant to section 5(9) of the Marine Reserves Act, and subject to our recommended conditions and measures, declaration of the proposed marine reserve will be in the best interests of scientific study, will be for the benefit of the public and will be expedient.

9. While DOC acknowledges the Ngāti Pāoa Iwi Trust (in particular) remains fundamentally opposed to the proposed marine reserve as a marine protection mechanism, including its impact on their rangatiratanga and kaitiaki responsibilities, we consider that our recommendations on the proposal meet statutory requirements, including those relating to tangata whenua interests and the principles of the Treaty of Waitangi.

10. We engaged with 12 tangata whenua groups immediately prior to the Applicant publicly notifying the Application, and continued engagement throughout the statutory

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consultation period and beyond. The level of response from tangata whenua to offers of engagement varied.

11. If you decide to approve the proposed marine reserve, you then seek the concurrence of the Minister for Oceans and Fisheries and the Minister of Transport. If concurrences are obtained, you then recommend that the Governor-General declare the reserve by Order in Council.

12. Marine protection is contentious, and affected parties may challenge your decisions by way of judicial review. There are risks of legal challenge from the Ngāti Pāoa Iwi Trust if you choose to approve the marine reserve, which may lead to your decision being set aside. Conversely, if you decide not to approve, there is a risk of legal challenge from the Applicant, the Ngāti Pāoa Trust Board, and potentially environmental groups.

13. Whatever decision you take, we will work with your office to develop a communications plan for any announcement. This may help address any public and stakeholder concerns, since your decision will attract, in particular, the interest of Ngāti Pāoa and the Applicant for the proposed marine reserve, as well as media interest.

14. Should ministers approve the proposed marine reserve, we will work closely with tangata whenua and others to ensure we are planning appropriately for its implementation.

We recommend that you … (Ngā tohutohu)

		Reference	Decision
General matters			
a)	**Confirm** that you have taken reasonable steps to ensure that any conflict of interest related to your role in decision-making on this Application, including due to your previous role as Ngāi Tai ki Tāmaki CEO, is being managed.	Paragraphs 52, and 24-25 of Appendix 1	Yes / No
b)	**Note** the Departmental report and its appendices (Attachment A and B respectively) provide you with advice and background information to support your decision-making on the proposed marine reserve.	Attachment A	Noted
c)	**Note** that internal tensions within Ngāti Pāoa manifests currently as two representative entities exercising mandates to represent Ngāti Pāoa interests. Navigating differences in view between these two entities requires careful consideration, including assessing the views on their own merits.	Attachment A, section 4.1	Noted
Statutory process requirements			
d)	**Agree** the Application, the actions of the Friends of the Hauraki Gulf (as the Applicant), and the development of advice to you by DOC, have met the statutory process requirements of sections 4 and 5 of the Marine Reserves Act 1971.	Attachment A section 5	Yes / No
e)	**Agree** the Application, the actions of DOC (after receipt of the Application), and the development of	Attachment A, section 4	Yes / No

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	advice to you by DOC, have met the statutory process requirements of sections 47-49 of the Marine and Coastal Area (Takutai Moana) Act 2011.		
f)	**Agree** the Application, the actions of DOC (after receipt of the Application) and the development of advice to you by DOC, have met the Crown's obligations under the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 and relevant individual or collective iwi Treaty settlements.	Attachment A, section 10.2.2 and 5.2.3.2	Yes / No
g)	**Agree** the Application, the actions of DOC (after receipt of the Application) and the development of advice to you by DOC, have met the Crown's obligations under the Hauraki Gulf Marine Park Act 2000 and other statutory planning instruments.	Attachment A, section 10.2.2 and 3.1	Yes / No
h)	**Agree** the Application, the actions of DOC (after receipt of the Application), and the development of advice to you by DOC, have given effect to the principles of the Treaty of Waitangi as required by section 4 of the Conservation Act 1987.	Attachment A section 10.2.1	Yes / No
Decisions under section 5(6) and 5(9) of the Marine Reserves Act 1971			
i)	**Note** that if any objections are upheld under section 5(6) of the Marine Reserves Act 1971, the marine reserve cannot be declared.	Attachment A, section 5.13-5.15 and 5.2.3	Noted
j)	**Have** particular regard to the views of affected iwi, hapū, or whānau, pursuant to section 49 of the Marine and Coastal Area (Takutai Moana) Act 2011.	Attachment A, sections 9.1-9.5, 10.2.4-10.2.6	Yes / No
k)	**Have** regard to submissions made by or on behalf of objectors, and to the Applicant's 'answers' **AND EITHER** i) **Agree** that, subject to your approval of the recommended Order in Council conditions at m) below and other measures at n) below, no objections be upheld under section 5(6) of the Marine Reserves Act 1971 **OR** ii) **Specify** the Marine Reserves Act 1971 section(s) under which objection(s) should be upheld: (a) interfere unduly with any estate or interest in land in or adjoining the proposed reserve (b) interfere unduly with any existing right of navigation (c) interfere unduly with commercial fishing	Attachment A, chapter 9	Yes / No Yes / No (a)Yes / No (b)Yes / No (c)Yes / No

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	(d) interfere unduly with or adversely affect any existing usage of the area for recreational purposes (e) otherwise be contrary to the public interest		(d)Yes / No (e)Yes / No
l)	Provided no objections are upheld, **agree** that a decision to declare the proposed Hākaimangō-Matiatia marine reserve, with the recommended Order in Council conditions at m) below and other measures at n) below, will be in the best interests of scientific study, will be for the benefit of the public, and be expedient (in accordance with section 5(9) of the Marine Reserves Act 1971).	Attachment A, sections 10.1, 10.2.4-10.2.6	Yes / No
m)	**EITHER** i) **Agree** all the following proposed Order in Council conditions **OR** ii) **Agree** some/none of the following proposed Order in Council conditions, and specify which: a) Condition to require generational reviews b) Condition for the control of unwanted organisms c) Condition for pollution response d) Condition for existing consented structures, replacement of existing consented structures and associated maintenance e) Condition for existing discharges of contaminants and associated monitoring f) Condition for retrieval of dead marine mammals and marine mammal parts	Attachment A, section 10.1.1	Yes / No a) Yes / No b) Yes / No c) Yes / No d) Yes / No e) Yes / No f) Yes / No
n)	**EITHER** i) **Agree** all the following proposed other measures **OR** ii) **Agree** one/none of the following proposed other measures and specify which: a) Recommendation relating to kina removal from the marine reserve for management purposes b) Recommendation to establish an advisory rōpū for the marine reserve	Attachment A, section 10.1.2	Yes / No a) Yes / No b) Yes / No
o)	**Agree** that a decision to declare the proposed Hākaimangō-Matiatia marine reserve, with the recommended Order in Council conditions (recommendation l) and other measures (recommendations m and n), would be consistent	Attachment A, section 10.2.1	Yes / No

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	with your obligation, as decision-maker, to give effect to the principles of the Treaty of Waitangi, as required by section 4 of the Conservation Act 1987.		
p)	**Agree** declaration of the marine reserve is consistent with the requirements of the Hauraki Gulf Marine Park Act.	Attachment A, section 10.2.2	Yes / No
q)	**Agree** declaration of the marine reserve is consistent with the Conservation General Policy and the Auckland Conservation Management Strategy.	Attachment A, section 10.2.3	Yes / No
r)	**Agree** to seek the concurrence of the Minister for Oceans and Fisheries and the Minister of Transport.	Attachment A, chapter 13 Attachment D	Yes / No
s)	**Note** the proposed name for the marine reserve is subject to review by the New Zealand Geographic Board.	Attachment A, chapter 11	Noted

Date: 28 / 11 /24

Ruth Isaac
Deputy Director-General Policy and Regulatory Services

Date: / /

Hon Tama Potaka
Minister of Conservation

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Purpose – Te aronga

1. This briefing seeks your decision on an application under the Marine Reserves Act 1971 (the **Act**) by the Friends of the Hauraki Gulf Inc. (the **Applicant**) for a marine reserve off Waiheke Island – the proposed Hākaimangō-Matiatia marine reserve (the **Application**).
2. This briefing includes context for your decision, decision-making steps, directs you to the sections of the Departmental report (Attachment A) relevant to each statutory decision and outlines risks.
3. Please note that the briefing uses shorthand terms to describe your decisions, for example we refer to you 'approving' the proposed marine reserve, or 'agreeing to declare' it. However, strictly speaking the Act requires two decisions. Firstly, whether to 'uphold objections' and second (if you do not uphold objections) whether declaring the reserve would be 'in the best interests of scientific study…for the benefit of the public, and expedient'. This is set out in more detail below.

Background and context – Te horopaki

4. On 23 April 2021, the Applicant notified the Director-General of Conservation of their intention to apply for an Order in Council declaring a marine reserve in the north-west of Waiheke Island; the proposed Hākaimangō-Matiatia marine reserve (the **proposed reserve**).
5. The Applicant attached a draft application made under the Act. The boundary of the proposed reserve is from the northern point of Matiatia Bay to the western point of Oneroa Bay on Waiheke Island (see **Figure 1**).
6. The Application is separate and independent to the Revitalising the Gulf process and the resulting Hauraki Gulf / Tīkapa Moana Marine Protection Bill (the **Tīkapa Moana Bill**).
7. The Application was formally notified by the Applicant on 20 January 2022, commencing a two-month public consultation period that closed on 20 March 2022.
8. The proposed reserve is approximately 23.5 km^2. If established as proposed, it would be the largest marine reserve in the Northeastern Coastal Biogeographic region of New Zealand.[1] The proposed reserve encompasses:
    - a range of intertidal and subtidal marine habitats, including rocky reef systems, gravel and sand beaches, soft sediment habitats and complex reef systems
    - 12 of the Northeastern Coastal Biogeographic region's 42 habitat types. Five of these 12 are not found in any of the other ten marine reserves in this bioregion
    - soft sediment habitat types that are not well represented in existing marine protection in the Hauraki Gulf Marine Park or within marine protected areas proposed under the Tīkapa Moana Bill
    - two significant natural features – the submarine volcanics (pillow lavas, chert) that are exposed in Island Bay and the fossil beds exposed in Double U Bay.
9. The proposed site is readily accessible to the public, including local schools and research institutions based in Auckland and Waikato.
10. Establishing the proposed reserve would contribute to New Zealand's international biodiversity commitments and to Te Mana o te Taiao – Aotearoa New Zealand Biodiversity Strategy 2020 goals. Establishment would also contribute to the objectives of New Zealand's Marine Protected Areas Policy and Implementation Plan 2005.

[1] Defined as the region from Ahipara around the tip of North Island and down to East Cape. Marine Protected Areas: Classification, Protection Standard and Implementation Guidelines – pg 32.

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11. The Departmental report in Attachment A provides you with advice and background information to support your decision-making on the proposed reserve. Appendices to the Departmental report are provided in Attachment B.

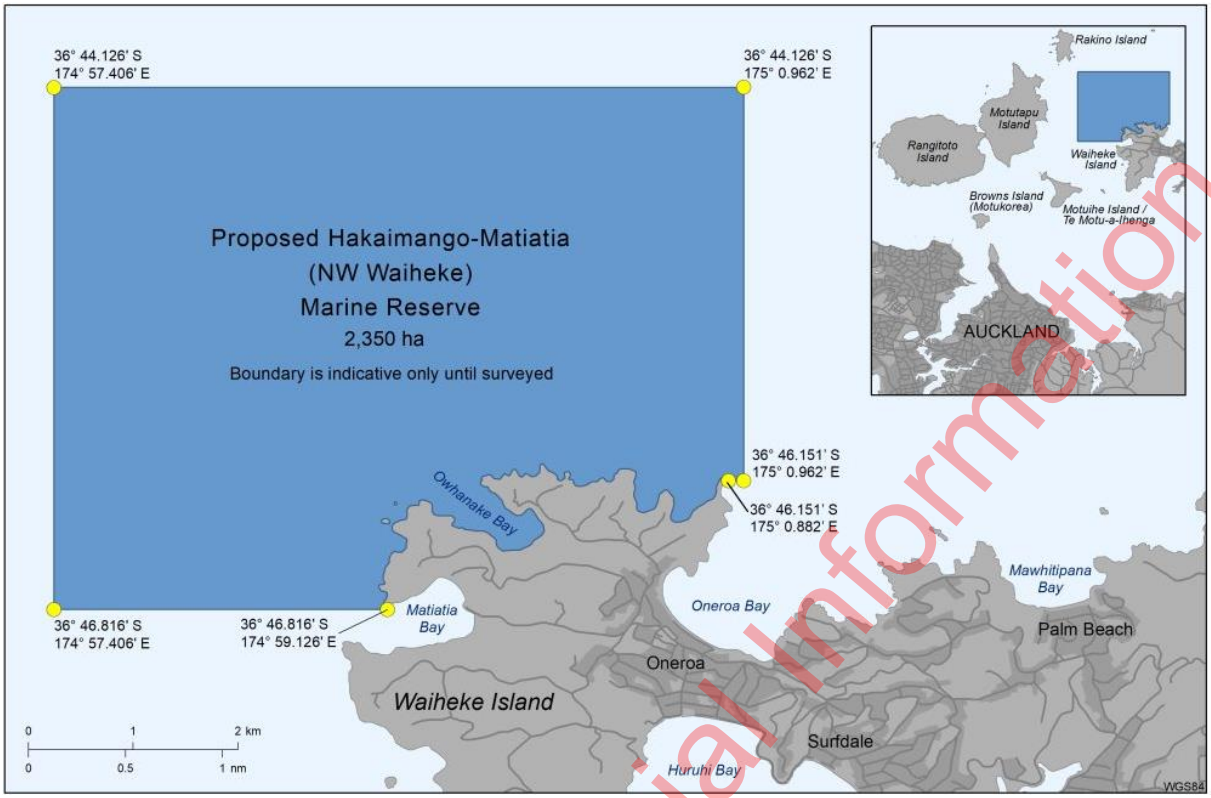


Figure 1: Proposed boundaries of the Hākaimangō-Matiatia marine reserve.

Statutory framework for decision-making (chapter 5 of Attachment A)

12. Your decisions on the proposed reserve must be in accordance with the Act and the below identified statutory obligations. The requirements are outlined in full in sections 5.2 and 5.3 of the Departmental report (Attachment A).

13. The statutory obligations and approach that is required from you includes:

- consideration of whether process requirements have been met (sections 4 and 5 of the Act). If you agree that they have been met, then
- consideration of objections to the proposed reserve in accordance with section 5(6) of the Act as well as any conditions or measures proposed by DOC in response to any objections raised and any answer given by the Applicant on any objections received. If you decide not to uphold any objections, then
- consideration of the proposed reserve in accordance with section 5(9) of the Act.

14. You also have statutory obligations under the Marine and Coastal Area (Takutai Moana) Act (**te Takutai Moana Act**), various Treaty settlement obligations, the Hauraki Gulf Marine Park Act and section 4 of the Conservation Act.

15. To aid your decision-making, where relevant, the Departmental report classifies the objections/submissions as those of 'affected iwi, hapū, or whānau' as per te Takutai Moana Act and relevant to section 4 considerations, 'Māori' (i.e. those identifying as Māori but not considered to be 'affected iwi, hapū, or whānau') or 'all other submitters'.

16. If you approve the proposed reserve, you next seek the concurrence of the Minister for Oceans and Fisheries and the Minister of Transport. If concurrences are received, you then recommend to the Governor-General the making of an Order in Council, either

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unconditionally or subject to conditions, to declare the proposed area a marine reserve under the Act.

Departmental advice on the proposed reserve (chapters 6-10 of Attachment A)

17. Our detailed advice to support your decision-making on the proposed reserve is set out in the Departmental report (Attachment A):
    - chapters 1-5 set the scene
    - chapter 6 assesses compliance with the statutory process requirements
    - chapter 7 summarises the submissions received
    - chapter 8 assesses the benefits of the proposed reserve
    - chapters 9 and 10 set out our assessment and recommendations under sections 5(6) and 5(9) of the Act, respectively.
18. 1,293 submissions were received through the statutory consultation process, of which 117 were classified as objections. Our analysis of objections was informed by existing science and other information, and by DOC science, technical, policy and legal expertise. Published literature, case law, and information provided by other local and central government agencies assisted with the analysis of issues raised in submissions.
19. As a result of statutory consultation and tangata whenua engagement, we recommend several conditions and other measures be applied to the proposed reserve.
20. The Director-General considers the Application, the public notice actions undertaken by the Applicant and DOC, and the development of the Departmental advice to you on the proposed reserve:
    - meets the statutory process requirements of sections 4 and 5 of the Act
    - meets the requirements of sections 47–49 of te Takutai Moana Act
    - meets the various relevant Treaty settlement obligations
    - gives effect to the principles of the Treaty of Waitangi in accordance with section 4 of the Conservation Act.
21. We consider that (on the proviso that the recommended Order in Council conditions and 'other measures' are implemented per chapter 9 and sections 10.1.1-10.1.2, Attachment A):
    - no objections received under section 5(6) of the Act should be upheld
    - declaring a marine reserve would fulfil the broader requirements of section 5(9) of the Act, namely being in the best interests of scientific study, for the benefit of the public, and expedient
    - a decision to declare the proposed reserve would be consistent with all relevant provisions of the Conservation General Policy and the Auckland Conservation Management Strategy, and the requirements of the Hauraki Gulf Marine Park Act, relevant treaty settlement obligations, and te Takutai Moana Act
    - a decision to declare the proposed reserve would be consistent with your obligation, as decision-maker, to give effect to the principles of the Treaty of Waitangi, as required by section 4 of the Conservation Act 1987.

Treaty partner/tangata whenua views on the Application

22. The cultural landscape in Tāmaki Makaurau, including Waiheke, is complex.

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23. Ngāti Pāoa has been acknowledged as holding mana whenua for Waiheke Island and its surrounding waters, including the area of the proposed reserve. However, this is not to the exclusion of other iwi who also have interests. Waiheke Island is within the rohe of 12 tangata whenua groups, 11 of which are at varying stages of Treaty settlement, including three enacted settlements (Attachment B, Appendix 2).

24. The Applicant sought the views of tangata whenua during development of the Application. This engagement is summarised in Attachment B, Appendix 1.

25. DOC engaged with the 12 tangata whenua groups prior to public notification of the Application, during the statutory consultation period and beyond, including during development of the Departmental report. The intent of this engagement was to: inform tangata whenua groups about the Application and statutory process and how to engage in it; understand how they wanted to engage directly with DOC on the matter; and understand their views on the Application, especially relating to potential impacts on their rights, interests and values and how any impacts might be mitigated. A summary of this engagement is provided in chapter 4 of Attachment A.

26. The level of response from tangata whenua groups varied. Some deferred to Ngāti Pāoa as mana whenua. Some groups did not make a submission or take up any engagement opportunities. Of the groups contacted by DOC, and who did engage, Ngāti Pāoa engaged most.

27. As mana whenua, the views of Ngāti Pāoa are particularly important in this process. Internal tensions within Ngāti Pāoa manifest currently as two representative entities exercising mandates to represent Ngāti Pāoa interests. For the purposes of this Application, DOC recognises the Ngāti Pāoa Iwi Trust (the **Iwi Trust**) as the post-settlement governance entity representing the interests of the Ngāti Pāoa iwi, and the Ngāti Pāoa Trust Board (the **Trust Board**) as a validly constituted Ngāti Pāoa entity that continues to have support from iwi members. The Iwi Trust objects to the proposed reserve, and the Trust Board supports it (Attachment A, section 4.5, chapters 9 and 10). Navigating differences in view between these two entities requires your careful consideration, including assessing the views on their own merits.

28. During engagement and via submissions during the statutory process, affected iwi, hapū, or whānau raised support and concerns about the proposed reserve and the process undertaken. These views are detailed in chapters 9 and 10 of Attachment A. Key themes/views include:

- Support
    - economic opportunities for local whānau and community
    - opportunities for rangatahi and whānau to learn from and interact with the recovering and eventually thriving marine ecosystem
    - aligns with Ngāti Pāoa aspirations (as stated by the Trust Board)
    - significant scientific benefit
    - opportunity for mātauranga Māori and western science to offset and complement one another in the conservation of the marine environment
    - the proposal is supported if it includes co-management/co-governance, and mātauranga Māori as part its management.
- Concerns
    - feeling disenfranchised by this process and engagement was insufficient
    - this was not an ‘iwi-led’ initiative
    - marine protection is wanted by most, but a marine reserve is not the right tool

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- customary tools (e.g. mātaitai reserves, rāhui) are preferred and better reflect a te Ao Māori approach to marine protection and management
- marine reserve rules are too restrictive, they: impact the ability to exercise kaitiakitanga and rangatiratanga; don't allow for mātauranga Māori and active management to restore biodiversity; impact on customary fishing rights
- the Act is old and does not account for Treaty obligations. Co-governance or a Crown/iwi partnership to manage the area is preferred and the Act doesn't enable this
- the proposed reserve is misaligned with current initiatives in the Hauraki Gulf e.g. the Sea Change Plan, Revitalising the Gulf strategy, which are viewed as more collaborative and providing for co-governance.

Risk assessment – Aronga tūraru

Implications if you only agree to some of the recommendations

29. The proposed conditions to the Order in Council and 'other measures' are primarily in response to consultation submissions and were refined during engagement with tangata whenua, while some are recommended as best practice measures.

30. Please note that the recommended conditions and other measures are closely tied to DOC's recommendation that you do not uphold objections, and that you consider the reserve meets the section 5(9) criteria. Therefore, if you intend to accept some, but not all, of the recommended conditions and other measures, we recommend that you seek further advice from DOC on the implications of this before making your decisions.

Opposition to your decisions on the proposed reserve

31. Whether you approve or decline the proposed reserve, some will likely strongly oppose your decision.

32. The Applicant has invested a lot of time and effort in the Application, and in the process. The Applicant clearly feels strongly that the reserve will help restore the health of the Gulf. Throughout this process, the Applicant has advocated for the Application and implored, you, and former Ministers of Conservation, to require DOC to provide you with advice in a timely manner. The Applicant considers the process has taken too long.

33. During the Select Committee process on the Tīkapa Moana Bill, the Applicant submitted that the proposed reserve should be included in the marine protection measures within the Bill. DOC advised the Select Committee against including the proposed reserve in the Bill as it had not been part of the process undertaken over more than 10 years for the other Bill proposals and would likely extend the Bill's implementation timelines. You decided that the proposed reserve should not be included in the Bill (24-B-0105 refers). Proposals for marine protection around Waiheke Island were not considered earlier as part of the Sea Change process due to the Waiheke Local Board undertaking consultation on other marine protection options at that time.

34. If you were to decide not to approve the proposed reserve, then the Applicant will likely be vocal in their views that the proposed reserve is needed. They may pursue judicial review of your decision (as may the Trust Board). See paragraphs 47-58 for more detail.

35. We will work with your office to develop a communications plan for any announcement. This may help manage any anticipated iwi, Applicant, public and stakeholder concerns.

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Treaty partners

36. DOC acknowledges the establishment of a marine reserve has the potential to impact on a range of tangata whenua interests, rights, and values. We have undertaken engagement to ensure we understand the views of tangata whenua groups. This engagement has informed DOC advice on how to best apply section 4, as you must, so far as possible, apply the legal and other considerations in a manner that gives effect to the principles of the Treaty. In response, we have proposed conditions and mitigation measures we consider to be reasonable and appropriate to address concerns raised in submissions and during tangata whenua engagement.

37. DOC recognises the Iwi Trust (in particular) remains fundamentally opposed to the proposed reserve as a marine protection mechanism, including its impact on their rangatiratanga and kaitiaki responsibilities. However, DOC considers the proposed conditions and other mitigations recognise the strength of the relationship of the customary interest groups with the Hauraki Gulf and provides for a degree of rangatiratanga and the continuation of some kaitiaki responsibilities, and that this would be reasonable in the circumstances and consistent with statutory obligations.

38. Throughout the process, DOC has worked to ensure you are able to make a robust decision that can withstand legal challenge. A court is much less likely to intervene by way of judicial review when DOC and you can demonstrate we have correctly understood the interests of tangata whenua (and the interests of the public and other stakeholders), applied the correct legal tests and reached a decision reasonably open to you in all the circumstances of the case and in light of the broader statutory regime and its purpose.

39. It is our view that a decline of the Application is not reasonably required and that the proposed conditions for the Order in Council and other mitigation measures are reasonable and sufficient to recognise the rights and interests of tangata whenua, including to discharge the duty of active protection in the circumstances of this matter, while also recognising the government's ability to manage the environment in the interests of all New Zealanders.

40. Despite our confidence and despite the proposed conditions and other mitigations measures, it may be that one or more Treaty partners remains fundamentally opposed to the imposition of a marine reserve. The most likely applicants for judicial review are the Iwi Trust, who oppose the Application and are likely to be critical of DOC's approach to engagement with the Trust Board.

Ngāti Pāoa entities

41. Your decision, either way, will likely displease some within Ngāti Pāoa, given the opposing view of the Iwi Trust and the Trust Board. The Iwi Trust may also be critical of and/or challenge DOC's continued engagement with the Trust Board as representing Ngāti Pāoa interests, in circumstances where the Iwi Trust is the post settlement governance entity for Ngāti Pāoa settlement interests. (Noting that the Deed of Settlement has been signed but the legislation that gives legal effect to certain aspects of the settlement is still at Bill stage.)

42. There has been much litigation between these two entities, and this has not been wholly resolved by the Treaty settlement. While recognising the Crown and DOC have, or will have, statutory and contractual obligations to the Iwi Trust under the Treaty settlement (as the post settlement governance entity), the Trust Board remains a validly constituted Ngāti Pāoa entity and continues to have support from some iwi members and has engaged on the Application in its own right.

43. It is our view that the dispute is largely between the two entities and a matter best addressed according their own tikanga. DOC has determined it reasonable in the circumstances to engage in good faith with both entities as part of its section 4 Conservation Act obligations. Despite this view, given the litigious nature of the two

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entities and the entrenched nature of their positions, judicial review proceedings remain a clear likelihood.

Timeframe for decision

44. The Act does not stipulate a process or timeframe for your decisions on the proposed reserve. It is important that you take the time necessary to consider the advice.

45. However, there is no doubt that the Applicant, and others, will be heartened that you now have the papers in front of you, and will no doubt apply pressure for a decision as soon as possible.

46. The Application was notified for public consultation on 20 January 2022, and the Applicant, and others, have criticised the time it has taken DOC to prepare advice. If too much time elapses between notification and decision, some may argue that the statutory consultation is now out of date and should be repeated. We do not consider this to be the case, at this stage.

Legal risks – paragraphs 47-58 below are legal advice and subject to legal professional privilege

47. Legal Professional Privilege

48. Legal Professional Privilege

49. Legal Professional Privilege

50. Legal Professional Privilege

51. Legal Professional Privilege

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58. Legal Professional Privilege

Treaty principles (section 4) – Ngā mātāpono Tiriti (section 4)

59. DOC has considered the principles of the Treaty when providing advice to you on this Application and given effect to these principles throughout the process and in the development of proposed conditions and other mitigation measures. This advice is described in the Departmental report (Attachment A).

60. DOC's actions to understand the rights, interests, and views of tangata whenua are set out in section 4.3 of Attachment A. There was limited uptake of direct engagement opportunities, rather, the views of tangata whenua were mostly heard via the public consultation process. Ngāti Pāoa were the main iwi group to express their views: the Iwi Trust and the Iwi Board made submissions in the public process and engaged with

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DOC directly. The Iwi Trust and the Trust Board hold divergent views on the proposed reserve.

61. When developing the Departmental report, we sought feedback from the 12 tangata whenua groups on proposed recommendations to address concerns related to the impact of the proposed reserve on their customary rights and interests. Feedback was only received from the Iwi Trust and the Trust Board (see Appendix 6 and 7, Volume 2). Our advice on these proposed measures is detailed in chapter 10 of the Departmental report (Attachment A). Note that the Iwi Trust remains fundamentally opposed to the proposed reserve as a marine protection mechanism, including its impact on their rangatiratanga and kaitiaki responsibilities. While DOC recognises the impact on cultural rights and interests, we consider the recommendations provide for a degree of rangatiratanga and the continuation of some kaitiaki responsibilities and that this is reasonable in the circumstances and meets the statutory requirements, including those relating to tangata whenua interests and the principles of the Treaty of Waitangi.

62. You will need to consider the positions of tangata whenua, Ngāti Pāoa in particular, and DOC's advice as part of your decisions on the proposed reserve.

63. Note that Treaty settlement harbours redress has been excluded from the relevant individual and collective Treaty settlements and is yet to be negotiated. While you need to be cognizant of the potential impact of the declaration of a marine reserve on future settlement negotiations, our advice is that this does not of itself prevent you from making decisions in the meantime to manage the environment in the interests of all New Zealanders. Our understanding is that these negotiations have not yet started and may be some way off. However, if it is subsequently found that there had been Crown commitments given to tangata whenua groups about the potential harbours redress, then any such undertaking would be directly relevant to section 4.

Consultation – Kōrero whakawhiti

64. The proposed reserve is the result of Waiheke Island community-led conversations over ~30 years. Tangata whenua were consulted on the proposal, and, in 2022, the proposal was subject to statutory public consultation under the Act.

65. The process and results of tangata whenua engagement and public consultation are detailed in the Departmental report (Attachment A). All submissions received (with redactions) are provided on the DOC website[2] and unredacted submissions are provided to your office concurrently with this briefing.

66. Fisheries New Zealand and the Ministry of Transport have reviewed relevant aspects of the Departmental report (Attachment A).

Financial implications – Te hīraunga pūtea

67. We consider DOC capacity and funding requirements to implement and manage the proposed reserve can be largely absorbed within BAU resource and work programming already in place for Te Matuku Marine Reserve (which is also on Waiheke Island). No additional roles are anticipated.

68. Where there are one-off costs to implement the proposed reserve, such as signage, we will manage these as cost pressures as and when required.

69. There is some uncertainty around what the proposed advisory rōpū may look like, including whether it can be folded into existing advisory bodies in the Hauraki Gulf or those that may be established through the Hauraki Gulf / Tīkapa Moana Bill. We will refine the required costs around any advisory rōpū once Ministerial decisions are

[2] https://www.doc.govt.nz/get-involved/have-your-say/all-consultations/2022-consultations/proposed-hakaimango-matiatia-northwest-waiheke-marine-reserve/.

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made. Further conversations with tangata whenua and stakeholders would be required.

Legislative implications – Te hīraunga a ture

70. You, as Minister of Conservation, are the decision-maker under the Act with respect to the Application. If you decide to approve the marine reserve and gain Ministerial concurrence of your decision, you will need to recommend to the Governor-General the making of an Order in Council.

Next steps – Ngā tāwhaitanga

71. Should you decide to progress recommending the making of an Order in Council for the proposed reserve, your next step is to seek the concurrence of the Minister for Oceans and Fisheries and the Minister of Transport. We have prepared draft letters in for this purpose (Attachment D). If concurrence is withheld, following the Ministers' respective independent consideration in light of their portfolios, the Application does not proceed.

72. If concurrence is obtained, DOC will notify the Applicant and objectors of the decision.

73. DOC will seek the review of the name of the proposed reserve from the New Zealand Geographic Board (under section 27(2) of the New Zealand Geographic Board (Ngā Pou Taunaha o Aotearoa) Act 2008). The proposed reserve must be named in accordance with the requirements of this Act.

74. DOC will commission a Survey Office Plan for the proposed reserve and Parliamentary Counsel Office will draft the Order in Council.

75. You will then need to recommend that the Governor-General make an Order in Council to establish the new marine reserve. This would be notified in the New Zealand Gazette and come into force 28 days after notification, at which point the marine reserve will take legal effect.

76. DOC intends to notify the Applicant, and the 12 tangata whenua groups that we have previously engaged with, that we have now provided advice to you to support your decision on the Application. These parties may request to see DOC's advice. We will work with your office to manage any such request.

77. We will support you with a communications plan regarding your decision.

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