

# BRUCE SCOTT

BARRISTER

28 May 2022

DIRECT: [REDACTED]

MOBILE: [REDACTED]

EMAIL: [REDACTED]

Conservation Services Programme  
Department of Conservation  
Po Box 10-420  
Wellington

by email

Tēnā koutou

## SUBMISSION ON CONSERVATION SERVICES PROGRAMME - DRAFT ANNUAL PLAN FOR 2022/2023

### Purpose

- 1 I have provided advice to the New Zealand Rock Lobster Industry Council (**NZ RLIC**) on certain legal issues relating to the Department of conservation's Draft Conservation Services Programme Annual Plan for 2022-23 (**CSP**). Having done so, this memorandum now provides a submission on NZRLIC's behalf on the draft CSP, primarily addressing those legal issues.

### Overview

- 2 NZ RLIC submits that the CSP unlawfully includes programmes that do not fall within the definition of "*conservation services*" in the Fisheries Act 1996 (**Act**) and, therefore, cannot be included in the CSP or be subject to cost recovery from industry.
- 3 In particular, proposed service 2.7 "*Determining the resilience of Fiordland corals to fisheries impacts*" (**Fiordland Coral Project**) does not constitute a conservation service as the output of this programme is not related to the "*adverse effects*" of commercial fishing on the coral. This is because:
  - 3.1 it is not yet known what effect (if any) commercial rock lobster fishing is in fact having on coral in the Fiordland region; with the Fiordland Coral Project aiming to gain a greater understanding of the interaction between coral and commercial fishing; and
  - 3.2 the lack of overlap over between the location of coral habitat in Fiordland and commercial rock lobster fishing grounds suggests that there is no justification, based on the best available information, for assuming that commercial rock lobster fishing is having an adverse effect on coral.
- 4 Even if the Fiordland Coral Project does constitute a conservation service, which has clearly not been established, there is no legitimate basis for seeking full cost recovery from industry given the general public interest aspects of the research.

---

Bruce Scott Barrister

D [REDACTED]

M [REDACTED]

E [REDACTED]

Hawkestone Chambers  
32 Hawkestone Street  
PO Box 12091, Thorndon  
Wellington 6144



- 5 The central legal issue addressed in this submission, regarding the application of the cost recovery principles in the Act, has been consistently raised by industry representatives over many years in respect of a range of different projects which the Crown has sought to recover the costs of from industry, including matters that relate to conservation services. Many of the issues raised in previous submissions have not been addressed and remain unresolved.
- 6 This is of increasing concern to industry and if not addressed must inevitably lead to legal proceedings.

### **Cost Recovery Principles and Conservation Services**

- 7 Cost recovery of services is only permitted to the extent allowed for under Part 14 of the Act. Section 262 sets out the Cost Recovery Principles. This section makes clear that cost recovery is limited to recovery of either “*conservation services*” or “*fisheries services*”.<sup>1</sup>
- 8 Conservation services are defined in s 2 of the Act as follows (emphasis added):

Conservation services means outputs produced in relation to the **adverse effects** of commercial fishing on protected species, as agreed between the Minister responsible for the administration of the Conservation Act 1987 and the Director-General of the Department of Conservation, including—

  - (a) Research relating to **those effects** on protected species:
  - (b) Research on measures to mitigate the **adverse effects** of commercial fishing on protected species:
  - (c) The development of population management plans under the Wildlife Act 1953 and the Marine Mammals Protection Act 1978.
- 9 What this means is that a programme can only constitute a “conservation service” if the outputs of that programme relate to the adverse effects of commercial fishing. A programme will not fall within the definition of “conservation service” where the purpose of that programme is only to investigate what effect (if any) commercial fishing is having on a protected species.
- 10 Put another way, DOC must already have sufficient information about the interaction of commercial fishing and a particular protected species on which to form a reasonable view that commercial fishing is having an adverse effect on that species (or that such an adverse effect is likely) before a programme relating to commercial fishing and that species can fall within the definition of “conservation service”. That is hardly surprising conclusion – before this selective tax can be imposed on those causing an adverse effect, it needs to have been established that their actions are having that effect. This does not, of course, mean that that the project cannot proceed. It just means that the Crown must itself pay for this research.
- 11 The need for DOC to have sufficient information to be able to show that commercial fishing is having an adverse effect on a protected species **before** it can constitute a conservation service and be liable for cost recovery was confirmed by the Office of the

---

<sup>1</sup> Noting that cost recovery is not permitted where such services are provided in the general public interest: s 262(b).



Auditor General in their 2002 and 2005 reports on the Conservation Services Programme.<sup>2</sup> A copy of the 2005 report is attached. It summarises the findings of the 2002 report. The Office of the Auditor General stated in its 2005 follow up report that, without sufficient information to show that commercial fishing was having an adverse effect “*it is appropriate, in our view, for the Crown to fund this research (rather than the commercial fishing industry)*”.<sup>3</sup>

### **Proposed service 2.7 Determining the resilience of Fiordland corals to fisheries impacts**

- 12 The CSP proposes that Fiordland Coral Project is 100% cost recovered from the CRA8 and BCO5 stocks.<sup>4</sup> NZ RLIC submits that this project does not fall within the definition of conservation service and, therefore, **cannot** be subject to cost recovery from industry.
  - 13 The Fiordland Coral Project cannot constitute a conservation service as the output of this programme is not related to the “*adverse effects*” of commercial fishing on the coral:
    - 13.1 DOC does not have sufficient information about the interaction of commercial fishing and the coral on which to have reasonable grounds to believe that commercial fishing is having (or is likely to have) an adverse effect on the coral.
    - 13.2 Mere speculation or the use of simplistic proxies, such as spatial overlap between fishing and a protected species population, is not sufficient to justify the existence of an adverse effect.
    - 13.3 Before there is sufficient information to establish that commercial fishing is having an adverse effect on coral, then it appropriate for the Crown (and not the fishing industry) to fund this research as such research cannot fall within the definition of conservation service.
- Interactions do not equal adverse impacts*
- 14 The CSP looks to **obfuscate** this issue by referring to “interactions” between commercial fishing and the coral when describing the Fiordland Coral Project. However, “interactions” do not legally equate to “adverse effects”.
  - 15 It is clear from the objectives of the Fiordland Coral Project itself that there is not yet sufficient information to establish a link between commercial fishing and any adverse effect on the coral. Rather the Project’s objectives make clear that this project is aimed at gaining a greater understanding of the interaction between coral and commercial fishing rather than relating to any adverse effect:

---

<sup>2</sup> <https://oag.parliament.nz/2005/doc-csp/departement-of-conservation-administration-of-the-conservation-services-programm-2013-follow-up-audit>

<sup>3</sup> Office of the Auditor General “*Department of Conservation: Administration of the Conservation Services Programme – Follow-up Audit*”, February 2005, at [2.19]. This statement was made in relation into the Auditor General’s consideration of the Black Petrel research programme.

<sup>4</sup> CSP, p 43.: 2017



- 15.1 *“Increase understanding of the ecology and impacts of fishing on protected corals in Fiordland”* – this shows that the impacts of fishing are not yet known;
  - 15.2 *“Improving our understanding of the distribution of Fiordland corals inside and outside of protected areas”* – that is, the distribution and abundance of corals are not well known;
  - 15.3 *“Inform our understanding of black coral resilience to fishing”* – that is, the impacts of fishing are not known.
- 16 The scope of the Fiordland Coral Project is confirmed by the DOC statement in the relevant Medium Term Research Plan that describes the Project.<sup>5</sup> This makes it clear that there is no information that could support a view that commercial fishing is having an adverse effect on the coral but rather that the research is aimed at determining whether any such adverse effects exist (emphasis added):
- Shallow water corals (e.g., 10-40m in Fiordland, Port Pegasus) in New Zealand possibly interact with commercial fishing methods such as potting for crayfish and blue cod..... Currently there is **no quantitative data on the interaction between these fisheries and protected coral species**. Gaining this data is essential to identifying the potential impacts of these fisheries on the protected corals in these waters.
- 17 While it is acknowledged that DOC has a legitimate interest in investigating the distribution and abundance of corals and what environmental or other factors might be adversely affecting corals as protected species, this does not mean that such research presently constitutes a conservation service that is subject to cost recovery.
- Limited overlap between commercial fishing and coral habitat*
- 18 In addition to this, NZRLIC submits that current understanding suggests that there is a low likelihood of overlap between areas where commercial rock lobster potting is undertaken and coral habitat. Accordingly:
- 18.1 there is no justifiable basis for assuming that commercial rock lobster fishing is having an adverse effect on coral: and as such
  - 18.2 the Fiordland Coral Project cannot constitute a conservation service and be liable for cost recovery.
- 19 The information relevant as to the low likelihood of overlap includes the following:
- 19.1 The fjords are closed to commercial fishing inside the habitat lines. The habitat lines represent the place where the ecology of the fiord changes from one of an inner fiord to one of an open coast. The known black coral distribution is mainly inside these habitat lines and in areas where the inversion layer limits light penetration.
  - 19.2 There are substantial areas of the fjords and sounds inside the habitat lines that have been designated as marine reserves and “china shops” – for the purpose of protecting rare, unique and fragile habitats including corals, and other areas are closed to anchoring to address concerns about impact on habitat.

---

<sup>5</sup> From *Protected Coral Medium Term Research Plan*, February 2022



- 19.3 Commercial rock lobster fishing (and all other commercial fishing) has been excluded from the internal waters of Fiordland (and other areas) since 2005, as per amendment to the Commercial Fisheries Regulations (1986). Maps that depict the boundaries of the restricted areas for the various fiords and sounds can be found in the Fiordland Marine Guardian's *Beneath the Reflections* publication.
- 19.4 NIWA has documented the physical oceanography of the Fjords, with the sounds mentioned in the project proposal (Doubtful, Dusky and Breaksea) reaching a maximum depth of 300-400+ meters, before raising up to 60-100 meter depths at their entrances. Work by Grange on the distribution of black corals in southern fiords, suggests the majority of the black coral population of Fiordland are restricted to the rock walls at depths of 40 meters or less.
- 19.5 Critically, there is no information to suggest the open coast foul ground fished by commercial rock lobster potting is coral habitat.
- 20 Overall, with the spatial restrictions excluding commercial operators from fishing within the internal waters (i.e., inside the habitat lines) of Fiordland, and the maximum (and entrance) depth of the fjords greatly exceeding the range where the majority of the black coral population has been surveyed to occur, the best available information confirms that overlap is likely to be minimal.

**Fiordland Coral Project in general public interest and not liable for cost recovery**

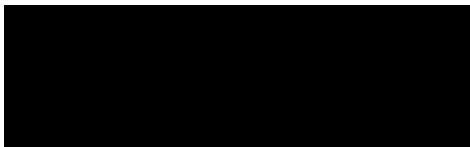
- 21 NZ RLIC submits that even if the Fiordland Coral Project did meet the definition of a "conservation service", 100% cost recovery from industry for this Project is not permitted in accordance with the Act's Cost Recovery Principles.
- 22 The Cost Recovery Principles specify that:
- 22.1 a conservation service cannot be recovered if the service provided is in the general public interest: s262(c); and
- 22.2 the costs of a conservation service aimed at avoiding, remedying or mitigating an adverse effect must "*be attributed to the persons who caused the risk or adverse effect*": s262(d).
- 23 Even on DoC's rationale, the Fiordland Coral Project is being provided predominantly in the general public interest. This is made clear by the rationale for the Project that expressly states that the purpose of the research is to determine how coral responds to a range of environmental impacts including climate change, changes in land use and fishing. Accordingly, it is appropriate for the Crown to fund this research, not industry.
- 24 Further, given that the Project expressly recognises that to the extent that there could be adverse effects on coral caused by environmental change, these are not all caused by the fishing industry. Some may relate to climate change and changes in land use. To the extent there are any fishing impacts on black corals in the fjords and sounds, they are much more likely to be from recreational potting because they do operate in the areas of known black coral distribution.
- 25 In short, there is not legitimate basis for seeking to recover 100% the cost of this Project from the fishing industry.



### **Meeting and response by DoC needed**

- 26 As noted earlier, there is nothing new about the important issues raised in this submission concerning DoC's ability to seek recovery of the cost of research in circumstances where (a) there is insufficient evidence to establish that the industry is having an adverse effect; (b) a research project is primarily aimed at establishing the nature and extent of any interaction with the commercial fishing sector as well as the impact of other environmental changes and (c) it is acknowledged by DoC that there are other potential contributing causes to impacts on a protected species population, not connected to the fishing industry, which are being investigated through this research.
- 27 It is, with respect, no longer acceptable for DoC to simply continue to ignore these important issues. The fishing industry would much prefer to try and resolve them by discussion. To that end NZ RLIC would welcome the opportunity to meet to discuss these issues at the earliest opportunity and would like a written response to them following that meeting, if the meeting cannot resolve the issues.
- 28 I look forward to your response.

Nāku noa, nā



**Bruce Scott**  
**BARRISTER**

**D** [REDACTED]

**M** [REDACTED]

**E** [REDACTED]

Copies to: NZ RLIC  
MPI - Cost Recovery

Enclosures: Auditor General (2005) Follow up report - DoC Administration of the Conservation Services Programme.