In Confidence

Office of the Minister of Conservation

Office of the Minister for Oceans and Fisheries

Cabinet Legislation Committee

The Hauraki Gulf / Tīkapa Moana Marine Protection Bill: Approval for Introduction

Proposal

1 We propose that the Hauraki Gulf / Tīkapa Moana Marine Protection Bill 2023 (**Attachment A**) be approved for introduction to the House of Representatives in August 2023.

2 We seek approval to issue drafting instructions to the Parliamentary Counsel Office for regulations under the Hauraki Gulf / Tīkapa Moana Marine Protection Bill 2023.

Relation to government priorities

3 The Labour Party's 2020 manifesto commits to continue working on the Sea Change project within the Hauraki Gulf / Tīkapa Moana (the Gulf).

Policy

4 The Gulf is recognised as a taonga of natural, economic, recreational, and cultural importance. However, State of the Gulf reports over the last 20 years have shown it to be in an ongoing state of environmental decline.[1]

5 Marine protection is needed to help reverse the environmental decline in the Gulf. This Bill will give effect to the new classes of marine protection areas that will regulate harmful activities in the marine environment. It will increase marine protection in the Gulf from 6.7% to around 18%.

6 In June 2021, the Government released *Revitalising the Gulf: Government action on the Sea Change Plan (Revitalising the Gulf)* [ENV-21-MIN-0032] – a package of integrated marine conservation and fisheries management actions to improve the health and mauri of the Gulf.

7 In December 2022, Cabinet agreed the final policy decisions for the *Revitalising the Gulf* marine protection proposals and gave approval for the Minister of Conservation to issue drafting instructions to the Parliamentary Counsel Office (PCO) for the Hauraki Gulf / Tīkapa Moana Marine Protection Bill (the Bill) [CAB-22-MIN-0599.02 refers].

[1] Every three years, the Hauraki Gulf Forum is required to produce a report on the state of the Hauraki Gulf environment. The reports can be found at https://gulfjournal.org nz/state-of-the-gulf

8 Cabinet agreed to the establishment of:

8.1 two marine reserves, one adjacent to the existing Cape Rodney – Okakari Point Marine Reserve (Leigh/Goat Island), and one adjacent to the Whanganui A Hei (Cathedral Cove) Marine Reserve. This will in effect extend the two existing marine reserves. These marine reserves will protect the marine environment by providing the same protections as the existing marine reserves, including prohibiting all fishing and other impactful activities.

8.2 12 High Protection Areas (HPAs) to protect and restore marine ecosystems. HPAs will regulate a range of activities including commercial and recreational fishing, but will provide for customary fishing with the following provisions:

- customary fishing must align with the biodiversity objectives for a site;
- customary fishers will require authorisations under the existing customary fisheries framework established under the Fisheries Act 1996; and
- there will be a legislative mechanism whereby Ministers can, if necessary, apply additional management actions should customary fishing conflict with the biodiversity objectives of a site.

8.3 five Seafloor Protection Areas (SPAs) to protect seafloor habitats and communities by prohibiting bottom impacting fishing activities (e.g., bottom trawling, Danish seining) and other activities such as dredging, sand extraction, and mining.

9 The two marine reserves will be treated as if they were declared by an Order in Council made under section 4(1) of the Marine Reserves Act 1971. Once in place, these marine reserves will be managed entirely under the Marine Reserves Act 1971 and will be subject to the same rules and provisions as the existing, contiguous marine reserves. No other parts of the Bill will apply to the marine reserves.

10 The Bill is on the 2023 Legislative Programme as category 4 priority (to be referred to a select committee in 2023).

Supporting customary rights and interests

11 The Bill acknowledges Māori rights and interests, including those provided for by the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 and the Marine and Coastal Area (Takutai Moana) Act 2011.

12 As noted above, as part of providing for the exercise of customary practices, customary fishing will be provided for in HPAs with some provisions including alignment with the biodiversity objectives for a site. We consider that the provisions in the Bill will not significantly impact on non-fishing customary rights. The Bill will allow for the small-scale removal of natural materials and will not impact on protected customary rights under the Marine and Coastal Area (Takutai Moana) Act 2011.

13 The Bill will recognise the role of whānau, hapū, and iwi as kaitiaki through the collaborative development of biodiversity objectives, and associated regulations concerning activities within the HPAs.

14 Some aspects of this Bill, particularly the allowance for customary fishing in HPAs, could be contentious. The Department of Conservation received feedback during consultation that this allowance is considered unfair by some as it is seen as giving Māori preferential treatment. We consider the provisions of the Bill to be consistent with, and preserve, existing rights under the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992, te Tiriti o Waitangi/the Treaty of Waitangi and customary rights of iwi, hapū, and whānau.

15 Tangata whenua feedback was generally supportive of the proposals and public feedback was very supportive of greater protection in the Gulf.

Interaction with the Marine and Coastal Area (Takutai Moana) Act 2011 (MACA Act)

16 Nothing in the Bill related to HPAs or SPAs will limit or otherwise affect the exercise of protected customary rights or rights held by a customary marine title group under the MACA Act. The Bill, other than the establishment of marine reserves, will also not impact on any application for protected customary rights or customary marine title under the MACA Act.

17 Not all protected customary rights or rights held by a customary marine title group under the MACA Act can be exercised in the marine reserves. Any activities prohibited in a marine reserve through the Marine Reserves Act would not be able to be carried out as a protected customary right.

18 The MACA Act applies to any application to declare or extend a marine reserve.[2] These provisions do not apply in this case as these marine reserves were not applications made under section 5 of the Marine Reserves Act 1971. We are confident that the process for developing the marine protection proposals involved adequate consultation with whānau, hapū, and iwi and that decision-makers had particular regard to these views such that it would satisfy the requirements under the MACA Act.

Development of regulations

19 Regulations outlining the infringement offences, fees, notice, and notice reminders will be developed in time for commencement of the Act.

20 These regulations are necessary for the operationalisation of the Bill and include detail that is more appropriate in secondary legislation than in the Bill itself.

Additional policy decisions

21 Since Cabinet decisions in December 2022, we have made additional minor and technical policy decisions related to the operationalisation of the general policy intent set out in the 2022 Cabinet paper, within the discretion given by Cabinet (see **Attachment B**)

[2] Notice of an application for a marine reserve is defined in the Marine and Coastal Area (Takutai Moana) Act 2011 and stipulates the process by which affected iwi, hapū, or whānau are engaged with on the application.

22 We have also made additional policy decisions regarding a compliance and enforcement regime, a permitting regime, a 25-year review clause, and a Treaty provision in the Bill. These decisions require approval by Cabinet as they do not directly reflect previous Cabinet decisions. Consultation with the relevant agencies was carried out for these decisions.

Approval of the compliance and enforcement regime included in the Bill

23 We propose:

23.1 an offences and penalties system similar to that in the Marine Reserves Act 1971 but updated to include a corporate liability clause and to be more aligned with modern conservation legislation:

Offence	*Type*	*Purpose*	*Maximum fine*	*Maximum imprisonment term*
Infringement	Strict liability	All	$1,000 fee $2,000 fine	None
Criminal	Strict liability	Non-commercial	$100,000	None, but ability to impose community-based sentences
		Commercial*	$200,000	
Criminal	Mens rea	All	$250,000	3-month
Criminal	Mens rea	Other offences**	$100,000	3-month

**commercial means "the court is satisfied beyond reasonable doubt that the offence was committed for the purpose of commercial gain or reward (whether or not any gain or reward is realised) and/or in the case of fishing, is found in possession of an amount exceeding 3 times the amateur individual daily limit*

***other offences means any offences not related to the prohibitions under the Bill e.g., failing to comply with directions of a ranger, or obstructing or threatening a ranger*

23.2 that the Bill includes provisions for the power of rangers that are modelled on the Marine Reserves Act 1971 and include the following powers:

- to order a person thought to be or about to commit an offence under the Bill to refrain from the prohibited activity;
- to apprehend a person who is/has committed an offence against the Bill;
- to require information from someone thought to have committed an offence, or for the purpose of monitoring compliance with the Bill; and
- to seize property, aquatic life and natural materials, or proceeds from the sale of aquatic life or natural materials related to the offence undertaken.

These powers are subject to Part 4 (excluding sub-part 3) of the Search and Surveillance Act 2012.

23.3 that the Bill includes provisions for Court ordered forfeiture of property, aquatic life and natural materials, or proceeds from the sale of aquatic life or natural materials related to the offence undertaken, for all offences.

Approval of a permitting regime in the Bill

24 There will be some instances where activities that are prohibited or regulated in SPAs and HPAs may have sufficient rationale to occur e.g., permits for undertaking mātauranga Māori activities or scientific study, active restoration, or maintenance of existing infrastructure.

25 The provision of powers for the Director-General of the Department of Conservation (the Director-General) to grant a permit in specific circumstances is a common provision in other conservation legislation e.g., the Conservation Act 1987, Reserves Act 1977, and the Marine Mammals Protection Act 1978.

26 We propose:

26.1 a permitting regime whereby the Director-General can grant (and change, review, revoke, and transfer) permits for otherwise prohibited activities.

26.2 that the Bill specifies the matters the Director-General must consider when making a decision on a permit application. We propose that the matters to be considered are:

- the anticipated effects of the activity on the SPA or HPA and the biodiversity objectives;
- whether the activity can take place only within the SPA or HPA;
- if the anticipated effects are negative, reasons why the activity is necessary and can only occur within the SPA or HPA area;
- any measures that can be undertaken to avoid, remedy, or mitigate any adverse effects of the activity; and
- the impact of the activity on the rights and interests on whānau, hapū, and iwi who exercise kaitiakitanga in the area.

Inclusion of a 25-year review clause in the Bill

27 We propose that the Bill includes a 25-year review clause, requiring a review of the HPAs and SPAs. The review is to be carried out by the Minister of Conservation and the Minister responsible for the administration of the Fisheries Act 1996. This is in line with review clauses found in the Kaikōura (Te Tai o Marokura) Marine Management Act 2014, Fiordland (Te Moana o Atawhenua) Marine Management Act 2005, and in relation to Te Tapuwae o Rongokako Marine Reserve and Te Angiangi Marine Reserve.

28 A review would assess the operation, effectiveness, and management of the marine protection. The review would require consultation with whānau, hapū, and iwi that exercise kaitiakitanga in the area and will allow for interested persons to make a submission.

29 The review clause of 25 years allows for sufficient time for environmental changes in the protected areas to occur and be measured. However, a review can be initiated at any time that the Minister of Conservation and the Minister responsible for the administration of the Fisheries Act 1996 consider appropriate.

30 The intent of the review will not be to determine if the marine protection should

continue; rather, it is to ensure the protection remains effective and to inform any improvements.

31 Any recommendations resulting from the review would require an amendment to the Act and/or the regulations made under it. The Minister of Conservation would present a report on the review to the House of Representatives.

Inclusion of a Tiriti o Waitangi/Treaty of Waitangi (Treaty) provision

32 We propose that the Bill includes a Treaty clause similar to section 4 of the Conservation Act: *This Act must be interpreted and administered as to give effect to the principles of te Tiriti o Waitangi/the Treaty of Waitangi.*

33 The Conservation Act Treaty clause is one of the strongest in legislation as it directs those administering the Conservation Act to "give effect" to the principles of the Treaty. The application of this clause is a key focus for the Department of Conservation and continues to be informed by case law. By modelling the Treaty provision in the Bill on section 4, with modernisation to include te Tiriti o Waitangi, the suite of case law and interpretation of the section 4 clause can be applied to this Bill.

34 Including the proposed Treaty clause would mean that any person undertaking an activity under the Bill, such as issuing permits or developing regulations, would need to give effect to the principles of te Tiriti o Waitangi/the Treaty of Waitangi. We consider that this reflects the purpose of the Bill.

Impact analysis

35 A Regulatory Impact Assessment was prepared in accordance with Cabinet requirements and was submitted to Cabinet on 19 December 2022 [CAB-22-MIN-0599.02, 22-B-0741/B22-0681 refers].

36 A further Regulatory Impact Assessment (RIA) has been prepared for the development of regulations associated with this Bill. This has been finalised and assessed by the regulatory quality panel. The RIA is in **Attachment C**.

37 The Department of Conservation Regulatory Impact Analysis Panel has reviewed the Regulatory Impact Assessment "Regulatory Impact Statement: Infringement offences regulations associated with the Hauraki Gulf Marine Protection Bill 2023" produced by the Department of Conservation and dated 06/07/2023. The review team considers that it partially meets the Quality Assurance criteria.

38 The panel considers the Regulatory Impact Statement meets the complete, convincing, clear and concise criteria. The Regulatory Impact Statement is constrained by the lack of consultation on the proposed regulations. However there has been extensive consultation on the marine protection proposals that informed the proposed Bill and empowering provisions for the Regulations. The RIS acknowledges the lack of consultation on regulatory tools (including infringement offences) and notes where further engagement will occur as the design of the infringement regime is developed further.

Compliance

39 The Bill complies with:

39.1 the principles of the Treaty of Waitangi;

39.2 advice from the Treaty Provisions Oversight Group on any Treaty of Waitangi provisions;

39.3 the disclosure statement requirements (see the agency disclosure statement attached to this paper in **Attachment D**);

39.4 the principles and guidelines set out in the Privacy Act 2020;

39.5 relevant international standards and obligations; and

39.6 the Legislation Guidelines (2021 edition).

Human rights

40 The inclusion of strict liability offences engages section 25(c) of the New Zealand Bill of Rights Act 1990, which relates to the presumption of innocence. We consider that the inclusion of strict liability offences is justified because it is consistent with similar offences in environmental legislation, includes appropriate defences modelled on other conservation legislation, and addresses the significant difficulty in enforcing mens rea offences in an environmental law context. The strict liability penalties in the Bill do not include imprisonment terms.

41 The Ministry of Justice concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act 1990.

Agency Consultation

42 A range of government departments and Crown entities reviewed the draft Bill to ensure it is fit for purpose and were consulted on the policy and proposals, including the Treasury, Te Arawhiti, Te Puni Kōkiri, Ministry for the Environment, Ministry of Foreign Affairs and Trade, Land Information New Zealand, New Zealand Geographic Board, Ministry of Business, Innovation and Employment, Ministry of Transport, Ministry of Justice the New Zealand Defence Force, Maritime New Zealand, and the Department of Internal Affairs. The Department of Prime Minister and Cabinet was informed.

43 The Ministry of Business, Innovation and Employment observed that the Bill will prohibit all mining activities in SPAs and HPAs, rather than prohibiting mining in SPAs as indicated in the Cabinet policy paper. MBIE consider that the evidence base for these prohibitions, including economic implications, were not discussed in the regulatory impact analysis as MBIE would have expected. However, a technical document analysed the opportunity cost of the prohibitions to the extent practicable. MBIE consider that this may suffice for the discrete areas of low mineral prospectivity in this case, but consider that this should not set precedent.

44 The New Zealand Defence Force notes that certain activities proposed to be regulated under this Bill are also regulated under the Resource Management Act 1991 (RMA) for a similar purpose, in particular, discharges. The Defence Force considers that landowners could be required to obtain a resource consent under the RMA as well as a permit under this proposed legislation for the same activity. The Defence Force considers this to be onerous and less effective, and consider that it could be better dealt

with if central agencies regularly engage with Auckland Council to ensure effects on seafloor protection areas and high protection areas are addressed in the Auckland Unitary Plan.

45 We consider that the regulatory regime under the RMA is not comparable to the regulatory regime under the new protection areas. The requirement to receive a permit under this Bill is necessary to provide a significant and more substantial level of protection in these areas than is currently in place. This cannot be guaranteed using the regulatory provisions of the RMA. We note that the considerations when making decisions on an application for an activity differs between the RMA and this Bill. We also note that the requirement for multiple permits/consents under different legislation is not unusual for protection and conservation areas e.g., marine reserves and national parks.

Non-agency consultation

46 Auckland Council and Waikato Regional Council have been consulted during the development of the Bill.

47 No other consultation has occurred since Cabinet decisions in December 2022. Prior to those decisions, officials met with all tangata whenua groups who expressed an interest in meeting on the proposals. Officials also heard from 11 fisheries stakeholder groups including Te Ohu Kaimoana, the NZ Rock Lobster Industry Council, the Pāua Industry Council, and Fisheries Inshore New Zealand. Feedback on the proposals was also received through over 7,550 email submissions (over 7,000 of which were four types of form submissions sponsored by either Forest & Bird, Gulf Users Forum/Gulf Users Group, LegaSea, or Revive our Gulf).

Binding on the Crown

48 The Bill states that the Act will bind the Crown.

Creating new agencies or amending law relating to existing agencies.

49 The Bill does not create any new agency.

Allocation of decision-making powers

50 The Bill does not change the allocation of decision-making powers.

Associated regulations

51 No regulations are required in order for the Bill to be implemented.

52 The Bill creates regulation-making powers for a range of purposes, including:

52.1 providing for the marking of boundaries of HPAs and SPAs, and the management of such areas;

52.2 providing for setting biodiversity objectives for seafloor protection and for HPAs;

52.3 the regulation of activities (including customary fishing) to the extent necessary to give effect to the biodiversity objectives of HPAs;

52.4 prescribing offences for the breach of the regulations;

52.5 prescribing infringement offences for the breach of the regulations; and

52.6 providing for anything incidental that is necessary for giving effect to the Act.

Commencement of legislation

53 The Bill will come into force on the day after the date on which it receives Royal assent.

Parliamentary stages

54 The Bill should be introduced into Parliament on 17 August 2023 and be passed in mid-2024, following the general election and a standard six month select committee process.

55 We intend that the Bill be referred to the Environment Committee.

Financial implications

56 Cabinet previously noted that implementation of the marine protection proposals in the Revitalising the Gulf Strategy will be funded through reprioritisation and transfer within Vote Conservation [CAB-22-MIN-0599.023].

57 The total cost of implementing the marine protection package is $10.54 million over four years, with ongoing operational costs of $3.505 million per year following that.

58 In addition to funding the marine protected areas, we have allocated approximately $1.408 million over four years for research and monitoring to track the effectiveness of all the actions across the Revitalising the Gulf strategy as a whole.

59 The Minister of Tourism, Minister of Finance and the Minister of Conservation have agreed that the first year will be funded by the International Visitor Conservation and Tourism Levy ($1.605 million).

60 For the following years, the Minister of Conservation has reprioritised $3.41 million - $3.51 million from Vote Conservation. This will come from the Budget 2022 uplift originally allocated to the Predator Free 2050 Strategy. This includes a Fiscally Neutral Adjustment through the October Baseline Update to shift operating expenditure to capital expenditure for the 2024/25 financial year.

Proactive Release

61 We intend to proactively release this Cabinet paper within 30 business days of decisions being confirmed by Cabinet, subject to redaction as appropriate under the Official Information Act 1982.

Recommendations

The Minister of Conservation and the Minister for Oceans and Fisheries recommend that the Committee:

1 **note** that the purpose of the Hauraki Gulf / Tīkapa Moana Marine Protection Bill 2023

is to establish new marine protection areas to protect and enhance the ecological integrity and biodiversity of the Hauraki Gulf / Tīkapa Moana, while acknowledging the rights and interests of Māori;

2 **note** that the Bill holds a Category 4 priority on the 2023 Legislation Programme (to be referred to a select committee in 2023);

3 **note** that the establishment of marine reserves under the Bill may impact on protected customary rights and customary marine title under the Marine and Coastal Area (Takutai Moana) Area Act 2011;

4 **note** that the process for establishing marine reserves under this Bill is not subject to the requirements outlined in the Takutai Moana Act 2011, e.g., adequate consultation with whānau, hapū, and iwi and that decision-makers have particular regard to these views;

5 **note** that it is considered the process undertaken in developing the Bill's marine protection proposal would nonetheless satisfy the requirements under the Takutai Moana Act 2011;

6 **agree** that the Bill bind the Crown; and

7 **agree** that the Bill create regulation-making powers as set out in paragraph 52.

Additional policy decisions

8 **Agree** that the Bill will include an offences and penalties system that includes:

- strict liability infringement offences covering all activities that has a maximum fee of $1,000 and a maximum fine of $2,000 and no imprisonment;
- strict liability criminal offences covering non-commercial activities that has a maximum fine of $100,000 and no imprisonment, but an ability to impose community-based sentences;
- strict liability criminal offences covering commercial activities that has a maximum fine of $200,000 and no imprisonment, but an ability to impose community-based sentences;
- mens rea criminal offences covering all activities that has a maximum fine of $250,000 and maximum 3-month imprisonment term;
- mens rea criminal offences covering 'other offences' that has a maximum fine of $100,000 and maximum 3-month imprisonment term; and
- a body corporate liability clause modelled on existing conservation legislation.

9 **agree** that the Bill includes provisions for the power of rangers modelled on the Marine Reserves Act 1971;

10 **agree** that the Bill includes provisions for Court ordered forfeiture for all offences**;**

11 **agree** that the Bill will include a permitting regime whereby the Director-General of the Department of Conservation can grant permits for otherwise prohibited activities;

12 **agree** that the Bill will specify the matters the Director-General of the Department of Conservation must consider when deciding on a permit application;

13 **agree** that the Bill will include a 25-year review of the HPAs and SPAs;

14 **agree** that the Bill will include the following Treaty provision: This Act must be interpreted and administered as to give effect to the principles of te Tiriti o Waitangi/the Treaty of Waitangi; and

15 **note** that we have made minor and technical policy changes consistent with the intent set out in the 2022 Cabinet paper**.**

Approval for introduction

16 **approve** the Bill for introduction, subject to the final approval of the government caucus and sufficient support in the House of Representatives;

17 **agree** that the Bill be introduced on 17 August 2023; and

18 **agree** that the Bill be:

18.1 referred to the Environment Committee for consideration; and

18.2 enacted by mid-2024 at the latest, subject to parliamentary processes and the Government's legislative priorities.

Approval to issue drafting instructions to PCO for regulations under this Bill

19 **authorise** the Minister of Conservation to issue drafting instructions to the Parliamentary Counsel Office for secondary legislation of regulations outlining the infringement offences, fees, notice, and notice reminders under the Hauraki Gulf / Tīkapa Moana Marine Protection Act 2024**.**

Authorised for lodgement

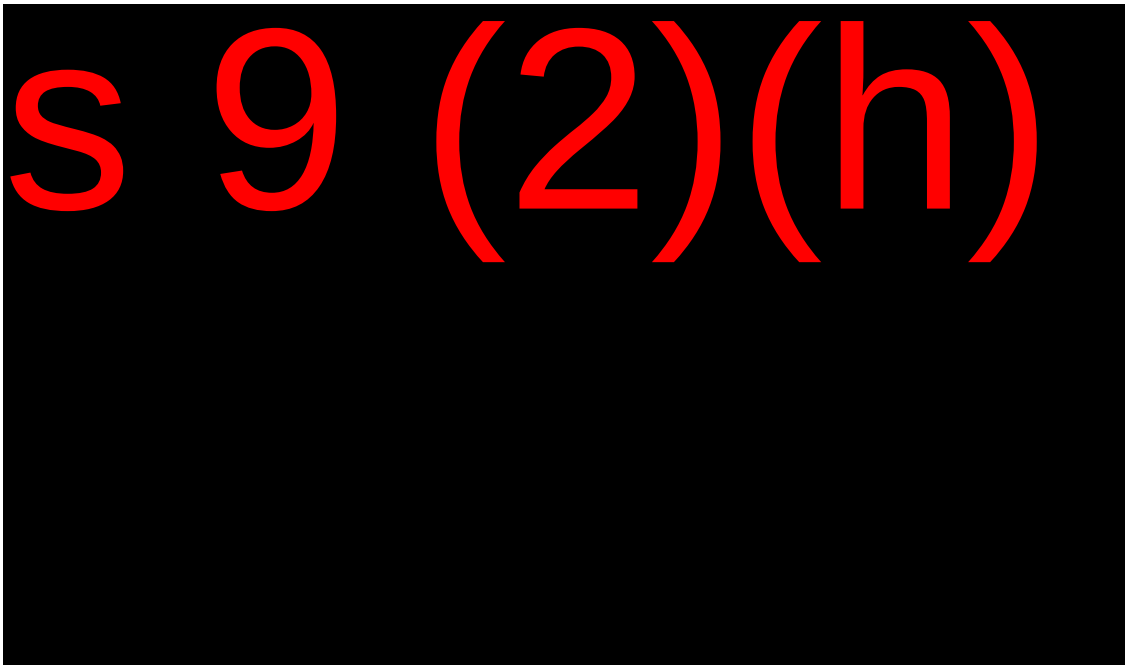
Hon Willow-Jean Prime

Minister of Conservation

Hon Rachel Brooking

Minister for Oceans and Fisheries

Attachment A: Hauraki Gulf / Tīkapa Moana Marine Protection Bill 2023



Attachment B: Minor or technical policy decisions

Title of the Bill

1 Cabinet noted that HPAs and SPAs would be new marine protection tools, and that new legislation to create them would be required, i.e., the Hauraki Gulf Marine Protection Bill (the Bill).

2 The title of the Bill will be updated to include the official name of the Hauraki Gulf and be named "The Hauraki Gulf / Tīkapa Moana Marine Protection Bill".

Prohibitions in High Protection Areas (HPAs)

3 The Bill will include the following prohibitions in HPAs:

- 3.1 fishing (not including customary fishing);
- 3.2 aquaculture activities;
- 3.3 the removal of natural material;
- 3.4 introduction of any living organism;
- 3.5 the dumping, depositing, or discharge of waste or other matter;
- 3.6 mining activity, including prospecting and exploration and mining as defined in the Crown Minerals Act 1991;
- 3.7 the construction, alteration, extension, removal, or demolition of a structure (including a ship);
- 3.8 the causing of vibrations (other than the vibrations caused by the propulsion of a ship) in a manner that is likely to have more than a minor adverse effect on aquatic life;
- 3.9 the destruction or damage of the seafloor or subsoil in a manner that is likely to have an adverse effect on the seafloor or subsoil;
- 3.10 the landing of an aircraft; and
- 3.11 the causing of an explosion.

4 This aligns with Cabinet's agreement that an HPA will also regulate a wider range of pressures than just fishing, e.g., prohibiting dumping, harmful discharges, and the take of non-marine life.

Definition of mining for Seafloor Protection Area prohibitions

5 Cabinet agreed that all SPAs will prohibit mining. Cabinet did not agree to a definition of mining.

6 The definition of mining that will be prohibited includes prospecting and exploration as defined in the Crown Minerals Act 1991.

Definition of bottom trawling for Seafloor Protection Area prohibitions

7 Cabinet agreed that all SPAs will prohibit bottom trawling.

8 The definition of the prohibited activity will change to be 'trawling that makes contact with the seabed'.

Definition of dumping for Seafloor Protection Area prohibitions

9 Cabinet agreed that all SPAs will prohibit dumping.

10 The prohibited activity will change to be 'the dumping, depositing, or discharge of waste or other matter that is likely to have a more than minor adverse effect on aquatic life'.

Exemptions to prohibitions

11 The Bill will include the following exemptions to prohibited activities:

11.1 customary fishing (in HPAs only);

11.2 small-scale take of non-living natural materials, including sand, rocks and shells by anyone;

11.3 any action taken under the Biosecurity Act 1993;

11.4 any activity with a Resource Management Act consent at the date of the Bill receiving the Royal Assent, until the expiry date of the consent;

11.5 any activity permitted under Department of Conservation administered legislation;

11.6 any activity under the Resource Management Act (Marine Pollution) Regulations 1998;

11.7 any activities that are associated with military training under the Defence Act 1990;

11.8 stormwater discharge that is a permitted activity under the Resource Management Act 1991;

11.9 emergencies involving risk to human safety or protection of the environment;

11.10 any other action taken in response to marine oil spills or other pollution;

11.11 any work or activity of the Crown that the Minister of Defence certifies is necessary for reasons of national security; and

11.12 transit shipping that complies with the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (1972).

12 Activities 11.1 and 11.2 were both previously agreed to be exempt from prohibitions by Cabinet. The other exemptions relate to powers that exist under other legislation.

Immunities of warships etc not affected

13 The Bill will have a clause that sets out that the immunities of warships and governmental ships etc under the United Nations Convention on the Law of the Sea (UNCLOS Art 32) will not be affected by this Bill.

Additional prohibitions in the Mokohīnau Seafloor Protection Area

14 Cabinet previously agreed that the SPA at the Mokohīnau Islands have prohibitions on the additional following activities:

14.1 set netting; and

14.2 potting and bottom longlining, except for within specified areas that would have minimal impact on fragile and protected species.

15 We have since decided that potting and bottom longlining will be prohibited in the Mokohīnau SPA except for within 0.5 nautical miles of the Mean High-Water Springs of all islands and all rocks, and in the South-West section.

Exclusion of the Bill from being listed in Schedule 1 of the Conservation Act 1987

16 Cabinet previously noted that HPAs and SPAs would be new marine protection tools, and that new legislation to create them would be required.

17 Due to the bespoke nature of the legislation, the Hauraki Gulf / Tīkapa Moana Marine Protection Act 2024 will not be included in Schedule 1 of the Conservation Act 1987.

Non-fishing customary practices

18 Cabinet previously agreed that non-fishing customary practices can continue within HPAs, including the small scale removal of non-living materials such as shells and stones. Cabinet did not agree to any further definition of customary practices.

19 This Bill will allow for the small scale remove of non-living materials and will recognise protected customary rights as defined in the Marine and Coastal Area (Takutai Moana) Act 2011. The Bill will not contain a broad exemption for non-fishing customary practices.

Marine reserve extensions

20 Cabinet previously agreed that the existing marine reserves at Cape Rodney-Okakari Point (Leigh/Goat Island) and Whanganui A Hei (Cathedral Cove) be extended by way of marine reserve under the Marine Reserves Act 1971.

21 The extension of these reserves will be implemented by establishing new marine reserves directly adjacent to these existing reserves (as opposed to revoking and re-establishing new marine reserves).

Consequential amendments to existing legislation

22 In order to effectively operationalise the Bill, consequential amendments will be made to the following legislation:

22.1 Crown Minerals Act 1991;

22.2 Environment Act 1986;

22.3 Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012;

22.4 Hauraki Gulf Marine Park Act 2000;

22.5 Search and Surveillance Act 2012;

22.6 Summary Proceedings Act 1957;

22.7 Resource Management Act (Marine Pollution) Regulations 2011; and

22.8 Land Transport (Road User) Rule 2004.

Attachment C: Regulatory Impact Statement for regulations

Regulatory Impact Statement: infringement offences regulations associated with the Hauraki Gulf Marine Protection Bill 2023

Coversheet

Purpose of Document	
Decision sought:	Approval by Cabinet for drafting instructions to be issued to the Parliamentary Counsel Office for regulations associated with the Hauraki Gulf Marine Protection Bill. This is to enable these regulations to be drafted and come into force at the same time as the Bill.
Advising agencies:	Department of Conservation (DOC) Ministry for Primary Industries – Fisheries New Zealand (FNZ)
Proposing Ministers:	Minister of Conservation Minister for Oceans and Fisheries
Date finalised:	6 July 2023

Problem Definition

Cabinet has agreed to a package of marine protection to be administered through the Hauraki Gulf Marine Protection Bill (the Bill), which is expected to come into force in 2024.

Infringement offences are an important component of the regulatory system in the Bill, by deterring low-level offending in marine protected areas. These offences have minor impacts individually but could have a significant impact collectively, especially if such offending becomes widespread.

Regulations for infringement offences, fees and notices should come into effect at the same time as the new legislation, to enable infringement offence provisions to become operative. The absence of these regulations would mean that these regulatory tools would not be available.

Executive Summary

The Bill is intended to prevent ongoing degradation in the Hauraki Gulf / Tīkapa Moana / Te Moananui-ā-Toi ('the Gulf') and help reverse historical decline, by limiting activities with negative impacts. It will do this through the implementation of 19 protected areas in the Gulf (12 high protection areas, five seafloor protection areas, and two marine reserves adjacent to existing marine reserves). These protection measures will be supported by a range of monitoring and enforcement tools, including enhanced powers for DOC rangers, offences, and infringement offences.

Note that the two marine reserves to be established by this Bill will be subject to the infringement regime that already applies to marine reserves established under the Marine Reserves Act 1971. The infringement regime discussed in this paper will apply only to the new high protection areas and seafloor protection areas.

An infringement offences system would play an important role in the regulatory system by providing intermediate sanctions to deter low-level offending (these are likely to be the majority of offences).

Infringement offences have a stronger deterrent effect than warnings for low-level offending. They offer simpler and more efficient alternatives to taking prosecutions through the courts, which may be disproportionate to the seriousness of the offending, and highly expensive (to the extent that it may be a deterrent to taking prosecutions).

The desired outcome of a system of infringement offences is to support the Bill's objectives by enabling effective sanctions to deter low-level offending in marine protected areas.The criteria for considering options are that:

- functional regulatory tools will be available to deter low-level offending in marine protected areas
- the regulatory tools will be a cost-effective way of deterring low-level offending
- the costs of the regulatory tools should not be excessive nor applied unfairly to users of Gulf resources.

The options considered for implementing an infringement offence regime are:

Option 1 - when the new Act comes into force, there are regulations specifying a system of infringement offences; or

Option 2 - regulations are made at a date after the Act comes into force.

When comparing options 1 and 2, we concluded that:

- both options would provide a functional set of sanctions against low-level offending to support the overall objectives of the Bill; but delaying the regulations results in a risk of low-level offending becoming common in the interim
- for both options, infringement offences are much more cost-effective than prosecuting low-level offenders through the courts; delaying the regulations delays the potential savings from a system of infringement offences and obliges DOC to rely on expensive prosecutions in the interim
- for either option, we do not have robust evidence of the overall costs to users of Gulf resources from changing behaviour to comply with the new requirements in marine protected areas. Infringement offences contribute to fairness between users, by reducing the risk that people who comply voluntarily with the requirements are subject to greater costs than those committing offences.

On this basis we conclude that enacting regulations to establish an infringement offences system at the same time as the new Act comes into force is preferable to it coming into force without such regulations in place.

The impact of making regulations after the enactment of the new Act depends on the length of time this takes. Any delay results in a risk that non-compliance with the restrictions in marine protected areas becomes common, and this risk would increase the longer it takes to make regulations. The costs of introducing infringement offences would mainly fall on:

- marginally-compliant users of Gulf resources – ie people who would only comply with the new protected areas regime because of the risk of an infringement fee - who would experience reduced access to Gulf resources
- non-compliant people who receive infringement notices and must pay the fees.

DOC would face additional costs in operating an infringement notice system, but these costs would be more than offset by savings from not having to take prosecutions for less serious offences.

Compliant users of Gulf resources would benefit from the perceived fairness of a system of infringement offences. Failure to sanction non-compliant behaviour may be seen as unfair by them and undermine their willingness to comply voluntarily.

Mana whenua may be affected by infringement offences if biodiversity objectives for individual High Protection Areas (HPAs) result in regulations that impact on customary fishing rights. Failure to observe this could lead to imposition of an infringement offence.

DOC will work with mana whenua to define the biodiversity objectives. The size of the impact will depend on how this is implemented.

Mana whenua and the wider community in the Hauraki Gulf environs would benefit from increased protection for natural resources and a healthier Hauraki Gulf ecosystem.

Limitations and Constraints on Analysis

The available options for an infringement offences system are determined by Ministry of Justice guidelines. Other regulatory and non-regulatory options were not available.

For this reason, the options relate to the timing of making regulations.

There are some material information gaps. Most of these information gaps are due to the new marine protection regime having not been established, and include evidence relating to:

- the level of low-level offending that would occur in marine protected areas without an infringement offences system
- the expected reduction in such offending from the availability of an infringement offences system
- the costs to users of Gulf resources from changes in behaviour to comply with the new requirements in marine protected areas
- the incidence of infringement fees – ie which groups of users of Gulf resources would be most likely to engage in low-level offending and receive infringement notices

- the costs of the infringement offences system within total regulatory costs for the new marine protection regime in the Gulf
- the effectiveness of infringement offences in deterring low-level offending (across all types of regulatory systems in which they are used, within and outside DOC).

The Government engaged extensively with mana whenua, stakeholders and other interested parties after the release of *Revitalising the Gulf* in June 2021. However, at Ministerial direction, the focus of that consultation was on specific matters including how customary practices are managed and the inclusion of a high protection area at the Noises Islands. Engagement documentation did not include a discussion of the regulatory tools (including infringement offences) that could be used to deliver the proposed marine protection regime. However, DOC did engage with the Ministry of Justice and Fisheries New Zealand on the inclusion of an infringement regime in the Bill. DOC also carried out inter-agency consultation on the Bill, which references the infringement regime, and no feedback was received from any agency on the matter.

This analysis does not include consideration of the detailed design of the proposed infringement regulations. This will be done during the preparation of drafting instructions.

No formal assessment has been made of Treaty of Waitangi implications regarding an infringement regime. We do not anticipate any specific Treaty of Waitangi implications, other than that the infringement regime will apply to regulations made under the Bill which may impact on customary fishing rights for mana whenua. DOC have engaged with Fisheries New Zealand (the organisation that regulates customary fishing) on how this Bill will impact on mana whenua, and on the inclusion of an infringement regime. No specific concerns were raised. The infringement regime will not impact or affect in any way any protected customary rights or customary marine title established under the Marine and Coastal Area (Takutai Moana) Act 2011. This will be stipulated in the Bill.

DOC will engage with relevant agencies on the design of the infringement regime.

Some impacts of infringement offences, such as consistency of application and effects on mana whenua, depend on how they are implemented.

Notwithstanding these limitations, we are confident in the robustness of our conclusions.

Responsible Manager(s) (completed by relevant manager)

Amelia Smith

Manager
Marine Policy Team
Department of Conservation - Te Papa Atawhai

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6 July 2023

Quality Assurance (completed by QA panel)	
Reviewing Agency:	The Department of Conservation Regulatory Impact Analysis Panel
Panel Assessment & Comment:	The Department of Conservation Regulatory Impact Analysis Panel has reviewed the Regulatory Impact Assessment "Regulatory Impact Statement: Infringement offences regulations associated with the Hauraki Gulf Marine Protection Bill 2023" produced by the Department of Conservation and dated 06/07/2023. The review team considers that it partially meets the Quality Assurance criteria. The panel considers the Regulatory Impact Statement meets the complete, convincing, clear and concise criteria. The Regulatory Impact Statement is constrained by the lack of consultation on the proposed regulations. However there has been extensive consultation on the marine protection proposals that informed the proposed Bill and empowering provisions for the Regulations. The RIS acknowledges the lack of consultation on regulatory tools (including infringement offences) and notes where further engagement will occur as the design of the infringement regime is developed further.

Section 1: Diagnosing the policy problem

What is the context behind the policy problem and how is the status quo expected to develop?

The Hauraki Gulf / Tīkapa Moana / Te Moananui-ā-Toi ('the Gulf') is recognised as a taonga of natural, economic, recreational, and cultural importance. However, *State of the Gulf* reports[1] over the last twenty years have found the Gulf is in an ongoing state of environmental decline due to pressures from economic, urban, and recreational activities on land and at sea. In the absence of action, the ecological condition of the Gulf will continue to worsen, with adverse impacts on the wellbeing of those who work, live, and recreate there.

Marine protection is required to prevent ongoing degradation and help reverse the ecological decline, by limiting marine-based activities with negative impacts.

A key milestone in the protection of the Gulf was *The Sea Change Plan*[2] which was published in April 2017 with proposals for improving the health and mauri of the Gulf.

The Plan was developed over three years by a 14-member stakeholder working group representing mana whenua, environmental groups, and the fishing, aquaculture and agriculture sectors. It made over 180 proposals for the Gulf and its catchments across land, freshwater and marine domains.

In response to the Plan, in June 2021 the Government released *Revitalising the Gulf: Government action on the Sea Change Plan*[3] ('*Revitalising the Gulf*'), which contained a proposed package of integrated marine conservation and fisheries management actions to improve the health and mauri of the Gulf. Since that time Government agencies have engaged extensively with mana whenua and fishery, environmental and other stakeholders such as the Auckland and Waikato Regional Councils.

In December 2022, Cabinet agreed to a package of marine protection and gave approval for the Minister of Conservation to issue drafting instructions to the Parliamentary Counsel Office (PCO) for the Hauraki Gulf Marine Protection Bill (the Bill)[4].

The proposed legislation will come into force on the date of enactment, which is expected to be in 2024.

The purpose of this Act (as set out in Clause 3 of the Bill) is

> *to contribute to the restoration of the health and mauri of the Hauraki Gulf by—*
>
> *(a) establishing new marine protected areas within the Hauraki Gulf*
>
> *(b) recognising protected customary rights and customary fishing within high protection areas and seafloor protection areas.*

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1 Every three years, the Hauraki Gulf Forum produces a report on the state of the Hauraki Gulf environment. The reports can be found at https://gulfjournal.org.nz/state-of-the-gulf/.

2 https://www.seachange.org.nz/read-the-plan

3 Revitalising the Gulf: Government action on the Sea Change Plan (doc.govt.nz)

4 CAB-22-MIN-0599.02 refers.
See also *Regulatory Impact Statement: Marine protection proposals from Revitalising the Gulf: Government action on the Sea Change Plan* (not yet published).

The focal point of the Bill is the implementation of 19 marine protected areas in the Gulf, including:

- twelve high protection areas (HPAs) in which a range of activities including commercial and recreational fishing will be prohibited, to protect and enhance marine habitats and ecosystems while providing for the customary practices of mana whenua in alignment with site-specific biodiversity objectives
- five seafloor protection areas (SPAs) in which harmful fishing activities (eg bottom trawling and Danish seining) and other activities such as dredging, sand extraction, and mining will be prohibited, to protect sensitive habitats while continuing to allow for activities in the water column
- two marine reserves adjacent to existing marine reserves: Whanganui A Hei (Cathedral Cove) and Cape Rodney-Okakari Point (Leigh/Goat Island).

The Bill will increase marine protection in the Gulf from 6.7% to around 18%.

It is also proposed that protection of these areas will be supported by a range of monitoring and enforcement tools, including enhanced powers for DOC rangers (clauses 30-35 of the Bill), offences (clauses 36-39) and infringement offences (clauses 40-49). The latter would be implemented through regulations covering:

- the specification of some offences (clause 40)[5],
- the amount of infringement fees and maximum fines (clause 41(2))[6]
- the form of and information to be included in an infringement notice (clause 46).

What is the policy problem or opportunity?

In any regulatory system, the problems that infringement offences are intended to address are that:

- much offending is 'low level' and at an individual level, has minor impacts; but collectively, low-level offending can present significant problems, especially if it becomes widespread
- educational campaigns and warnings for low-level offending may be ineffective without sanctions for non-compliance
- sanctioning low level offending by taking court proceedings may be perceived as unfair and disproportionate, undermining public confidence in the regulatory system as a whole and willingness to comply voluntarily with regulatory requirements
- Court proceedings can be so expensive that they are used infrequently, which may undermine their effectiveness as deterrents.

5 This clause proves for infringement offences to be specified in the legislation or in regulations; at the time of preparation of this RIS, no infringement offences have been specified in the legislation.

6 Infringement offences may be enforced by an infringement notice issued by a DOC ranger, in which case an infringement fee is payable; or through Court proceedings, eg to collect an unpaid infringement fee, in which case a fine may be imposed.

Intermediate sanctions through an infringement notice system are seen as desirable to deter low-level offending, as they fill the gap between unsanctioned actions and taking prosecutions through the courts.

DOC has a well-developed system of infringement offences under the Conservation (Infringement Systems) Act 2018. The rationale for infringement offences was set out in the 2017 RIS[7] in support of the above Act.

A system of infringement offences is considered to improve the effectiveness of conservation compliance and law enforcement, as a tool that both educates the public and acts as a deterrent through:

- enabling simpler and more efficient law enforcement for offending at the less serious end of the spectrum (the majority)
- enabling the consequences to better fit the circumstances and relative seriousness of the offending; in particular, ensuring that people guilty of minor offending do not generally receive a criminal record
- creating greater awareness of, and respect for, conservation values, which should reduce actions that harm natural and historic heritage
- contributing to the Government's objectives of improving the interaction between government agencies and citizens, and delivering better public services for less cost, in particular by reducing costs and delays in the courts.

As the 2017 RIS notes, a small proportion of offending subject to a system of infringement offences might otherwise be taken to court, but the vast majority would not.

Under the above legislation, infringement offences are tied to specific Acts and won't apply to the new Hauraki Gulf marine protection regime unless there is both an enabling power in the Act (already provided in clauses 40-49), and offences, fees and notices specified in regulations.

The absence of regulations specifying the above would mean that these tools would not be available.

If low-level offending became widespread, it could compromise the recovery of marine protected areas and the wider objectives of the Bill.

What objectives are sought in relation to the policy problem?

The desired outcome from a system of infringement offences is to support the new Act's purposes, namely

> *to contribute to the restoration of the health and mauri of the Hauraki Gulf by—*
>
> *(a) establishing new marine protected areas within the Hauraki Gulf*
>
> *(b) recognising protected customary rights and customary fishing within high protection areas and seafloor protection areas.*

by enabling effective sanctions to deter low-level offending in marine protected areas.

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7 Proposal to introduce an infringement notice system for less serious offending against conservation legislation: Regulatory Impact Statement (doc.govt.nz)

Section 2: Deciding upon an option to address the policy problem

What criteria will be used to compare options to the status quo?

The first criterion derives from the above objective:

- functional regulatory tools will be available to deter low-level offending in marine protected areas

In addition there are more general criteria relating to the regulatory system and regulated parties:

- the regulatory tools are a cost-effective way of deterring low-level offending
- the costs of the regulatory tools should not be excessive nor applied unfairly to users of Gulf resources.

What scope will options be considered within?

The purpose of this RIS is to support Cabinet decisions for drafting instructions to be issued to the Parliamentary Counsel Office for relevant regulations, in parallel with drafting of the new Act.

We considered whether infringement offences could be implemented through a different (tertiary) regulatory instrument (eg a Notice published in the Gazette) or by being specified administratively without enacting any additional regulatory instrument. While Ministry of Justice guidance[8] does not exclude these options, it clearly indicates that the appropriate instrument is regulations -

> *The legal framework for an infringement offence scheme is provided in three parts.*
>
> a. *Primary legislation specific to the subject matter;*
> b. *Regulations, rules and by-laws, made under the provisions of the primary legislation; and*
> c. *The Summary Proceedings Act 1957[9].*

and

> *Primary legislation (i.e. an Act of Parliament) is required to:*
>
> *…*
>
> - *enable detailed provisions such as infringement offences, fees and forms to be established in regulations or by-laws.*

Hence the options are essentially related to timing - either regulations to implement a system of infringement offences are in place when the legislation comes into force, or regulations are introduced afterwards.

Note that this does not include consideration of the detailed design of these regulations, which will be done during the preparation of drafting instructions.

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8 **Ministry of Justice** (undated) *Policy Framework for New Infringement Schemes* APPENDIX: POLICY FRAMEWORK FOR NEW INFRINGEMENT SCHEMES (justice.govt.nz)

9 to provide enforcement mechanisms for infringement offences and fees.

What options are being considered?

Counterfactual – current Bill, no regulations

The new Act would come into force as currently drafted, but with no regulations specifying a system of infringement offences.

Option 1 - current Bill, simultaneous regulations

Regulations would be made to specify infringement offences and would come into force at the same time as the new Act.

Option 2 - current Bill, delayed regulations

The new Act would come into force as currently drafted, but regulations specifying infringement offences would not be made until later. These regulations could be postponed until a need for infringement offences becomes apparent.

Prior stakeholder feedback

The Government has engaged extensively with mana whenua, stakeholders and other interested parties since the release of release of *Revitalising the Gulf* in June 2021. However, at Ministerial direction the focus of that consultation has been on the designation of marine protected areas. Engagement documentation did not include a discussion of the regulatory tools (including infringement offences) that could be used to deliver the proposed marine protection regime.

Feedback was received from 11 fisheries stakeholder groups as well as several individual operators, 12 mana whenua groups, and via 7,550 other submissions (including more than 7,000 'form' submissions sponsored by four organisations).

Overall, there was strong support from mana whenua, stakeholders, and the public for improved marine protection in the Gulf. However, there was opposition from some current users to the restrictions proposed.

Support from mana whenua for the proposals was contingent on continuing recognition of their customary rights and interests within HPAs.

The use of penalties and regulatory tools was raised in the document, *The Sea Change Plan (op.cit)*. However, there was no more detail other than a suggestion that there were stronger penalties introduced and regulatory agencies were adequately funded and resourced to enforce compliance. As the Sea Change Plan is not a Government document, DOC does not have access to any consultation or feedback that was received in inputting into the plan.

A range of government departments and Crown entities[10] reviewed the draft Bill to ensure it is fit for purpose and were consulted on the policy and proposals. The Ministry of Justice was consulted on the sections enabling infringement offences and supported the proposal.

How do the options compare to the counterfactual?

The following table compares the introduction of suitable provisions in regulations, to come into force at the same time as the new Act or at some time afterwards, against the

10 The Treasury, Te Arawhiti, Te Puni Kōkiri, Ministry for the Environment, Ministry of Foreign Affairs and Trade, Land Information New Zealand, Ministry of Business, Innovation and Employment, Ministry of Transport, Ministry of Justice, and the New Zealand Defence Force. The Department of Prime Minister and Cabinet was informed.

counterfactual of the Act coming into force without these provisions. They are assessed against the criteria above, on the following basis:

Key for qualitative judgements:
relative to the counterfactual

++	+	0	-	- -	?
much better	better	about the same	worse	much worse	unknown

		Counterfactual current Bill, no regulations	Option 1 current Bill, simultaneous regulations	Option 2 current Bill, delayed regulations
[1]	Functional regulatory tools to deter low-level offending in marine protected areas	0	++ DOC will be able to apply such tools as soon as the Act comes into force and marine protected areas are in operation.	+ DOC will be able to apply such tools at a later stage, and can defer implementation until low-level offending becomes a problem. There is a risk of low-level offending becoming common in the interim.
[2]	Cost-effective means of deterring low-level offending	0	++ Infringement offences are much more cost-effective than prosecuting low-level offenders through the Courts	+ Infringement offences are much more cost-effective than prosecuting low-level offenders through the Courts. Savings would be delayed until the regulations are implemented, and prosecutions would have to be used in the interim.
[3]	Costs to users of Gulf resources are not excessive nor applied unfairly	0	+ We do not have robust evidence of the overall costs imposed on users of Gulf resources. Infringement offences reduce the risk that people who comply voluntarily are subject to greater costs than those committing offences.	+ We do not have robust evidence of the overall costs imposed on users of Gulf resources. Infringement offences reduce the risk that people who comply voluntarily are subject to greater costs than those committing offences.
Overall assessment		0	++	+

We can be confident in the conclusion for criterion [1]. Absent an infringement offences system, the only option for addressing low-level offending is prosecution through the courts, which can be problematic (as discussed in the section , *What is the policy problem or opportunity?*).

While option 2, 'delayed regulation', has similar benefits to option 1, 'simultaneous regulation', it also carries the risk that low-level offending could become common until the regulation is made.

During the recent consultation there was opposition from many current users of Gulf resources to the proposed marine protected areas, so voluntary compliance by them cannot be taken for granted. Some users may decide that the restrictions in marine protected areas can be ignored if there is a perception that the only sanction is prosecution, and this is not likely to be used frequently. See the discussion under criterion [3] below.

There is no clear basis to say what is an 'acceptable' or 'unacceptable' delay, but the extent of non-compliance is likely to increase the longer it takes to make regulations.

There is also a possibility that when regulations for infringement offences come into force, non-compliance will be common and the regulatory response may have to be stricter (ie more infringement notices issued and prosecutions taken) than if infringement offences were available from the outset.

We are also confident in the conclusion for criterion [2]. The analysis undertaken for the 2017 RIS on infringement offences (*op.cit*) suggested that a regime using these can be significantly less expensive (over 50%) that one relying only on prosecutions to sanction non-complaint behaviour. See the discussion in the section .

What are the marginal costs and benefits of the option?'

Note that this benefit is delayed for option 2 until regulations are made, with higher costs from prosecutions in the interim.

The general conclusion for criterion [3] is somewhat uncertain. The largest costs to users from the new marine protection regime come from changes in behaviour to comply with the new requirements in marine protected areas.[11] They may have to move to other unrestricted areas of the Gulf (with additional costs in time and fuel), use alternative (more expensive) catching methods, and possibly achieve smaller catches because of more competition within unrestricted areas. Some may cease fishing in the Gulf altogether, with loss of income or enjoyment. See the discussion in section 'Impacts on users of Gulf resources'.

With no infringement fees, people who ignore the new requirements (at a level below the threshold for prosecution) do not incur these costs. The key impact of the infringement offences system is to impose some costs on potential offenders, as actual infringement fees or the risk of receiving one.

This makes the system fairer, as the difference in costs between compliant and non-compliant users would be reduced.

Furthermore, failure to sanction non-compliant behaviour may be seen as unfair by otherwise law-abiding users and undermine their willingness to comply with the restrictions voluntarily. Education and communication may encourage high levels of compliance initially, but this may be eroded over time if there is a perception that the restrictions can be ignored without penalty.

However, there are some important qualifications to this conclusion.

Whether the infringement offences regime would be applied fairly to all people who receive infringement notices and fees depends on, for example, how clear the rules are about compliant and non-compliant behaviours (and the boundary between them), and whether the rules are applied consistently[12].

Nor is there any basis to state whether the dollar values of infringement fees are 'appropriate'. Despite the widespread use of infringement fees in this country and elsewhere, there is no research that we are aware of to determine the 'appropriate' level of fees, in terms of deterrence or relative costs of compliant and non-compliant behaviour.

The imposition of infringement fees is likely to have uneven impacts across the group of people who receive them. For some people, fees of hundreds of dollars may have no more than nuisance value; but the same fees can cause financial stress to low-income offenders, including some who are gathering seafood to supplement household food budgets[13].

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11 See the discussion in MartinJenkins *Revitalising the Gulf - Stage 2: Economic Impact Assessment of the Marine Protection Proposals* Final Report, December 2022 Stage2-revit-gulf-economic-impact-assessment.pdf (doc.govt.nz)

12 Clarity of rules needs to be addressed when the regulations are drafted and communications materials prepared. Consistent application of the rules will be delivered through operational guidelines and training for DOC rangers and FNZ fishery officers. See the section *How will the new arrangements be implemented?*

13 The provisions for multiple payment options and instalment payments (discussed in the implementation section) are intended to partially offset this, by reducing the impact of requiring immediate payment when the infringement notice issued,

What option is likely to best address the problem, meet the policy objectives, and deliver the highest net benefits?

On the above basis we conclude that enacting regulations to establish an infringement offences system is clearly preferable to the new Act operating without such regulations in place. Such regulations would provide a deterrent against low-level offending in marine protection areas, and would be cost-effective compared to reliance on taking prosecutions against offenders.

The preferred option is for infringement offences regulations to be in place when the new Act comes into force, to secure the intended benefits as soon as possible.

The impact of making regulations after the enactment of the new Act depends on the length of time this takes. Any delay results in a risk that non-compliance with the restrictions in marine protected areas becomes common until regulations for infringement offences come into force. This risk would increase the longer it takes to make regulations.

What are the marginal costs and benefits of the option?

Affected groups	Comment	Impact	Evidence Certainty
Additional costs of the preferred option compared to taking no action			
Regulated groups	Changes in behaviour resulting from the prospect of infringement fees may impose costs on marginally-compliant users (see below), including reduced access to Gulf resources.	Medium	Medium Impact can be predicted with confidence but has not been quantified
	The vast majority of people who receive infringement fees will be worse off in monetary terms.	Medium	Medium We can be confident of the conclusion, but no estimates have been made of the expected level of infringements or fees collected.
	Infringement fees are likely to have uneven impacts across people who are subject to them, depending on consistency of application and household income.	Medium	Medium We can be confident of the conclusion, but • consistency of application is an operational matter (see discussion in the Implementation section) • no analysis has been undertaken of the incidence of fees and differences in impacts on offenders.
Mana whenua	Biodiversity objectives for individual HPAs may result in some reductions in the scope of customary fishing rights; and failure to observe this could lead to imposition of an infringement offence. DOC will work with mana whenua to define biodiversity objectives.	Low	Medium. We can be confident of the conclusion, but the size of the impact will depend on implementation.
Regulators	Total costs to DOC of the marine protection system have been estimated but the costs of an infringement offences system have not been identified separately.	Medium	Low See discussion below.
Non-monetised costs		**Medium**	**Medium**

Affected groups	Comment	Impact	Evidence Certainty
Additional benefits of the preferred option compared to taking no action			
Regulated groups	Specification and notification of infringement offences has an educational function, providing information to all users about what does and does not constitute compliant behaviour.	Medium	Medium
	Perceived fairness of system - compliant users are not disadvantaged (or are less disadvantaged) vis-à-vis non-compliant users.	Medium	Medium
	A small number of people who receive infringement fees might be better off if DOC would otherwise prosecute them and take the offence to court, with the possibility of higher costs and a criminal conviction.	Low	High
Regulators	There will be significantly fewer prosecutions taking less Court time. This may be partly offset by offenders challenging infringements or filings for enforcement.	Low	Medium See discussion above.
Wider community in the Hauraki Gulf environs	Public benefits from increased protection for natural resources and healthier Hauraki Gulf ecosystem.	Low	Medium Public benefit from increased compliance by marginally-complaint users (most benefits come from voluntary compliance by majority of users regardless of infringement offences).
Non-monetised benefits		**Medium**	**Medium**

Impacts on users of Gulf resources

The majority of the costs of the marine protection regime will fall on users who comply with the restrictions. We assume that the majority of users of Gulf resources will comply voluntarily with the marine protection regime without the need for sanctions. In effect their compliance is a result of designation of protected areas.

By 'marginally compliant users', we mean people who would not comply unless there is a risk of an infringement fee, ie whose compliance is a result of the infringement offences system.

In its analysis of the economic impacts of the proposals, MartinJenkins concluded that:

- There would be a maximum loss of national GDP of around $4.2 - 4.9m and $0.4 - 0.6m for the October and April fishing years respectively if all commercial fishing within permitted catch limits in protected areas ceased. Impacts would be lower if fishing activity could be transferred to other areas and/or replaced with non-restricted methods[14].
- Recreational fishing would be most affected by total prohibitions on fishing in HPAs, but fishers would be able to move to other areas in the Hauraki Gulf. They are not significantly affected by the restrictions in SPAs as the prohibited methods are largely used by the commercial sector. No estimate was made of potential impacts.
- Considering the impacts on national well-being through the Treasury's Living Standards Framework, its findings were that there would be an increase in the value of the natural environment; a loss of short-term wellbeing among commercial and recreational fishers; and significant uncertainty about medium-term impacts such as competition in remaining fishable areas and replenishment of fish stocks. For this reason it was unable to make an unambiguous conclusion about wider impacts on wellbeing.

These conclusions consider the impacts of the package as a whole, particularly the designation of protected areas. The implicit assumption was that there would be full compliance with the restrictions in those areas. The analysis did not examine the potential level of non-compliance and how different regulatory strategies and instruments might affect this.

Impacts on mana whenua

After the Act comes into force, the only fishing permitted in an HPA will be customary fishing conducted in accordance with authorisation issued by tangata kaitiaki under fisheries regulations.[15]

Part of the implementation process for the new Act will involve officials working with mana whenua to develop the site-specific biodiversity objectives for each HPA, and identifying any additional management measures necessary to mitigate any substantive risks.

When site-specific biodiversity objectives and mitigation measures have been identified for an HPA, these will be specified in a regulation. Regulations may affect customary fishing activities in the relevant HPA, which may result in some changes to how those rights are exercised (eg some current ways of fishing may no longer be permitted in those areas, or catch limits for some species in may be imposed).

If authorisation to fish in an HPA is inconsistent with the relevant regulation, the authorisation would not be valid. Exercising customary rights in an HPA in ways that are not in accordance with the regulation could result in an infringement offence.

Customary fishing that conflicts with the prohibitions of an SPA cannot occur in these areas, ie, no customary fishing that uses dredging, Danish seining, or trawling that touches the

14 Alternatives to the prohibited methods in SPAs (bottom trawling, Danish seining, and dredging) would be permitted.

15 Fisheries (Kaimoana Customary Fishing) Regulations 1998 or regulations made under s186, s297 or s298 of the Fisheries Act 1996. The latter two regulations must be for the purposes of s10 of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992.

seafloor, will be able to occur in these areas. As these methods are typically methods used for commercial catch, it is considered that the impact to mana whenua will be low.

When the Act comes into force, it will stipulate that the HPAs and SPAs will not limit or affect the right of a group to obtain recognition of protected customary rights or customary marine title under the Marine and Coastal Area (Takutai Moana) Act 2011 (MACA Act). It will also not limit or otherwise affect the exercise of protected customary rights or rights held by marine title group under the MACA Act.

Impacts on DOC

Total costs to DOC for implementing the marine protected areas are estimated as $10.54 million over four years, as set out below. This includes survey office plans, signage, boundary markers and baseline surveys. This will also provide for a number of marine rangers and one full-time equivalent (FTE) official focused on research, monitoring and reporting. Ongoing costs will include compliance, science, management, education and awareness.

	2023/24	2024/25	2025/26	2026/27	**Total**
Estimated costs $m	$1.22m	$3.04m	$3.14m	$3.14m	**$10.54m**

The costs of an infringement offences system within the above total have not been estimated, and it may not be possible to attribute some costs between infringement offences and other activities – for example rangers' time, or the costs of demarcating protected areas (which is necessary for the infringement system but has to be done regardless).

The 2017 RIS on Infringement Offences (*op.cit*) suggested that there would be significant cost savings to DOC from introducing this system, primarily from most current prosecutions being dealt with by infringement notices and fees rather than actions through the Courts. It was estimated that:

- the cost to issue each infringement notice would be $350, based on assumptions about the time taken to investigate the offence, and administrative decision-making to determine the appropriate response (warning, infringement, or prosecution)
- the cost of each prosecution that results in a guilty plea is $3,000 (85% of prosecutions)
- the cost of each defended prosecution is $10,000 (15% of prosecutions).

At the time, DOC issued 200 written warnings and took 100-150 prosecutions annually. Assuming that infringement notices would be issued instead of half of the written warnings and 80% of the prosecutions, total costs per annum were estimated as:

- status quo - $405-604,000
- infringement notice system - $193-272;000
- difference (savings to DOC) - $212-332,000

Note also that revenue collected from infringement fees would not accrue to DOC. In keeping with normal practice it would be paid to the Crown general account.

DOC's experience with enforcement is that there are a large number of offences in the marine environment. The chart below shows that offences against the Marine Reserves Act

consistently represents a large proportion of prosecutions and infringements across legislation managed by DOC, representing 28-42% of total prosecutions/infringements over the past six years.

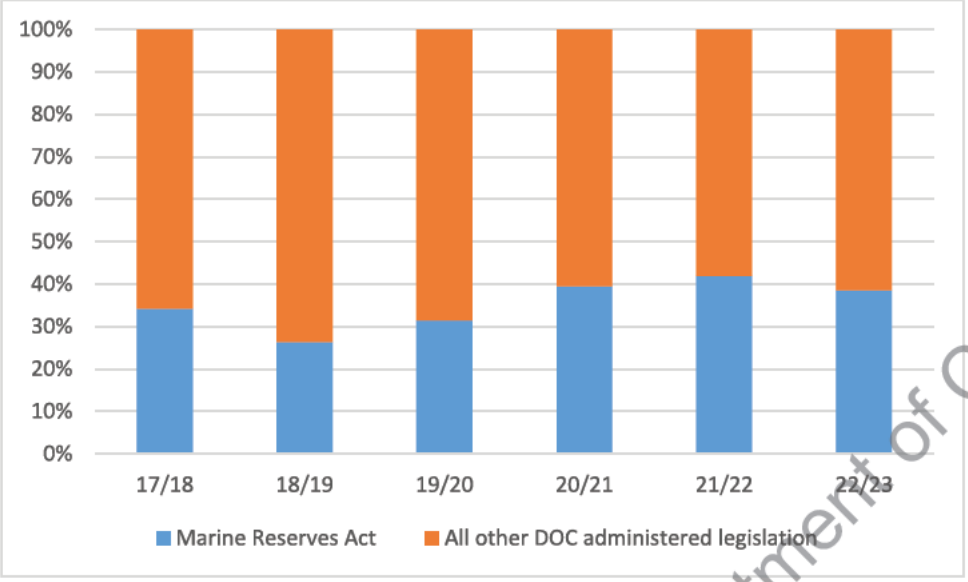

Figure 1: Graph showing the relative number of prosecutions between the Marine Reserves Act and other conservation legislation from years 17/18 to 22/23. Note that years 17/18-19/20 is represented by prosecutions only, years 20/21-22/23 is represented by prosecutions and infringements.

Source: DOC

The chart below shows trends in DOC enforcement actions for marine reserves.

Source: DOC

Notes:

1 The 'no further action/cancelled' category relates to offences that do not fit into the other categories.

2 Some other important activities are not recorded such as the number of preventions and education and advocacy.

As this table shows, the number of enforcement actions has substantially increased since infringement offences became available. The number of prosecutions has fallen dramatically, in line with expectations that the majority of offences previously taken to court are better dealt with through infringement notices. The number of warnings issued has increased (where prior expectations were that these could reduce), which is apparently a result of changes in the approach to enforcement, including during Covid-related lockdowns.

Section 3: Delivering an option

How will the new arrangements be implemented?

Implementation planning for the infringement offences will proceed as the provisions for them are developed and the regulations are drafted. This will include:

- formal operational guidelines about the issuance of notices, to ensure that authorised officers act in a consistent manner when issuing them, including:
  - identifying when alternative actions such as oral or written warnings are more appropriate
  - giving offenders the opportunity to rectify the offending where this is feasible
  - recording only one offence on an infringement notice rather than multiple related offences, when multiple penalties would be disproportionate
  - how customary fishing offences in HPAs are considered
- procedures to ensure recipients of an infringement notice are properly informed of their rights at the beginning of the process, to ensure consistency within the two agencies and to increase the likelihood of compliance with the penalty
- training for DOC rangers and FNZ fishery officers on the new operational guidelines
- systems to encourage voluntary payment, by enabling multiple payment options (eg cash, EFTPOS, internet banking), payment by instalment (especially in cases of financial hardship) and payment reminders
- specifying the circumstances under which infringement reminder notices will be filed with the District Court for enforcement
- compiling key statistics on the infringement notices issued each year (see next section).

These will be in line with Ministry of Justice guidelines on infringement offences (*op.cit*), and the agencies' current procedures for infringement offences systems.

After the Act comes into force, the only fishing permitted in an HPA will be customary fishing conducted in accordance with authorisation issued by tangata kaitiaki under fisheries regulations.

Infringement offences regulations need to allow for situations when it is reasonable for permit holders to believe they were fishing lawfully. They also need to have a clear demarcation with fisheries regulations to avoid double jeopardy, ie to ensure contravention of fisheries

regulations does not attract an infringement notice or prosecution under infringement offences regulations.

Customary rights in SPAs are unlikely to be affected by the Act as the prohibited fishing methods are generally only used by the commercial sector.

Clear communications and guidelines on the above points will be essential for kaitiaki authorising customary take, fishers exercising customary rights and DOC and FNZ officers monitoring them.

The above actions will be part of an implementation package through which the following actions will need to be completed prior to enactment of the legislation in 2024:

- drawing digital survey plans of the HPA/SPA boundaries, to be lodged with Land Information New Zealand's survey office; with boundaries displayed on nautical charts and the 'MarineMate' app
- installing demarcation buoys in priority areas where HPAs/SPAs are adjacent to land or other areas of marine protection, especially in sheltered/high use areas
- erecting signage and interpretation panels in high use areas
- rolling out an educational campaign and clear communications explaining rule changes around the Gulf.

How will the new arrangements be monitored, evaluated, and reviewed?

An extensive programme of research, monitoring and reporting is planned to track the effectiveness of the Strategy as set out in *Revitalising the Gulf*.

Part of the implementation planning will be a system of compiling key statistics on infringement notices issued, including

- ongoing collection and monitoring of numbers and costs of warnings, infringements, prosecutions, and numbers of infringements requiring court enforcement
- monitoring compliance with the operational guidelines on the exercise of discretion, and an audit of compliance with the guidelines (after a suitable bedding–in period)
- ongoing collection and monitoring of trends in offending against offences under the new Act
- (optionally) pre- and post-implementation surveys about perceptions of DOC/FNZ's responses to offending (included periodically in existing DOC surveys).

This will be integrated into the agencies' existing systems for infringements data.

This information will be the source of annual statistics about infringement notices required by the Ministry of Justice, and will be publicly available on the DOC and FNZ websites.

Attachment D: Disclosure statement