In Confidence

Office of the Minister of Conservation

Cabinet Legislation Committee

Proposal

1 This paper seeks Cabinet's agreement to policy decisions for the Hauraki Gulf / Tīkapa Moana Marine Protection Bill (the Bill), to be progressed through an Amendment Paper at the Committee of the Whole House stage.

Relation to government priorities

2 The National Party Blueprint for a Better Environment states that the National Party will accelerate initiatives like the Hauraki Gulf Marine Protection.

3 One of my Conservation portfolio priorities is to deliver on targeting high value conservation areas, which includes progressing the Bill.

4 The Bill is on the 2024 Legislative Programme as category 4 priority (to be passed by the end of 2024 if possible).

Executive Summary

5 In June 2024, the Cabinet Legislation Committee considered a Cabinet paper recommending that the Bill continues to be progressed through the House. At this meeting, the Committee requested a report back seeking policy decisions on amendments to the Bill [LEG-24-MIN-0132].

6 This paper seeks agreement to:

6.1 preferred options for amendments to the Treaty of Waitangi clause;

6.2 how customary non-commercial fishing is provided for;

6.3 how rights under the Marine and Coastal Area (Takutai Moana) Act 2011 are provided for; and

6.4 the removal of clause 9A (the 'no compensation' clause).

7 Following decisions on the matters in this paper, the Parliamentary Counsel Office will draft an Amendment Paper to be further considered by Cabinet before being considered and voted on at the Committee of the Whole House stage for the Bill.

Background

8 The Hauraki Gulf / Tīkapa Moana (the Gulf) is a taonga of natural, economic, recreational and cultural importance. The Gulf has a diverse array of habitats, including biologically important dog cockle beds, kelp forests and fragile fields of coral. One third of all seabirds that breed in New Zealand nest in the Gulf. A recent

assessment by the New Zealand Institute of Economic Research put the economic value of the Gulf at $100 billion.

9 However, State of the Gulf reports over the last 20 years have shown it to be in an ongoing state of environmental decline.[1] There are increasing kina barrens (areas where an overabundance of kina graze the seaweed to leave behind almost bare reef), habitat loss and localised fisheries depletion, e.g. snapper and tarakihi. Lobsters (kōura) are regarded as functionally extinct in the Gulf, meaning they have been reduced to an extent where they do not play their usual role in the Gulf's marine ecosystems.

10 Cabinet has previously noted that marine protection can help to help reverse the decline in health and mauri of the Gulf [CAB-22-MIN-0599.02]. Marine protection is a proven tool for biodiversity management both domestically and internationally. It is expected that in some of these areas, snapper density will increase by at least 400%, kōura (rock lobster) will increase by 20%, and kina barrens will decrease by 30% relative to adjacent fished areas by 2030.

11 To that end the Bill will create new marine protected areas that will regulate a range of activities including fishing, the management of discharges and dumping, impact of structures, and damage to the seabed. As previously agreed by Cabinet, the Bill would increase marine protection in the Gulf from 6.7%[2] to around 18% by specifically establishing:

11.1 12 high protection areas (covering 5.8% of the Gulf) to protect and restore marine ecosystems. High protection areas will regulate a range of activities including commercial and recreational fishing and will provide for customary fishing subject to provisions outlined in paragraph 28;

11.2 5 seafloor protection areas (covering 5.5% of the Gulf) to protect seafloor habitats and communities by prohibiting bottom impacting fishing activities (e.g., bottom trawling and Danish seining) and other activities such as dredging, sand extraction, and mining; and

11.3 two marine reserves (covering 0.2% of the Gulf), one adjacent to the existing Cape Rodney – Okakari Point Marine Reserve (Leigh/Goat Island), and one adjacent to the Te Whanganui-o-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 impactful activities [CAB-22-MIN-0599.02].

12 Overall, the Bill responds to and balances growing public demand for new marine protection in the Gulf and frustration with the slow pace at which protection is proceeding, with maintaining the region's economic interests. The approach means we can protect the most precious biodiversity at minimal cost. An Economic Impact Assessment carried out by MartinJenkins found that:

[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] Existing marine protection in the Gulf consists of 0.3% in marine reserves and 6.4% in cable protection zones.

12.1 fishing in the proposed marine protection areas accounts for only 1-3% of total fishing in all quota management areas (QMAs) that include the Gulf;

12.2 annual revenue from fish caught within the proposed protection areas was estimated at $4.2-$5.2 million over the two-year study period, based on market price. This was approximately only 2%-3.5% of the revenue generated by catch across all QMAs that include some or all of the Gulf; and

12.3 around 12%-14% of permit holders who fish in QMAs that include the Gulf fished in the proposed protected areas. But, for the majority of fishers, catch landed from the proposed protected areas was less than 10% of their total catch.

13 While I acknowledge that some fishers will be affected by the proposals in the Bill, on balance I consider the impact justifiable in the context of the purpose of the Bill to restore the health and mauri of the Gulf.

Analysis

14 In December 2022, Cabinet agreed to the final policy decisions for the marine protection proposals in the Bill and gave approval for the Minister of Conservation to issue drafting instructions to the Parliamentary Counsel Office [CAB-22-MIN-0599.02]. In August 2023, Cabinet approved the introduction of the Bill [LEG-23-MIN-0151].

15 In June 2024, the Cabinet Legislation Committee agreed in principle to progress the Bill through the House. This agreement was subject to a report back to Cabinet seeking policy decisions on amendments to the Bill, including in relation to clause 4 (the Treaty of Waitangi clause), and the interaction between customary fishing and the protected areas established by the Bill [LEG-24-MIN-0132]. This paper addresses the matters raised by the Cabinet Legislation Committee and addresses feedback on clause 9A (an ‘avoidance of doubt’ clause that sets out that there is no entitlement to compensation).

16 These matters have been considered in light of feedback from Cabinet and consistency with previous policy decisions and feedback received on the Bill, including from mana moana and stakeholders.

Te Tiriti o Waitangi / Treaty of Waitangi clause (the Treaty clause)

17 As currently drafted, the Bill contains a general Treaty clause that requires the Department of Conservation (DOC) to interpret and administer the Act to ‘give effect to the principles of te Tiriti o Waitangi/the Treaty of Waitangi’. This reflects the current Treaty clause of the Conservation Act 1987.

18 I have further considered options for the Treaty clause, with specific reference to alignment with existing conservation legislation, mana moana expectations, feedback from Te Arawhiti’s Treaty Provisions Oversight Group, and providing for greater clarity and specificity about how Treaty of Waitangi obligations are engaged by the Bill.

19 The options I have identified and considered are:

19.1 Option 1: retain the general Treaty clause as is currently drafted

19.2 Option 2: retain the general Treaty clause and include 'signposting' provisions

19.3 Option 3: remove the general Treaty clause and replace it with 'signposting' provisions

19.4 Option 4: remove the general Treaty clause (and not include 'signposting' or any other provisions)

20 If the general Treaty clause is removed from the Bill (Options 3 and 4), recognition of the Treaty of Waitangi would continue to occur through targeted operational provisions, e.g. for customary fishing and consultation with mana moana. There will also likely be a general obligation on DOC to consider (but not 'give effect' to) Treaty of Waitangi principles in the administration of the operative Act.[3]

21 Retention of the current Treaty clause (Options 1 and 2) to 'give effect' to Treaty of Waitangi principles aligns with the Conservation Act and provides a 'catch-all' mechanism recognising the Crown's Treaty of Waitangi obligations, including in future contexts that may not have been anticipated at the time this legislation was developed. Retention of the current Treaty clause is supported by mana moana.

22 Option 2 further enhances Option 1 by 'signposting' the following operational clauses (noting that the Parliamentary Counsel Office will determine the final drafting of the clause and that these provisions may be subject to amendment):

(a) section 8 which provides that nothing in this Act will limit or otherwise affect the ability of an applicant group to obtain recognition of protected customary rights or customary marine title under the Marine and Coastal Area (Takutai Moana) Act 2011

(b) section 19 which provides for customary non-commercial fishing within high protection areas

(c) section 21(aaa) which provides for protected customary rights or rights held by a customary marine title group under the Marine and Coastal Area (Takutai Moana) Act 2011 to be exercised within high protection areas and seafloor protection areas

(d) section 30A which provides that where the Marine and Coastal Area (Takutai Moana) Act 2011 applies to an activity, that an applicant has satisfied those requirements

(e) sections 29, 30 and 32 which provide that the rights and interests of whānau, hapū, and iwi that exercise kaitiakitanga in a protected area must be considered

[3] The Legislation Design and Advisory Committee Guidelines note that due to its constitutional significance, in the absence of clear words to the contrary, the courts will presume that Parliament intends to legislate in a manner that is consistent with the principles of the Treaty and interpret legislation accordingly. However, this would not have the same effect of a general operative 'give effect' requirement, as a mandatory consideration.

by the Director-General of the Department of Conservation when granting, revoking or amending a permit under this Act

(f) section 66 which provides that collaborative development, with whānau, hapū, and iwi that exercise kaitiakitanga in the high protection area or seafloor protection areas is required for regulations that provide for the setting of biodiversity objectives within high protection areas and seafloor protection areas and the regulation of activities within the high protection areas necessary to give effect to the biodiversity objectives

(g) section 66 which provides that mātauranga Māori is recognised in informing the development of regulations

(h) section 67(3) which provides that consultation with whānau, hapū, and iwi that exercise kaitiakitanga in a high protection area on regulations that provide for additional management actions within a high protection area is required

(i) in section 68(3) which provides that a reasonable opportunity for whānau, hapū, and iwi that exercise kaitiakitanga in any protected area to make submissions during any review of seafloor protection is required.

23 Option 2 is my preferred option, as it aligns with existing conservation legislation, provides further clarity to how the Bill operationally gives effect to the Treaty of Waitangi and is likely to be supported by mana moana.

24 I propose that the clause also includes that all Treaty of Waitangi settlements will be upheld.

Allowing customary fishing within the protected areas established by the Bill

25 All types of fishing, including customary non-commercial fishing, would be prohibited in marine reserves, including those established under the Bill.

26 As currently drafted, the Bill provides for customary non-commercial fishing in high protection areas and seafloor protection areas as regulated under the Fisheries Act 1996. The Bill does not expand on these existing customary non-commercial fishing rights. I recommend that these provisions for customary non-commercial fishing be retained in the Bill. To remove these provisions would be a substantial deviation from what was engaged on and would not be supported by mana moana.

27 The provision for customary non-commercial fishing was a key component of the development of the marine protection areas since they were first proposed in the independent Sea Change Tai Timu Tai Pari Marine Spatial Plan.[4]

28 As currently drafted, the Bill sets out that customary non-commercial fishing can continue in high protection areas and seafloor protected areas and so long as it complies with the following conditions:

[4] The Sea Change Tai Timu Tai Pari Marine Spatial Plan in a non-statutory plan released in 2016 by an independent stakeholder working group and includes recommendations for marine protection in the Hauraki Gulf / Tīkapa Moana.

28.1 bottom trawling, dredging and Danish seining fishing methods are not used[5];

28.2 any regulations related to access for customary non-commercial fishing that have been developed collaboratively with mana moana and give effect to the biodiversity objectives (for high protection areas only) (clause 66); and

28.3 any further regulations related to access for customary non-commercial fishing made on the recommendation of the Minister of Conservation (for high protection areas only, and in consultation with the Minister for Oceans and Fisheries and mana moana) (clause 67). This is a 'back-stop' power.

29 These 'conditions' on customary non-commercial fishing have been criticised by Te Ohu Kaimoana, the Hauraki Māori Trust Board and some iwi. In particular, these groups have expressed opposition to the ability to make additional regulations for customary non-commercial fishing. Overall, their view is that the Crown should not be able to make regulations under the Bill that will impact on customary non-commercial fishing, and these should remain regulated under the Fisheries Act only.

30 A key part of the design of the Bill has been to achieve a balance across customary rights and the purpose of marine protection.

31 In relation to 28.1, I recommend that the prohibition on bottom trawling, dredging and Danish seining fishing methods, including for customary non-commercial fishing, is retained for both seafloor protection areas and high protection areas. These methods are not compatible with the purpose of these protection areas. This is unlikely to have a significant impact on the exercise of customary non-commercial fishing rights as these methods would not be commonly used.

32 Regarding 28.2, I recommend that customary non-commercial fishing is removed from the scope of the regulations collaboratively developed with mana whenua to give effect to the biodiversity objectives. This provides for customary non-commercial fishing to be regulated through only the Fisheries Act, and potentially a 'back-stop' power as discussed below. I recommend that the requirement to consult with the Minister for Oceans and Fisheries in developing these regulations is removed as regulations will not impact on customary non-commercial fishing.

33 Regarding 28.3 (the 'back-stop' power), in addition to the Bill's status quo, I have identified one other approach for consideration:

33.1 Option 1: remove regulation of customary non-commercial fishing from within the scope of the 'back-stop' regulation-making powers

33.2 Option 2: retain regulation of customary non-commercial fishing in the scope of the 'back-stop' regulation-making powers (status quo).

34 Option 1 removes any mechanism for customary non-commercial fishing to be regulated through this Bill. Customary non-commercial fishing as provided for under the Fisheries Act can continue in these areas. If progressing Option 1, I recommend

[5] While bottom trawling and Danish seining are commercial methods, they can theoretically be used by a commercial fisher in an HPA who is collecting fish on behalf of a customary authorisation holder. If used, these methods will likely impact on the biodiversity values intended to be protected at these sites.

that the requirement to consult with the Minister for Oceans and Fisheries in developing regulations is removed. I also recommend that the requirement to collaboratively develop biodiversity objectives and associated regulations with mana moana is removed as regulations will not impact on customary non-commercial fishing. Mana moana will continue to be consulted on these matters.

35 I recommend option 1 is progressed through an Amendment Paper. With these proposed changes, customary non-commercial fishing will be regulated through the Fisheries Act only.

36 Mana moana have not been consulted on these proposed changes. I expect that mana moana are likely to support any change to the Bill that removes customary non-commercial fishing from the scope of additional regulations over and beyond Fisheries Act provisions.

37 The changes proposed may strengthen the opinions of those who were already opposed to the provision of customary non-commercial fishing. Some members of the public and eNGOs who were supportive of the regulation of customary non-commercial fishing through this Bill may oppose this change.

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

38 The Bill does not expand on any rights provided under the Marine and Coastal Area (Takutai Moana) Act 2011 (Takutai Moana Act); rather it provides for those rights to be exercised with the seafloor protection areas and high protection areas. Below I outline how the rights under the Takutai Moana Act interact with the protection areas and discuss options for how these rights are provided for in the Bill.

39 Rights under the Takutai Moana Act include ‘customary marine title’, which provides the right to give or refuse permissions for activities needing resource management consents, ownership over most minerals and the right to be consulted on marine mammal watching permits. Rights under the Takutai Moana Act also include ‘protected customary rights’, which refers to activities conducted according to tikanga such as launching waka or gathering stones for hāngī. ‘Protected customary rights’ do not include fishing activities.

40 The provisions in the Bill to give effect to rights under the Takutai Moana Act include:

40.1 an ’avoidance of doubt’ clause that provides that nothing in the Bill will limit or otherwise affect the ability of an applicant group to obtain recognition of ‘protected customary rights’ or ‘customary marine title’ (clause (8)(2));

40.2 a clause that provides for the exercise of rights under the Takutai Moana Act to be exempt from prohibitions (clause 21(aaa)); and

40.3 a clause that provides that, before granting a permit, the Director-General of Conservation must be satisfied that rights under the Takutai Moana Act associated with granting approval or permission for activities to occur have been exercised (clause 30A). This provision does not create any additional requirements on an applicant but ensures that these rights are upheld.

41 Options for how the Bill interacts with rights under the Takutai Moana Act are:

41.1 Option 1: retain provisions that acknowledge rights under the Takutai Moana Act; or

41.2 Option 2: remove provisions that acknowledge rights under the Takutai Moana Act

42 I recommend the provisions that acknowledge rights under the Takutai Moana Act are retained (Option 1) on the basis that this aligns with the purpose of the Bill, which includes 'acknowledging customary rights within seafloor protection areas and high protection areas'. Mana moana expressed that provision of customary rights is important to them and their support for the Bill is contingent on these being provided for. This option will be unlikely to have a significant impact on biodiversity due to the limited scope of rights (e.g. rights do not extend to fishing activities).

Clause 9A – the 'no compensation' clause

43 During the Select Committee process, a clause was inserted into the Bill stating that '*the Crown is not liable to pay compensation to any person for any loss of, or any adverse effect on, a right or an interest in individual transferable quota or a right to undertake fishing arising from the enactment or operation of this Act*.'

44 There has been opposition from the fishing industry and Te Ohu Kaimoana to the inclusion of this clause.

45 This clause was for the avoidance of doubt and aligns with existing approaches to not compensate for conservation or sustainability measures. Compensation would likely not be available to fishers as the marine protection would not involve the taking of a property right (though it may have an effect on the exercise of those rights).

46 While I have been advised that compensation is very unlikely, removal of this clause would provide for parties to test this claim should they choose to. I recommend removing the clause.

Next steps

47 Following decisions on the matters in this paper, the Parliamentary Counsel Office will write an Amendment Paper, reflecting the decisions made. It is proposed that the Amendment Paper will be considered by Cabinet in November 2024.

48 When finalised, the Amendment Paper outlining the proposed amendments to the Bill, will be considered and voted on at the Committee of the Whole House stage.

Cost-of-living Implications

49 The Bill may impact on some fishers' ability to catch their Annual Catch Entitlement or increase their costs to do so, e.g. increased fuel costs associated with needing to travel further. These increased costs to fishers may be passed to consumers. Based on the Economic Impact Assessment, this impact is expected to be minimal.

50 If regulations are developed under the Bill that impact on customary non-commercial fishing, this may have cost-of-living implications for mana moana who would have otherwise carried out certain customary non-commercial fishing practices in the proposed protection areas. This impact is expected to be minimal.

Financial Implications

51 There are no financial implications to the decisions sought in this paper.

52 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].

53 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. Funding for the first four years is through reprioritisation of Vote Conservation.

Legislative Implications

54 The outcomes of the decisions in this paper will be included in an Amendment Paper to be voted on at the Committee of the Whole House.

Impact Analysis

Regulatory Impact Statement

55 A Regulatory Impact Statement was prepared in accordance with Cabinet requirements on the marine protection proposals, including how customary non-commercial fishing was to be provided for. This was submitted to Cabinet in December 2022 [CAB-22-MIN-0599.02].

56 A further Regulatory Impact Statement was prepared in accordance with Cabinet requirements for the development of infringement regulations. This was submitted to Cabinet in August 2023 [LEG-23-MIN-0151].

Population Implications

57 If regulations that affect customary non-commercial fishing are developed, this may impact on whānau, hapū, iwi in the area where these regulations are. Any regulations must only affect customary non-commercial fishing to the minimum extent reasonably necessary to give effect to biodiversity objectives. As such I consider it unlikely that there will be a significant impact on whānau, hapū and iwi.

Human Rights

58 On 10 August 2023, the Ministry of Justice provided advice concluding that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act.

Consultation

59 Consultation was carried out with Te Arawhiti, the Parliamentary Counsel Office, and Fisheries New Zealand.

Communications

60 I will announce the proposed changes at the second reading of the Bill.

Proactive Release

61 I 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 for Conservation recommends that the Committee:

1 note that in June 2024, the Cabinet Legislation Committee invited a report back seeking decisions on amendments to the Bill, including in relation to clause 4 (the Treaty of Waitangi clause), and the interaction between customary fishing and the protected areas established under the Bill [LEG-24-MIN-0132];

2 agree to retain the current Treaty of Waitangi clause with additional ‘signposting’ provisions;

3 agree that the Treaty of Waitangi clause states that all Treaty of Waitangi settlements will be upheld;

4 agree that the provision for customary non-commercial fishing (as regulated under the Fisheries Act) is retained;

5 agree to retain the prohibition on bottom trawling, dredging, and Danish seining fishing methods in seafloor protection areas and high protection areas, even for customary non-commercial fishing;

6 agree that regulation of customary non-commercial fishing is out of the scope for regulations developed under clause 66 of the Bill;

7 agree that the requirement to consult with the Minister for Oceans and Fisheries is removed for regulations developed under clause 66 of the Bill;

8 agree that the regulation of customary non-commercial fishing is out of scope for regulations developed under clause 67 of the Bill;

9 agree that the requirement to consult with the Minister for Oceans and Fisheries is removed for regulations developed under clause 67 of the Bill;

10 agree that the requirement for biodiversity objectives and associated regulations to be developed collaboratively with mana moana is amended to require consultation with mana moana;

11 note that, with these proposed changes, customary non-commercial fishing will be regulated through the Fisheries Act only;

12 agree that provisions that acknowledge rights under the Takutai Moana Act are retained;

13 agree that the ‘no compensation’ clause (clause 9A) in the Bill is removed.

Next steps

14 agree to progress the above changes through introducing an Amendment Paper at the Committee of the Whole House stage on the Bill; and

15 authorise the Minister of Conservation to issue drafting instructions to the Parliamentary Counsel Office for an Amendment Paper reflecting the above changes.

Hon Tama Potaka

Minister for Conservation