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SUBMISSION ON GUIDANCE FOR IDENTIFYING A HABITAT OF PARTICULAR SIGNIFICANCE FOR FISHERIES MANAGEMENT

INTRODUCTION

1. This is a submission on the *Draft Guidelines for the Identification of Habitat of Particular Significance for Fisheries Management (Guidelines)* and *Draft Operational Proposals for Habitats of Significance (Operational Proposals)* prepared by Fisheries New Zealand (**Fisheries NZ**).
2. The Environmental Defence Society (**EDS**) is an independent not-for-profit organisation conducting interdisciplinary policy research and litigation. It was established in 1971 with the purpose of improving environmental outcomes in Aotearoa New Zealand.
3. EDS has a special interest in the marine environment and recently completed the first phase of a multi-year project looking at options for future reform of the oceans management system. This included, among other things, fisheries management.¹ In 2018, EDS led an in-depth review of the national fisheries management system and published findings in a report entitled *Voices from the Sea: Managing New Zealand's Fisheries*.² It has also sought to improve fisheries decision-making by submitting on proposals to set sustainability measures for the management of various wild fish stocks.³

¹ Greg Severinsen and others *The Breaking Wave: Oceans Reform in Aotearoa New Zealand* (EDS, Auckland, June 2022) available from www.eds.org.nz

² Raewyn Peart *Voices from the Sea: Managing New Zealand's Fisheries* (EDS, Auckland, 2018) available from www.eds.org.nz

³ Copies of EDS's recent submissions on a range of wild fish stocks are available from www.eds.org.nz

SUMMARY OF SUBMISSION

4. EDS's key submission points on the Guidelines and Operational Proposals are as follows:

- a. It has taken 26 years for government to produce proposals to implement section 9(c) of the Fisheries Act and it is essential that there is no further delay in both identifying and protecting habitat of particular significance for fisheries management (**HoS**) which are critical building blocks of marine ecosystems.
- b. The Guidelines and Operational Proposals should be combined and retitled as a "Standard for the Protection of Habitat of Particular Significance for New Zealand Fisheries Management" thereby indicating a similar status to the Harvest Strategy Standard and to highlight that their purpose is protection rather than just identification.
- c. Fisheries NZ has adopted an overly narrow approach to defining HoS which will exclude habitat important to fisheries management that needs protection. The definition should be widened as follows:

"habitat of particular significance for fisheries management includes an area or network of areas necessary to support the life-history stages of fisheries resources including spawning areas, nursery areas for larvae and juveniles, adult feeding areas, migratory corridors, and specific areas to which species are highly restricted. It includes degraded areas which have restoration potential."

- d. HoS that perform very important ecological functions and/or are especially vulnerable to degradation from fishing activities should be prioritised for early identification and protection.
- e. Information on the current and likely future risk to HoS should be collated and assessed at the stage of identification, so that important habitats at high risk of damage from fishing activity can be prioritised for protection through the *proactive* application of sustainability measures under section 11 of the Fisheries Act.
- f. The use of expert assessment to identify and assess HoS when there is an absence of reliable data is appropriate.
- g. A precautionary approach needs to be taken when identifying HoS and risks to them. Where there is a lower level of confidence in the presence and significance of the HoS, but a high risk of damage if not protected, HoS proposals should proceed.
- h. Fisheries NZ should establish an independent body of marine scientists and mātauranga Māori experts (a HoS Standing Committee) which should be given the task of identifying HoS which should then be automatically included on the register.
- i. The proposed HoS should not be submitted to Fisheries NZ science working groups for review but any peer review should be undertaken by independent scientists who are internationally respected in the field.
- j. EDS supports recording HoS on a web-based register, but this needs to include mapping of HoS based on fisheries management areas, including mapping important connections between HoS.
- k. The Guidelines and Operational Proposals need to describe the legal obligation to protect HoS correctly and more fully to make it clear that any time a person exercises a function, duty or power under the Act, that person must consider the need to protect HoS and must

address (through either avoiding, remedying or mitigating) any impacts of fishing on the aquatic environment (including HoS).

- l. Fisheries NZ needs to proactively identify HoS currently at risk from fishing activity and recommend to the Minister sustainability measures to protect them. In particular, where the risks to HoS from fishing are identified as High or Extreme, immediate steps should be taken to address those fishing impacts.
- m. Fisheries NZ needs to actively work collaboratively with regional councils and the Department of Conservation to design and implement combined approaches that effectively manage impacts on, and ensure protection of, HoS as an essential part of marine ecosystems.
- n. A robust monitoring and review programme for HoS should be included in the Operational Proposals.
- o. Ongoing research to increase our understanding of HoS, their importance, and impacts on them will be critical and adequate resourcing needs to be allocated to this.

THE PROPOSALS

5. Fisheries NZ is proposing to finalise Guidelines and Operational Proposals to support the application of section 9(c) of the Fisheries Act 1996 which requires “all persons exercising or performing functions, duties, or powers under this Act, in relation to the utilisation of fisheries resources or ensuring sustainability, shall take into account the following environmental principles – (c) habitat of particular significance for fisheries management should be protected”.
6. The Guidelines provide an initial working definition of “habitat of particular significance for fisheries management”, a process to identify and record HoS, and a process to identify adverse effects on HoS. The Operational Proposals outline how HoS are to be taken into account in fisheries management decisions.
7. EDS would like to commend Fisheries NZ for undertaking work in this area. Protecting Aotearoa New Zealand’s marine habitat is exceedingly important. As highlighted in the Fisheries NZ *Aquatic Environment Biodiversity Annual Review 2021 (AEBAR)*, “Loss of habitat and of the connectivity between habitats have been highlighted as two of the most significant issues facing the health of marine ecosystems in New Zealand”.⁴
8. *Our Marine Environment 2022* found that “The extent and condition of most biogenic habitats that are monitored has reduced dramatically, from intertidal areas to subtidal areas, including seamounts”. This is of considerable concern as “The state and condition of habitats affects marine species in a number of ways, including by affecting food supply, shelter, breeding, and migration”.⁵
9. Despite the long-recognised importance of habitat for healthy fisheries, and evidence of ongoing habitat degradation, it has taken some 26 years for government to produce proposals to implement section 9(c) of the Fisheries Act. With the growing intensity of cumulative impacts on the marine environment, including from increasing greenhouse gas emissions, such action has become increasingly urgent. **It is essential that there is no further delay in both identifying and protecting these critical building blocks of our marine ecosystems.**

⁴ Fisheries NZ *Aquatic Environment Biodiversity Annual Review 2021* (Wellington, 2021) at 482

⁵ Ministry for the Environment and Statistics New Zealand *Our Marine Environment 2022* (Wellington, 2022) at 11

STATUS OF DOCUMENTS

10. Before submitting on the substantive proposals, it is important to consider the status of the documents to be finalised by Fisheries NZ. They are described as “Guidelines” and “Proposals” rather than policies or standards.
11. Other documents developed by Fisheries NZ which are intended to influence fisheries decision-making are typically called standards. For example, the *Harvest Strategy Standard for New Zealand Fisheries*⁶ and the *Research and Science Information Standard for New Zealand Fisheries*.⁷
12. Although standards are not directly referred to in the Fisheries Act, and have no direct statutory force, they have been given effect to by the Courts. For example, in the recent *Tarakihi case* the High Court found that the Harvest Strategy Standard was “an implied mandatory relevant consideration for the Minister in setting a TAC under s 13”.⁸ The Court also made it clear that the Minister could not decide to depart from the provisions in the Harvest Strategy Standard unless there was a solid scientific basis for doing so.⁹
13. **EDS submits that the Guidelines and Operational Proposals should be combined and retitled as a “Standard for the Protection of Habitat of Particular Significance for New Zealand Fisheries Management” thereby indicating a similar status to the Harvest Strategy Standard and that the purpose is protection not just identification.**

DEFINITION OF HOS

14. The Guidelines provide an initial working definition for HoS which is “an area or areas of particular significance in supporting the productivity of fisheries resources”. It goes on to explain that the initial priority for HoS identification will be nursery and spawning or egg laying habitat “due to the particularly significant role these play in supporting productivity of fisheries resources and their sustainability”. Such areas are ecologically important to fisheries, but so are many other habitats. All relevant habitats need to be included in the definition, identification and protection of HoS.
15. The Guidelines go on to state that “Some habitat forming species such as kelp, provide ecosystem services and habitat for many marine species at a range of spatial scales” but “While these services are important at a wider fisheries context” they would not fall into the proposed definition. In EDS’s view, this serves to illustrate that the definition proposed by Fisheries NZ is too narrow, as such habitats are clearly of significance for fisheries management.
16. We note the broader approach taken in the USA Magnuson-Stevens Fisheries Conservation and Management Act 1998 which adopts the concept of “essential fish habitat” (similar in intent to HoS) which is defined as “those waters and substrate necessary to fish for spawning, breeding, feeding or growth to maturity”. National Oceanic and Atmospheric Administration (**NOAA**) Fisheries further defines such habitat as “the physical, biological and chemical characteristics necessary to support fish for feeding, spawning, breeding, and growth to maturity”.¹⁰ As

⁶ Ministry for Primary Industries *Harvest Strategy Standard for New Zealand Fisheries* (Wellington, October 2008)

⁷ Ministry for Primary Industries *Research and Science Information Standard for New Zealand Fisheries* (Wellington, April 2011)

⁸ *Royal Forest and Bird Protection Society v Minister of Fisheries and Ors* [2021] NZHC 1427 at [153]

⁹ *Royal Forest and Bird Protection Society v Minister of Fisheries and Ors* [2021] NZHC 1427 at [151]

¹⁰ <https://www.fisheries.noaa.gov/resource/document/essential-fish-habitat-ecosystem-approach>

explained by NOAA, “Depending on the fish species, EFH [essential fish habitat] could include the deep sea, coral reefs, kelp forests, bays, wetlands, and rivers that connect to the ocean.”¹¹

17. In Nordic countries, Essential Fish Habitat (**EFH**) has been defined as “environments necessary for any life-stage of a fish species and their importance can be assessed as the effects of changes in the quantity and/or quality of these habitats on populations or stocks in time ... EFH thus includes nursery areas, feeding areas, spawning areas and migratory routes.”¹²
18. A Baltic Marine Environment Protection Commission report explains “As most fish species use different habitat types for different parts of their life cycle, the description of essential habitats for one species should include all habitat types that are critical for a species to complete its life cycle. Examples of categories that should be considered are: spawning areas, nursery areas for larvae and juveniles, adult feeding areas, migratory corridors, as well as possible specific areas to which a species may be highly restricted.”¹³
19. Such descriptions highlight the problem of focusing only on nursery habitats – it fails to consider the connectivity of the aquatic environment and the importance of multiple habitat types to particular species. After all, where will juvenile species move to if habitats such as important adult feeding areas are not protected? As explained in AEBAR, “Some animals move between different [HoS] throughout their lives”¹⁴ and “These movements link together different habitats into ‘habitat chains’, which may also include ‘habitat bottlenecks’, where one or more spatially restricted habitats may act to constrain overall fish production ... Human-driven degradation or loss of such bottleneck habitats may strongly reduce the overall productivity of populations, and hence ultimately reduce long-term sustainable fisheries yields.”¹⁵
20. This means that it is not only important to protect individual HoS, but to maintain connectivity between them. This requires a network approach rather than focusing on identifying and protecting discrete areas. It requires a consideration of habitats, and species that are dependent on them, within the broader marine ecosystem to identify those that play a particularly important role in the lifecycle of each species.
21. It is also important, when identifying HoS, to consider all the country’s fisheries waters not just inshore coastal areas. As stated in AEBAR, “Harbours and coastal areas are identified as spawning sites for several coastal fish species, but offshore areas and features such as seamounts can be relevant for deep-sea and pelagic species spawning and feeding (e.g., the Chatham rise)”.¹⁶
22. AEBAR goes on to explain that “Certain habitats have been identified as important for marine species including: shallow sea grass meadows, wetlands, seaweed beds, rivers, estuaries, rhodolith beds, rocky reefs, crevices, boulders, bryozoans, submarine canyons, seamounts, coral reefs, shell beds and shallow bays or inlets.”¹⁷ These are the types of habitat that will need to be identified as HoS.

¹¹ <https://www.fisheries.noaa.gov/insight/understanding-essential-fish-habitat>

¹² Patrik Kraufvelin, Zeynep Pekcan-Hekim, Ulf Bergström, Ann-Britt Florin, Annukka Lehikoinen, Johanna Mattila and Jens Olsson, 2016, *Conclusions from a workshop on the importance, mapping, monitoring, threats and conservation of coastal EFH in the Baltic Sea*, Nordic Council of Ministers, Denmark, at 14

¹³ <https://portal.helcom.fi/meetings/FISH-PRO%20III%201-2019-592/MeetingDocuments/2-5%20Essential%20fish%20habitats%20in%20the%20Baltic%20Sea.pdf>

¹⁴ Fisheries NZ *Aquatic Environment Biodiversity Annual Review 2021* (Wellington, 2021) at 482

¹⁵ Fisheries NZ *Aquatic Environment Biodiversity Annual Review 2021* (Wellington, 2021) at 482

¹⁶ Fisheries NZ *Aquatic Environment Biodiversity Annual Review 2021* (Wellington, 2021) at 482

¹⁷ Fisheries NZ *Aquatic Environment Biodiversity Annual Review 2021* (Wellington, 2021) at 484

23. There is also the relevant timeframe to consider. The Fisheries Act's definition of "effects" (see below) includes past and future effects as well as those presently occurring. In addition, the purpose of the Act includes consideration of the needs of future generations.¹⁸ Consideration of past impacts as well as those likely to occur in the future are therefore an important element of fisheries management under the Act. This means that statements in the Guidelines that "Identification of an area as an HoS will be on the basis that it is *currently* particularly significant in supporting productivity of the fisheries resources" and that "Degraded areas that have been significant in the past, and have the potential to be significant if restored, would not meet the working definition" are not consistent with the framework of the Fisheries Act.
24. It is important to recognise that *all* environments have been impacted by humans to some extent and many important marine habitats have already been lost, significantly impacting fisheries productivity. Such areas need to be restored. To be effective, fisheries management needs to look to the future, based on an understanding of the past. It will be particularly important to protect areas with restoration potential where there are currently habitat bottlenecks (ie where the lack of suitable habitat to support part of a species' lifecycle limits the ability of that species to maintain its population). The definition of HoS needs to be broad enough to include such areas.
25. **EDS submits that Fisheries NZ has adopted an overly narrow approach to defining HoS which will exclude habitat important to fisheries management that needs protection. The definition should be widened as follows:**

"habitat of particular significance for fisheries management includes an area or network of areas necessary to support the life-history stages of fisheries resources including spawning areas, nursery areas for larvae and juveniles, adult feeding areas, migratory corridors, and specific areas to which species are highly restricted. It includes degraded areas which have restoration potential."

IDENTIFYING HOS

Prioritisation of effort

26. The Guidelines state on page 7, "Our initial priority for HoS identification is nursery and spawning or egg laying habitat...". Given the large size of the job of identifying all HoS within Aotearoa New Zealand's extensive marine area, it makes sense to prioritise efforts in a staged manner. However, **EDS submits that HoS that perform very important ecological functions and/or are especially vulnerable to degradation from fishing activities should be prioritised for early identification and protection.** They may or may not be important nursery or spawning areas. As emphasised by AEBAR, "For example, parts of the seabed with high roughness are important for many fisheries and can be easily damaged by interaction with fishing gear."¹⁹ It is such at risk habitats that should be the initial focus for identification and protection.
27. Our recommendation that the initial focus should be on HoS at risk from *fishing activity* (as opposed to land-based impacts) is because Fisheries NZ (through the Minister) has a legal duty (see below) and legal mechanisms at its disposal, under the Fisheries Act, to directly address these impacts.

Body responsible for identifying HoS

28. **EDS submits that Fisheries NZ should establish a body of independent marine scientists and mātauranga Māori experts (a HoS Standing Committee) which should be given the task of**

¹⁸ Fisheries Act 1996, section 8(2)

¹⁹ Fisheries NZ *Aquatic Environment Biodiversity Annual Review 2021* (Wellington, 2021) at 484

identifying HoS for automatic inclusion on the register. Identification of HoS is a technical scientific task and should not be subject to political influence. The proposals of the HoS Standing Committee could be subject to peer review, and if this was the case, **EDS submits that peer review should only be by independent scientists who are internationally respected in the field.**

29. The Guidelines (page 12) propose that potential HoS will be provided to Fisheries NZ science working groups for review. EDS does not support reviewing proposed HoS via fisheries working groups which include representatives of the fishing industry which has a vested interest in the outcome. Peer review needs to be undertaken by suitably qualified scientists that are independent of any stakeholder group.
30. The Guidelines (page 12) indicate that the science working groups will consider whether there “is sufficient evidence to recommend a habitat area is proposed for approval and sign-off within Fisheries NZ as a HoS”. It also indicates that the science working groups may recommend gathering additional evidence before areas can be proposed as HoS. This implies that uncertainty in information can be used as a reason not to identify and protect HoS. This approach does not reflect the precautionary approach under section 10(d) of the Fisheries Act as described above, and a lack of information should not be a reason not to identify and protect HoS where they are at risk from fishing impacts.

Collation and assessment of information

31. Page 8 of the Guidelines sets out a range of information which will be used to identify whether habitats are particularly significant. EDS considers this information to be appropriate, apart from the focus on spawning and nursery areas, which needs to be widened to include other stages of species’ lifecycles as outlined above. Connections between areas also need to be considered and identified due to the importance of habitat connectivity as outlined above.
32. The Operational Proposals suggest that risk to HoS will only be assessed when advice is prepared for the Minister on any particular fisheries management decision. This is a *reactive* approach which is likely to result in further loss of HoS. **Information on the current and likely future risk to HoS should be collated and assessed at the stage of identification, so that important habitats at high risk of damage from fishing activity can be prioritised for protection through the *proactive* application of sustainability measures under section 11 of the Fisheries Act.**
33. The Guidelines indicate that the “best available information” will be used to support the identification of HoS and Fisheries NZ will work with a range of experts to identify and assess relevant information, drawing on expert knowledge and published reports and papers. **EDS supports the use of expert assessment to identify and assess HoS when there is an absence of reliable data.** This acknowledges that baseline data is missing from much of the country’s marine environment and it will be some time before all the gaps can be filled. There is much existing knowledge on ecosystem function, resilience and recovery that can be drawn upon.
34. EDS recognises the important role that mātauranga Māori will need to play in identifying and protecting HoS. The Guidelines recognise “that there is a package of work needed to support identification of HoS informed by mātauranga, and to support fisheries managers’ understanding of which habitats are particularly significant to tangata whenua and taonga species” and that Fisheries NZ will “seek input and participation from Treaty partners, whānau, hapū, iwi and Māori organisations”. EDS supports the proposal to work with Māori to undertake this work. However, clarity on what the process will look like, as well as how Fisheries NZ would support customary management tools such as rāhui, would be useful.

Application of information principles

35. The Guidelines indicate that the “best available information” will be used to support the identification of HoS and that the level of confidence in the available supporting evidence will be ranked by experts. EDS supports this approach.
36. However, given the patchiness of information in the marine environment, **EDS submits that a precautionary approach needs to be taken when identifying HoS and risks to them.** As stated in section 10(d) of the Fisheries Act, “the absence of, or any uncertainty in, any information should not be used as a reason for postponing or failing to take any measure to achieve the purpose of this Act.” In this case, the measures “to achieve the purpose of this Act” are sustainability measures that avoid, remedy or mitigate the effects of fishing activity sufficiently to provide protection to HoS.
37. The High Court recently elaborated on the application of the precautionary approach to decision-making under the Fisheries Act, referring favourably to the definition in the Rio Declaration on Environment and Development 1992 which states “Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation”.²⁰
38. The Guidelines indicate (page 12) that “only potential HoS for which experts have a *high or very high level of confidence*” will be proceeded with. This is not consistent with the precautionary approach in section 10(d) of the Fisheries Act and as elaborated in the Rio Declaration. **EDS submits that where there is a lower level of confidence in the significance of the HoS, but a high risk of damage if not protected, HoS proposals should be proceeded with.**

Recording HoS

39. The Guidelines (page 13) propose that HoS be published in a register held on the Fisheries NZ website, which will be updated as new information becomes available. It is intended to be a living document. Provision will also be made for other parties to propose habitat areas as HoS and these can be notified to Fisheries NZ via a monitored email mailbox.
40. EDS supports these proposals. However, **it will be important that the register includes mapping of the areas, where spatial location is known, and also that all HoS in each fisheries management area are identified for easy incorporation into stock-based sustainability decisions.** As connectivity between habitat is important, mapping should indicate connections between habitats (i.e., movement of water, currents) as well as connection between habitats of importance for different life cycles of species (i.e., connection between spawning grounds, nursery habitat and adult habitat).

PROTECTION OF HOS

Legal obligation to protect HoS

41. When considering the need to protect HoS it is important to consider the relevant provisions of the Fisheries Act. The purpose under section 8 is “to provide for the utilisation of fisheries while ensuring sustainability”. The use of the word “while” is significant. When considered by the Supreme Court in the *King Salmon* case, in the context of similar usage in the Resource Management Act 1991 (RMA), the Court held that “while” meant “at the same time as”.²¹ This means that “ensuring sustainability” must be achieved at the same time as providing for the

²⁰ *The Environmental Law Initiative v Minister for Oceans and Fisheries* [2022] NZHC 2969 at [17]

²¹ *Environmental Defence Society Incorporated v The New Zealand King Salmon Company Limited* [2014] NZSC 38 at [24(c)]

utilisation of fisheries; providing for utilisation cannot trump ensuring sustainability. As recently stated by the High Court, the purpose of the Act “is broadly to create an environmental ‘bottom-line’ of sustainability”.²²

42. This is further emphasised by the words prefacing the two concepts. The utilisation of fisheries is to be “provided for” whereas sustainability is to be “ensured”. Ensuring is to “*make certain* that (something) will occur or be the case” whereas provide for is “to cause (something) to be available”. “Ensuring” sustainability is stronger than the active word used in the purpose of the RMA which is “to promote” sustainable development.²³ It is a strong, active word which creates an obligation to make something occur whereas “provide for” is more enabling.
43. “Ensuring sustainability” is further defined as “avoiding, remedying, or mitigating any adverse effects of fishing on the aquatic environment” as well as “maintaining the potential of fisheries resources to meet the reasonably foreseeable needs of future generations”. As the Supreme Court stated in the *King Salmon case* (in the similar context of the RMA), “avoiding” has its ordinary meaning of “not allowing” or “preventing”.²⁴ In the context of the Fisheries Act it therefore means preventing adverse effects of fishing on the aquatic environment from occurring. Remedying means to take action to correct any harm caused. In terms of mitigation, as stated by the High Court, “The usual meaning of ‘mitigate’ is to alleviate, or to abate, or to moderate the severity of something”.²⁵
44. This structure of section 8 is not correctly reflected in the Operational Proposals which includes the statement “This will inform advice on options, such as sustainability measures under s 11 of the Act to avoid, remedy or mitigate adverse effects of fishing while providing for sustainable utilisation”. As can be seen from the above, this last statement is an erroneous interpretation of the Act. Providing for utilisation is a separate matter to sustainability (which is to be ensured), and the obligation to avoid, remedy and mitigate is a means of ensuring sustainability.
45. It also needs to be recognised that the Fisheries Act defines “effect” very widely in section 2 as:
 - “the direct or indirect effect of fishing; and includes
 - (a) any positive or adverse effect; and
 - (b) any temporary or permanent effect; and
 - (c) any past, present, or future effect; and
 - (d) any cumulative effect which arises over time or in combination with other effects— regardless of the scale, intensity, duration, or frequency of the effect; and also includes—
 - (e) any potential effect of high probability; and
 - (f) any potential effect of low probability which has a high potential impact.”
46. This means that a wide range of effects from fishing need to be avoided, remedied or mitigated under the Fisheries Act including indirect effects, cumulative effects, future effects and some potential effects.
47. It is effects on the aquatic environment that need to be addressed. The Fisheries Act defines “aquatic environment”, and “aquatic life” which is part of that environment, very broadly in section 2 as follows:
 - “aquatic environment—
 - (a) means the natural and biological resources comprising any aquatic ecosystem; and

²² *The Environmental Law Initiative v Minister for Oceans and Fisheries* [2022] NZHC 2969 at [11]

²³ Resource Management Act 1991, s5(1)

²⁴ *Environmental Defence Society Incorporated v The New Zealand King Salmon Company Limited* [2014] NZSC 38 at [24(b)]

²⁵ *Royal Forest and Bird Protection Society of New Zealand Inc v Buller District Council* (No 2), [2013] NZHC 1346, at [72]

(b) includes all aquatic life and the oceans, seas, coastal areas, inter-tidal areas, estuaries, rivers, lakes, and other places where aquatic life exists

aquatic life—

(a) means any species of plant or animal life that, at any stage in its life history, must inhabit water, whether living or dead; and

(b) includes seabirds (whether or not in the aquatic environment)”

48. This means that a wide range of effects of fishing on all species of plants and animals in the marine environment must be addressed (either by avoiding, remedying or mitigating them).
49. It also needs to be noted that adverse effects must be addressed at the point and scale of impact. As indicated by the High Court, in order for an adverse effect on the environment to be mitigated, that effect must be mitigated both at an ecosystem level and at the level of its constituent parts. The Court found that offsetting at a different site was not mitigating, in that it did not address effects “at the point of impact”.²⁶ This means that the impacts of fishing on the aquatic environment which need to be addressed, include impacts on aquatic ecosystems as a whole, as well as direct impacts on particular species of animals or plants which are part of that ecosystem.
50. As already noted, section 9(c) of the Fisheries Act requires that “all persons exercising or performing functions, duties, or powers under this Act, in relation to the utilisation of fisheries resources or ensuring sustainability, shall take into account the following environmental principles: (c) habitat of particular significance for fisheries management *should be protected*”. As recently confirmed by the High Court, this is a *mandatory* environmental principle.²⁷
51. The Guidelines state that section 9(c) creates an obligation to take into account the protection of HoS in decisions, but does not create an obligation to protect them. The legal situation is more nuanced than this statement implies. This is evident in the following statement by the Select Committee in its report back on the 1996 Fisheries Bill:
- “We recommend that decision makers be required to ‘take into account’ the environmental principles. The nature of the environmental principles is such that a value judgement will be made about *the extent to which they are necessary to achieve the purpose of the Act*. In these circumstance ‘recognise and provide for’ places too strong an obligation on persons exercising functions under the Act, possibly forcing them to undertake vast amounts of research to meet the obligation. The words ‘take into account’ provide more appropriate discretion for the decision maker, while *clearly setting out his or her responsibility*”.²⁸ (emphasis added)
52. This statement makes it clear that there is not an unfettered discretion to decide to not protect HoS. The obligation to “take into account” requires the Minister to consider the matter (i.e., the need to protect HoS), to weigh it up with other relevant factors, and to give it the weight that is appropriate in the circumstances and achieves the purpose of the Act (including “ensuring sustainability”). It is an obligatory consideration which the Minister must pay attention to, to the extent that the protection of HoS is relevant to the matter being addressed. The weight to be given to the protection of HoS, as opposed to other relevant matters under the Fisheries Act, is to be determined by the nature of the matter at hand and the available evidence.²⁹
53. And it is clear from the purpose and schema of the Fisheries Act that the nature of the matter at hand (ie the protection of HoS) means that it will need to be given considerable weight in

²⁶ *Royal Forest and Bird Protection Society of New Zealand Inc v Buller District Council* (No 2), [2013] NZHC 1346, at [74]

²⁷ *The Environmental Law Initiative v Minister for Oceans and Fisheries* [2022] NZHC 2969 at [117]

²⁸ Fisheries Bill as reported from the Primary Production Committee, at viii

²⁹ *Trans-Tasman Resource Marine Consent Decision* (June 2014) at [113]

decision-making. As recently acknowledged by the High Court, the Fisheries Act acknowledges the importance of incorporating “wider ecosystem effects into fisheries management” and that this requires decisions as to the management of fishery resources to be considered “in the context of the functioning of the wider marine ecosystems” in order to “safeguard those marine ecosystems”.³⁰

54. The Operational Proposals indicate that “protect” in the context of Section 9(c) means “taking measures that would avoid, remedy or mitigate the *adverse effects of a decision* that could undermine the function the habitat provides for fisheries resources”. This approach is repeated throughout the document. For example, later the Operational Proposals state “Not all decisions made under the Act will result in adverse effects on HoS”.
55. These statements are legally wrong and need to be corrected. As noted above, section 8(2)(a) of the Fisheries Act refers to avoiding, remedying or mitigating “*any adverse effects of fishing on the aquatic environment*” not the adverse effects of a decision. This is an important distinction. If the former, erroneous, interpretation was applied it could be taken to mean that a decision that did not change status quo fishing impacts on a HoS, would not need to address existing adverse impacts, as the decision itself was not creating or changing them.
56. The correct legal interpretation of Section 9(c) is that any time a person exercises a function, duty or power under the Act (such as making a sustainability decision), that person must consider the need to protect HoS and must address (through either avoiding, remedying or mitigating) any impacts of fishing on the aquatic environment (including HoS). This is irrespective of whether the decision changes the status quo impacts or not. It also means, in practice, that when there are fisheries impacts on a HoS, “avoid” will likely be the more appropriate response than remedy or mitigate, given that the Act indicates that HoS “should be protected”.
57. **The Guidelines and Operational Proposals need to describe the legal obligation to protect HoS correctly and more fully.**

Guidance for protection of HoS

58. Neither the Guidelines or Operational Proposals suggest that there will be any proactive protection of HoS. Rather, HoS are merely to be taken into account when decisions are made on other fisheries matters. EDS considers this approach to be wholly inadequate and not in compliance with the duties under the Fisheries Act. As indicated above, there is an obligation to avoid, remedy or mitigate the adverse effects of fishing on the aquatic environment under Section 8, in order to ensure sustainability, which means there is an obligation to take action to address adverse effects of fishing on HoS.
59. **EDS submits that Fisheries NZ should proactively identify HoS currently at risk from fishing activity and recommend to the Minister sustainability measures to protect them. In particular, where the risks to HoS from fishing are identified as High or Extreme, immediate steps should be taken to address those fishing impacts.**
60. In addition, where areas are identified as HoS, what protection of them from fishing means should be defined (i.e., no extraction or limitations on fishing methods such as dredging and trawling). A shift towards targeted, non-destructive fishing methods (if fishing is allowed in these areas at all) would further support the function of these HoS.
61. The Guidelines refer to the exclusion of bottom-contacting fishing gear from estuaries, harbours and coastal zones. It is important to note that the impacts of trawling are damaging even in

³⁰ *The Environmental Law Initiative v Minister for Oceans and Fisheries* [2022] NZHC 2969 at [11]

deeper waters, and offshore soft-sediment systems should also be considered as HoS for key fishery species (e.g., scallops). There are also the concerns of plastic pollution from lost fishing gear and ghost fishing, and there is no mention of how these will be addressed.

62. EDS also notes that if HoS are not protected from fishing impacts under the Fisheries Act then regional councils may be forced to step in to protect them under the RMA (or new Natural and Built Environment Act). This means that if Fisheries NZ fails to adequately perform its role in this area, it may be pre-empted by Regional Councils. As noted in the *Motiti case*, “regional councils were assigned the primary governance role in maintaining indigenous biodiversity”.³¹

Protecting HOS in plans

63. The Operational Proposals indicate that the Fisheries NZ Coastal Planning Team will engage with other agencies, including regional councils and the Department of Conservation, to discuss “how they will consider the register of HoS to inform their decision making to manage impacts” and to “support and encourage Regional Councils to have regard to HoS when making decisions”. Working with Regional Councils will be critical to the application of an ecosystem-based management approach. However more action will be required than just to “raise the awareness”.
64. **EDS submits that Fisheries NZ needs to actively work collaboratively with Regional Councils and the Department of Conservation to devise combined approaches that effectively manage impacts on, and ensure protection of, HoS as an essential part of marine ecosystems.**
65. It is important that HoS are identified (and where possible mapped) in fisheries plans and regional coastal plans so that cumulative impacts on them can be managed. Where regional fisheries plans are developed, such as for the Hauraki Gulf, the network of HoS should be mapped and included as an integral part of the plan along with measures to be put in place to protect them. It may be possible to have a fisheries plan just focused on the identification and protection of HoS, setting out the management responses, and EDS would encourage Fisheries NZ to consider this option.
66. As indicated in the Draft Operational Guidelines, there will also need to be active input into the development of regional spatial strategies under the Spatial Planning Act and the combined plans under the Natural and Built Environment Act. As these will be staged, it will be important to prioritise the identification of HoS for those regions which will be the first off the block in preparing the new plans.

MONITORING OF HOS

67. The documents are silent on how the condition of HoS will be monitored, including the effectiveness of measures taken to protect them. Monitoring is a critical element to ensure the success of efforts. It is also critical to an adaptive management approach. **EDS submits that a robust monitoring and review programme should be included in the Operational Proposals.**
68. It is concerning that the Guidelines indicate that HoS may be removed from the register where there are changes in ecosystem function, presumably including degradation from fishing impacts. Surely, rather than the HoS being removed from the register, the appropriate response is to increase efforts to protect and/or restore the habitat.

³¹ *Attorney-General v The Trustees of the Motiti Rohe Moana Trust & Ors* [2019] NZCA 532 at [54]

FURTHER RESEARCH

69. **Ongoing research to increase our understanding of HoS, their importance, and impacts on them will be critical and adequate resourcing needs to be allocated to this.** It could be useful to incorporate into the framework a method for those in the research community to submit proposals/information to further support this. An open process where the best teams can be assembled to address these issues would provide more data/support to the management process. While acknowledging that there are constraints on fisheries scientists, and a number of excellent researchers are emerging across Aotearoa New Zealand that could support this programme.

CONCLUSIONS

70. EDS supports this initiative by Fisheries NZ to identify HoS. However, the proposals need to be strengthened in a number of ways, including broadening the working definition of HoS, providing for proactive protection (and where necessary restoration) of them, and implementing a robust monitoring and review process.