3 August 2021

Submission on the Natural and Built Environments Bill Exposure Draft

New Zealand Rock Lobster Industry Council

Seafood New Zealand

Paua Industry Council

FISHERIES INSHORE NEW ZEALAND

Introduction

1. This submission is made jointly by the NZ Rock Lobster Industry Council (NZ RLIC), the Pāua Industry Council (PIC), Fisheries Inshore New Zealand (FINZ) and Seafood New Zealand (SNZ) (**the fishing industry submitters**). We welcome the opportunity to submit on the Exposure Draft of the Natural and Built Environments Bill (**the Bill**).

Who we represent

2. NZ RLIC, PIC and FINZ are national representative bodies for the rock lobster, pāua and inshore finfish sectors of New Zealand's fishing industry. SNZ is a national organisation for the seafood sector. Our submission is made on behalf of our members who are quota owners, fishers and affiliated seafood industry personnel in rock lobster, pāua and inshore finfish fisheries. Collectively we directly represent commercial interests in all major inshore fisheries in New Zealand.

Our interest in the Bill

3. Rock lobster, pāua and inshore finfish fisheries are managed under the Fisheries Act 1996. Management measures under the Fisheries Act are designed to provide for the utilisation of fisheries resources by customary, commercial and recreational fishers while ensuring sustainability – which includes not only the sustainability of fish stocks, but also avoiding, remedying and mitigating any adverse effects of fishing on the aquatic environment.

4. Although fisheries sustainability is managed under the Fisheries Act, fish stocks and fish habitats are critically dependent on the quality of the surrounding marine environment which is currently managed under the Resource Management Act 1991 (RMA) and will in future be managed under the Bill. In particular, the health of our inshore marine fisheries is directly influenced by the effects of terrestrial activities on the levels of sediments, nutrients and other contaminants entering the coastal environment. The fishing industry submitters consider that the management of these types of effects on fisheries habitats has been inadequate under the RMA, and we look to the Bill to significantly improve the management of both terrestrial and marine activities that impact the quality of fisheries habitats and coastal waters.

5. In recent years, the fishing industry has become increasingly involved in RMA planning processes, particularly following the Court of Appeal ruling in the *Motiti* decision that regional councils have jurisdiction to control fishing impacts on biodiversity in certain circumstances.[1] The interface between the Fisheries Act and the RMA is currently unclear and extremely costly for all parties and we see this as a critical issue for the Bill to resolve. To the extent that fisheries issues may be encompassed within the scope of the final Bill, the fishing industry submitters also have an interest in ensuring that the Bill does not undermine the integrity of the fisheries management regime, protects the Fisheries Settlement and the associated rights of quota owners, creates strong incentives for environmental responsibility, and provides adequate opportunities for public input at all stages.

General response to the Exposure Draft

6. The fishing industry submitters are concerned that there is much about the Bill that remains unclear, in part because the Exposure Draft is only a small part of the Bill, but also as a consequence of the new terminology and concepts in the Bill. Obviously the terminology has been changed to move away from words and concepts that have developed specific meanings under the RMA, but it is not always clear whether just the term has been changed, or whether the underlying concept is actually different. In general we consider that where a concept has been well defined by case law under the RMA, then it (and the associated terminology) should be retained in the Bill to the extent that it is compatible with the Government's reform objectives. To change terminology simply to 'signal' a fresh approach might be good news for lawyers, but it will be unnecessarily complex and costly for everyone else.

7. We appreciate the recognition in clause 5, which sets out the purpose of the Act, that all aspects of the environment, including humans, are interconnected and must be sustained collectively. However, we do not understand what 'upholding' Te Oranga o te Taiao actually means in practice. Although clause 5(1)(a) states that it includes protecting and enhancing the natural environment, the clause does not state what else might be compatible with or necessary to uphold Te Oranga o te Taiao. We presume that the concept of Te Oranga o te Taiao incorporates sustainable use of the environment (since people are part of the environment), but this is not explicit in clause 5(1)(a) or in the meaning of Te Oranga o te Taiao in clause 5(3). This vagueness at the heart of the Bill creates significant uncertainty.

8. Neither is it clear how the purpose of the Bill applies to one of the key new elements in the Bill – i.e., environmental limits, which have a separate purpose related purely to protection (clause 7(1)). Similarly, it is not clear how the very long list of environmental outcomes in clause 8 will be achieved, particularly as some of the 'protection' outcomes on the face of it are incompatible with outcomes that provide for development. In our view, the Bill has an undue focus on environmental protection, and does not provide clear guidance on how ongoing use and any further development will be better enabled within environmental limits or how decision makers will achieve the necessary tradeoffs between different outcomes. While we understand that the Government intends to address these matters in the national planning

[1] Attorney-General v The Trustees of the Motiti Rohe Moana Trust & ors [2019] NZCA 532 [4 November 2019].

framework (see clauses 13(3) and 14), we are not confident that the Bill itself provides sufficient guidance to ensure that use will be adequately enabled (within limits).

9. The coastal marine area (or marine environment) has been given little explicit consideration in the drafting of the Bill to date. This is apparent in the use of undefined terms, the still-to-be-determined role of the Minister of Conservation (clause 17 placeholder), the absence of mandatory marine content in the national planning framework (clause 13), the unquestioning extension of terrestrial spatial planning into the marine environment (Strategic Planning Act), and the poorly developed marine environment 'outcome' (clause 8(n)). In addition, and in contrast to urban and rural areas, little consideration has been given in the drafting of the Bill to enabling sustainable utilisation and development in the marine environment. Unless this gap is addressed, the Government's objectives of enabling development within limits will not be achieved in relation to the marine environment. We address some of these concerns in more detail below.

10. Several critical terms that are of particular relevance to our interests are undefined – for example:

    - The term 'coastal marine area' is not used in the Bill, even though this is a useful RMA concept that is well understood (and no clear replacement terminology is adopted in the Bill);
    - The 'coast' in clause 8(e) is undefined – how far inland and seaward does the coast extend? and
    - Is the 'marine environment' in clause 8(n) the same as the coastal marine area or coastal waters (as defined in clause 3) or is it something different (if so, what does it encompass?).

11. Opportunities for public participation and local democratic input are also unclear from the limited available provisions in the Bill – for example, there is no detail on public participation in the preparation of the national planning framework (Schedule 1), but it is apparent from clause 15 that the implementation of the national planning framework may occur without further public input at a regional level.[2] Our overall impression is that in comparison to the RMA the Bill reduces opportunities for the public or stakeholder organisations such as the fishing industry submitters to achieve positive outcomes in relation to our sectors.[3] We would prefer a management framework that encourages all parties to take responsibility for managing the adverse effects of their activities on the environment and on other uses and values, including through opportunities to participate in planning processes.

12. We consider that further public discussion and analysis is required in order to make sure that these significant issues are properly considered and the consequences of policy decisions

[2] For example, national planning framework content may have direct legal effect, or may be inserted into regional plans without using a public plan change process (clause 15).

[3] The Parliamentary Paper states (p17) that *The NBA is designed to give central government, with iwi, hapū and Maori, a larger role in promoting activities and uses to achieve positive outcomes* – but the Paper and Bill are notably silent with respect to the role of other stakeholders in promoting and achieving positive outcomes.

related to the Bill's purpose, outcomes, environmental limits and public participation processes are fully understood. These issues are too important to be hurried.

13. The remainder of this submission focuses on more detailed matters of particular concern to the rock lobster, pāua and inshore finfish sectors.

Detailed comments on Exposure Draft

Clause 8 Environmental outcomes

14. The fishing industry submitters support the environmental outcome in clause 8(a) – the quality of air, freshwater, coastal waters, estuaries and soils is protected, restored, or improved.

15. However, we consider that the outcome in clause 8(b) – ecological integrity is protected, restored, or improved – requires further clarification. Although ecological integrity is defined in clause 3, the scale at which ecological integrity is to be protected, restored or improved is unclear. We would support an interpretation of this outcome that requires ecological integrity to be monitored and managed across all ecosystems at a broad spatial scale (in contrast to the outcomes in clause 8(c) and (d), for example, which are location-specific) and suggest that this could be clarified in the drafting.

16. We also question what 'resilience' means in the definition of ecological integrity. We support an interpretation that relates to the ability of an ecosystem to continue to function following disturbance, but we do not support an interpretation that implies 'no change' following disturbance, or a return to some former or idealised state. The Kaikōura nearshore marine environment provides a good example of resilience (i.e., continued ability to function) following the 2016 earthquake, but we should not expect the Kaikōura coastal ecosystems ever to be the same as they were prior to the earthquake – species composition and structure will inevitably be permanently altered as a result of the permanent and ongoing changes to the region's coastline and terrestrial environment, but the ecosystem still exhibits ecological integrity.

17. The outcome in clause 8(n) – the protection and sustainable use of the marine environment – is unhelpful as it does not achieve the intended role of managing conflicts between use and protection. Protection is an integral part of sustainable use, so should not be referred to as a separate or distinct part of the outcome for the marine environment. Furthermore, in the marine environment the quality of coastal waters and estuaries, ecological integrity, areas of significant indigenous vegetation, significant habitats of indigenous fauna, and cultural heritage are already protected under other outcomes – meaning that it is unnecessary to repeat the reference to protection in clause 8(n).

18. The marine environment is both a natural environment with high indigenous biodiversity values and a production environment that provides for a wide range of extractive and non-extractive uses and values that benefit New Zealand's communities and economy. However, the outcome in clause 8(n) is unbalanced in comparison to other production environments, such as rural areas, where the relevant outcome explicitly recognises the role of rural areas in providing for development and economically resilient communities (clause 8(m)).

19. We suggest that an outcome that is similar to the Fisheries Act purpose – modified to refer more broadly to the marine environment – would be a clearer, more readily understood outcome for the marine environment that is aligned with the Government's objective of enabling development within environmental limits. We recommend the outcome should be *Utilisation of the marine environment is provided for while ensuring sustainability*, where:

> *Ensuring sustainability means: (a) maintaining the potential of the marine environment to meet the reasonably foreseeable needs of future generations; and (b) avoiding, remedying or mitigating any adverse effects of utilisation on the marine environment.*
>
> *Utilisation means conserving, using, enhancing, and developing the marine environment to enable people to provide for their social, economic, and cultural wellbeing*.

20. The advantage of this type of outcome is that it provides clear direction and integrates use and sustainability (which includes protection) – both must be provided for, but sustainability is a bottom line that must be *ensured*.

Clause 18 Implementation principles

21. As noted in our introductory comments, the fishing industry submitters consider that the Bill does not encourage individual or sectoral responsibility for achieving positive outcomes under the Act – instead the implementation principles suggest that this is the responsibility primarily of iwi, hapū, and statutory decision makers. We recommend that, without detracting from the Treaty relationship, the implementation principles should encourage inclusive participation[4] and wider responsibility for achieving positive environmental outcomes.[5]

22. We note that the concept of proportionate responses is expressed in several parts of the Bill – including:

- Clause 18, where public participation must be 'proportionate to the significance of the matters at issue'; and
- Clause 8(h) where the outcome for cultural heritage requires a management response that is proportionate to a site's cultural values.

23. The fishing industry submitters consider that the concept of proportionate responses is useful and should not be limited to management of cultural heritage – i.e., it should apply equally to management responses for all other outcomes specified in the Bill (including the 'protection' outcomes) and could be expressed more generally as an implementation principle.

24. We also recommend that the implementation principles should include a requirement to base decisions on the best available information, including relevant technical evidence and scientific advice, including mātauranga Māori – this principle should apply to all decisions under the Bill, not only to the preparation of plans (see clause 24(2)(b)). Where the precautionary approach is

[4] For example, by addressing the discrepancy in clause 18 between making provision for 'appropriate' public participation and 'effective' iwi and hapū participation – the implementation principles should promote participation that is appropriate and effective for everyone.

[5] For example, through the inclusion of a provision equivalent to RMA section 17 (duty to avoid, remedy or mitigate adverse effects).

invoked on the basis of scientific uncertainty, decision-makers should also be required to take steps to obtain relevant information to reduce that uncertainty so as to better achieve the purpose of the Bill.

Clause 22 Contents of plans

25. Clause 22(1)(f) is a placeholder indicating the policy intent that plans must generally manage the same parts of the environment, and generally control the same activities and effects, that local authorities manage and control in carrying out their functions under the RMA sections 30 and 31. The fishing industry submitters note that this policy intent is problematic in relation to local authority control of fishing for RMA purposes such as biodiversity protection. The current duplication of the RMA and Fisheries Act functions for protecting marine biodiversity from the adverse effects of fishing creates an operating environment that is complex, highly uncertain, contentious and extremely costly for all parties. We recommend that the interface between the Bill and the Fisheries Act should be clarified to reduce the complexity of the resource management system in relation to fisheries impacts on marine biodiversity (see below).

Reducing the complexity of the system

26. The Select Committee has been asked to collate a list of ideas for making the new system more efficient, more proportionate to the scale and/or risks associated with given activities, more affordable for the end user, and less complex, compared to the current system.

'Clean line' interface with the Fisheries Act

27. As noted in the introduction to this submission, recent case law indicates that councils are able control fishing under the RMA for biodiversity-related purposes in certain poorly-defined circumstances. This creates a direct statutory overlap with the Fisheries Act which contains a legal obligation and operative mechanisms to avoid, remedy or mitigate all adverse effects of fishing on the environment, including adverse effects on marine biodiversity. The duplication of functions between the RMA and Fisheries Act is inefficient, unnecessarily complex and costly for all parties, has resulted in lengthy ongoing litigation, and is inconsistent with the Fisheries Deed of Settlement.

28. The fishing industry submitters consider that the Bill provides an opportunity to simplify the resource management regime by removing duplication with the Fisheries Act. We recommend that a 'clean line' should be drawn between the Bill and the Fisheries Act. Persons exercising functions under the Bill should not be able to exercise those functions to control fishing or fisheries resources for purposes encompassed by the purpose and operative provisions of the Fisheries Act, which include: managing all adverse environmental effects of fishing, protecting marine biodiversity from any adverse effects of fishing, giving effect to the Fisheries Deed of Settlement, and allocating access to fisheries resources between fishing sectors.

29. The rationale for the 'clean line' approach is that:

    - Removing duplication with the Fisheries Act better achieves the Government's reform objectives – in particular, it improves system efficiency and effectiveness, reduces complexity, and gives better effect to the principles of Te Tiriti o Waitangi than alternative solutions;

- There is no need for the Bill to address adverse environmental effects of fishing or protection of biodiversity from fishing-related impacts, as management of these effects is fully addressed in the scope and operative provisions of the Fisheries Act.[6] The recent report of the Prime Minister's Chief Science Advisor, Professor Dame Juliet Gerrard, confirms that the Fisheries Act requires the consideration of ecosystem impacts to be taken into account in fisheries management decisions.[7] Any desired improvements to the environmental performance of fisheries therefore can and should be achieved under the Fisheries Act, not the Bill. Likewise, any desired improvements in marine biodiversity protection more generally should be achieved under the Government's proposed marine protection reforms which we expect will provide a framework to ensure that the marine biodiversity is effectively managed under an integrated statutory regime with no unnecessary duplication or gaps;
- The control of fishing under the Bill would contravene the Fisheries Deed of Settlement, in which Maori endorsed the Quota Management System (not the Bill or the RMA) as the legitimate fisheries management regime. Enabling fisheries controls under the Bill would be inconsistent with the Bill's own requirement for decision makers to give effect to the principles of Te Tiriti (clause 6); and
- Councils are poorly equipped and resourced to manage fishing – for example, they have no capacity to monitor the location of fishing activity or detect non-compliance with rules that seek to control fishing. Attempts to develop this capacity would duplicate central government functions and add further ratepayer cost and complexity to the regime.

30. For the avoidance of doubt, we agree that decision-makers should still be able to exercise functions under the Bill to manage effects of fishing where these functions do not duplicate controls capable of being lawfully imposed under the Fisheries Act (e.g. noise, placement of moorings, control of odour).

31. We note that if, contrary to our recommended solution, fishing is able to be controlled under the Bill, then the Bill will require explicit provisions to safeguard the Fisheries Settlement and ensure that the effective operation of the Quota Management System is not eroded. The current RMA requirement for an 'aquaculture decision' and the provisions for aquaculture agreements and arbitration in Part 9A of the Fisheries Act provide an indication of the types of provisions that would be required. These provisions will add significant complexity to the Bill and would include:
    - Explicit evaluation of alternative ways of achieving the desired outcome (including measures implemented under the Fisheries Act) and the costs and benefits of alternative approaches;

[6] See Fisheries Act section 8 (purpose), section 9 (environmental principles), and Part 3 (sustainability measures).
[7] Office of the Prime Minister's Chief Science Advisor (2021). *The Future of Commercial Fishing in Aotearoa New Zealand.* February 2021.

- Specific consultation requirements to assess the impact of proposed controls on existing fisheries rights holders, including owners of Maori customary non-commercial and commercial fishing rights;
- A statutory 'test' to assess the displacement of fishing activity (as is currently provided in the Marine Reserves Act 1971 and in the RMA/Fisheries Act in relation to aquaculture activities) and consequential measures to ensure that displaced catch does not adversely affect fisheries sustainability; and
- A concurrence role for the Minister of Oceans and Fisheries (also currently provided in the Marine Reserves Act and in the RMA/Fisheries Act aquaculture provisions), with a specific focus on protecting Fisheries Settlement rights and achieving effective integration with the fisheries management regime.

The Strategic Planning Act and the coastal marine area

32. The Parliamentary Paper on the Exposure Draft states that the Strategic Planning Act will mandate strategic spatial planning at a regional level, including in the coastal marine area. The fishing industry submitters support the concept of strategic planning, including in the coastal marine area. We consider that strategic planning should help achieve a longer-term, more integrated approach to resource management. However, we question the utility and appropriateness of the narrow focus on strategic spatial planning, particularly in the coastal marine area.

33. The RMA Review Panel recommended that spatial planning should be extended into the coastal marine area primarily to promote integration between land use, the coastal environment and water quality.[8] While this is a laudable aim, and there is definitely scope to improve integration across resource boundaries under the Bill and the Strategic Planning Act, the key requirement for integrated management across the land/sea boundary is better management of terrestrial activities – spatial planning in the coastal marine area will not achieve the desired integration because adverse effects flow from the land to the sea, not the other way round.

34. The critical difference between marine spatial planning (MSP) and other strategic, integrative planning processes is the emphasis on space, meaning that 'problems' are defined spatially and so are solutions. MSP is not able to resolve non-spatial conflicts (e.g., competing demands for a share of available yield of a fishery) and is poorly suited to providing for activities that do not require exclusive access to space (e.g., fishing). More generally, the fishing industry submitters question why strategic planning should be limited to spatially-defined approaches when alternative approaches (such as we propose below) offer a more inclusive way of defining and resolving conflicts. All of the 'benefits' commonly attributed to MSP can be achieved using alternative strategic planning processes which do not restrict solutions to 'drawing lines on maps'.

35. Furthermore, while management of terrestrial environments is typically location-specific, serious questions have been raised about the applicability of spatial planning to marine

[8] Resource Management Review Panel (2020). *New Directions for Resource Management in New Zealand.* Report of the Resource Management Review Panel. June 2020.

environments given the variable scale and highly dynamic nature of oceanic processes, marine species and ecosystems (and marine resource users).[9] MSP also has a poor track record of dealing effectively with change and environmental or socio-economic variability.[10] The focus of MSP on allocating space contrasts with alternative approaches such as dynamic oceans management which emphasises the need for rapid, flexible and highly adjustable decision making (e.g., using pre-set decision rules) supported by the use of technology to gather and collate real time data to inform decision making.[11] This more responsive and dynamic management approach has informed the Government's recent strategic reforms to fisheries management[12] and is promoted in the Prime Minister's Chief Science Advisor's 2021 report on commercial fishing.

36. As an alternative strategic planning approach for the marine environment, the fishing industry submitters support:

    - A national-level 'oceans policy' to provide a high level vision and non-statutory integration of goals and principles across marine statutes; and
    - A regional strategic marine planning process that is not focused on allocating marine space, but is instead based on identifying the full range of threats to the marine environment (including threats arising from terrestrial activities and international threats as climate change and ocean acidification) and ensuring that adverse effects of all activities are effectively managed under sector-specific legislation by appropriately-resourced authorities using a full range of spatial and non-spatial management responses. Particular attention should be paid to management approaches that reflect the dynamic nature and shifting scale of marine ecosystems, and enable responsive, adaptive management.

37. We consider that this comprehensive approach would be more consistent with the Government's desired outcomes for reform than embedding spatial planning for the marine environment. The fishing industry submitters therefore recommend that, prior to the introduction of the Strategic Planning Act, the proposed extension of spatial planning to the marine environment should be reassessed and a more progressive and responsive strategic planning approach should be developed to guide future management of New Zealand's marine environment.

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[9] Hunt, Alister L. (2020). Seychelles Blue Finance: A Blueprint for Similar Countries? Opus Oceani / Finology. June 2020. The authors argue that the differences between marine and terrestrial ecology explain why the simple transfer of terrestrial resource management and planning arrangements may not work in the marine environment.

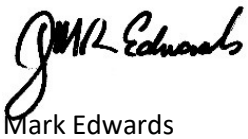
[10] A recent literature review found that *practical examples of MSP embracing change and dynamics are rare and the inclusion of system dynamics, environmental variability and future change in MSP remains challenging… Efforts to actually incorporate change in MSP are mainly limited to environmental dynamics, while social and governance changes are rarely represented. Long-term temporal scales are only seldom considered, and climate change effects rarely incorporated in methods and tools to support MSP.* Gissi, E. S. Fraschetti, F. Micheli, (2019). Incorporating change in marine spatial planning: A review, Environmental Science & Policy, Volume 92, 2019.

[11] Maxwell, Sara M. et al (2015). Dynamic ocean management: Defining and conceptualizing real-time management of the ocean, Marine Policy, Volume 58, 2015, Pages 42-50.

[12] Seven Cabinet papers dealing with aspects of fisheries reforms, released by the Government on 2 July 2021.

Thank you for the opportunity to make a submission. We look forward to discussing the Bill with the Select Committee.

Yours sincerely



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