

# OPTIONS FOR MARINE PROTECTION OF NOISES ISLANDS

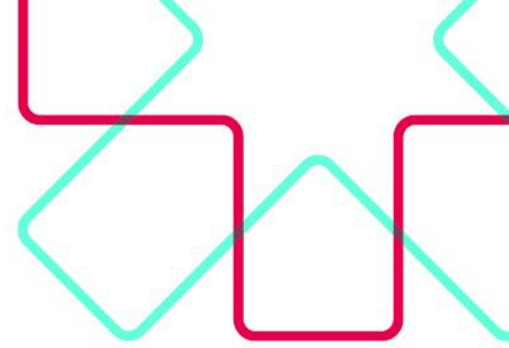
Report

Legislative and policy options analysis

May 2021







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# PREFACE

This report has been prepared for Tāmaki Paenga Hira Auckland War Memorial Museum by Philippa Bowron, Natasha Kuka and Amy Thomson from MartinJenkins (Martin, Jenkins & Associates Limited).

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# EXECUTIVE SUMMARY

The Noises Islands in the Hauraki Gulf Marine Park / Ko te Pātaka kai o Tikapa Moana Te Moananui ā Toi have long been host to a diverse ecosystem of species on land and in the surrounding marine area.

This report examines the regulatory and policy options available to support the custodians of the Noises - the Neureuter family, along with the Auckland Museum and the University of Auckland to advance marine protection around The Noises.

The government's intended intervention for marine areas requiring protection is the Marine Reserves Act 1971, however this legislation is intended for scientific purposes and therefore does not directly support ecosystem recovery, species abundance or habitat preservation. It is not particularly flexible and is not supportive of iwi having a kaitiaki role in protection. In recent years significant marine protection efforts have been enacted by establishment of standalone legislation rather than inclusion in the Marine Reserves Act.

Government has committed to reforming the Marine Reserves Act as a manifesto commitment. This legislative reform has not yet commenced and is likely to take a number of years to complete. As such, we do not recommend seeking inclusion in the Marine Reserves Act 1971 as a solution in the short term.

Another option is the Fisheries Act 1996, which includes options for temporary restrictions to protect customary kai moana and spiritual and cultural connections (section 186A). This could provide protection in the short term if mana whenua agree to support an application. The restrictions are for 2 year renewable periods and are usually limited to specific species that have been identified as culturally important and at risk.

The Fisheries Act also contains provisions in:

- Section 9c that allow for the identification and protection of a habitat of significance
- Section 11 that provide for the Minister to set or vary any sustainability measures relating to either specific stock or specific areas.

The report on the future of commercial fishing by the Office of the Prime Minister's Chief Science Advisor notes that no habitats of significance have been defined since the Act has been in force. The Act is silent on the process for defining or proposing a habitat of significance and it is our view that this is an unlikely designation for the Noises Islands given it is within the boundaries of the Hauraki Gulf Marine Park and subject to the Hauraki Gulf Marine Park Act 2000, as well as within the area for attention from the upcoming Government Response Strategy to Sea Change Tai Timu Tai Pari.

Section 11 provides for sustainability measures and is the section that sets out the context for the Minister's decisions on the Quota Management System. From what we can see, it has been used on occasion to ban the take of specific species in defined areas (e.g., a restriction of cockles and pipi at Whangataeu Harbour<sup>1</sup> and restriction of shellfish take at Cockle Bay <https://gazette.govt.nz/notice/id/2021-go1122> ) where the overarching goal is longer term

<sup>1</sup> <https://gazette.govt.nz/notice/id/2015-go7264>



sustainability. We were unable to identify a process for requesting restrictions or bans under Section 11.

Another consideration is the Resource Management Act 1991, which is particularly relevant with the recent Court of Appeal judgement relating to Mōtītī Island that:

- Regional Council can include rules in its Regional Coastal Environment Plan to manage the effects of fishing if it is for the purpose of maintaining indigenous biodiversity or other resource management purposes where there is evidence of adverse effects on values from fishing
- The ability of Council to apply controls is based on the maintaining of indigenous biodiversity and cultural values
- In maintaining indigenous biodiversity, an objective assessment is required that includes consideration of necessity, type, scope, scale and location.

Our view is that the decision has factors that are specific to Mōtītī Island that may not translate directly to the Noises Islands. The decision does not specify the levels of scientific evidence relating to rare species requiring protection required for inclusion, meaning that requests for protection in other areas have a high probability of legal challenge. In our view, Auckland Council may be reluctant to agree to a separate plan change for protection of the Noises Island area when the Government's Response Strategy to Sea Change will likely consider such protections for areas throughout the Hauraki Gulf.

Sea Change Tai Timu Tai Pari – a proposed spatial plan for the Hauraki Gulf developed from 2013 - 2016 has been assessed by government and response options are in front of Ministers for consideration. It is possible that the Government Response Strategy may result in special legislation specifically for marine protection of areas of the Hauraki Gulf Marine Park, rather than through the use of the Marine Reserves Act or through the options in the Fisheries Act. We understand that the Noises Islands may not currently be included in the Government Response Strategy. But government is open to its inclusion.

The advantage of inclusion in the Government Response Strategy is that the Noises will be part of a focussed effort by government to improve the biodiversity of the entire Hauraki Gulf and will benefit from the scale, resources and holistic approach that this brings.

Government has been in discussion with 32 iwi who have connection to the Hauraki Gulf about Sea Change and it is likely that government will ensure mana whenua has a role in the governance of whatever model they choose to move ahead with. While they may not select a model that is exactly what is envisaged by the project team, there will be an opportunity to submit on any changes through the process.

Were a marine protection plan for the Hauraki Gulf to go ahead and be legislated without including the Noises Islands, it is likely to make it more difficult to obtain separate protection for the Noises area.

We recommend that the project team seek inclusion of a protection area for the Noises Islands in the Government's Response Strategy to Sea Change. We recommend that the team submit the marine area they deem appropriate for protection, the governance model they would like to see in place and why, and a list of species the team are seeking to protect. This list could include species that the team is seeking to restore to the area as well as associated marine and land species that are impacted by food availability.





We also recommend that the team continue discussions with mana whenua to explore the option of a temporary closure under Section 186A of the Fisheries Act 2005. We understand that this can be applied for with or without an associated rāhui and is likely to be able to progress ahead of the Government’s Response Strategy to Sea Change.



# BACKGROUND

## The project

The Noises are currently under the guardianship of the Neureuter family who, having witnessed the accelerating degradation to the marine environment throughout their lifetime, wish to protect and restore the marine habitats and wildlife populations around The Noises using an approach that recognises the holistic connections between land and sea. The Neureuter family formed the Noises Island Trust in 1995, and gifted the islands to the Trust to help ensure the long-term protection of the island group.

The vision for holistic protection and restoration of the marine environment around The Noises is shared by Tāmaki Paenga Hira Auckland War Memorial Museum which has contributed significant scientific research to the Noises Islands terrestrial and marine environs over many decades, and also by the University of Auckland which has more recently been involved with marine science studies around The Noises.

In late 2019, the Neureuter family, the Auckland Museum and the University of Auckland joined forces to purposefully advance marine protection around The Noises. The aims of their work are to enable restoration and regeneration of the marine environment surrounding The Noises islands in the Hauraki Gulf Marine Park, Tīkapa Moana / Te Moananui-ā-Toi; to deliver holistic protection – of the land and the sea - and in doing so, revitalise the mauri surrounding The Noises. The project also aims to identify solutions to and overcome current barriers for marine protection, using The Noises as an example.

## Scope and methodology

MartinJenkins has been engaged by the Noises Islands project team, consisting of Tāmaki Paenga Hira Auckland War Memorial Museum, the Noises Island Trust, the University of Auckland and iwi (the Project Team), to provide independent advice on the options for marine protection and restoration. Our advice will focus on the policy and legislative options.

We are approaching this review through:

- engagement with key people, including:
  - public servants from the Department of Conservation, the Ministry for the Environment, and the Ministry for Primary Industries
  - subject matter experts that have direct experience with the Hauraki Gulf and/or related experience with other protection initiatives or conservation matters (the interview guide with general questions is appended to the report on page 36)
- desk-based research, including:
  - review of relevant legislation, reports, documents, data including examination of previous application of policy and legislation



- review and consideration of contextual information and situations particular to the Hauraki Gulf and the Noises Islands
- description of each identified tool that has, or could have, an impact on the project goal and development of a concise summary of its potential for application in the context of The Noises Islands
- development of a framework to assess the challenges and opportunities associated with each option
- analysis of the options and suggested next steps.

## About the Noises Islands

Located in the Hauraki Gulf Marine Park / Ko te Pātaka kai o Tīkapa Moana Te Moananui ā Toi (Hauraki Gulf), The Noises are a group of islands, rock stacks and reefs composed of 130 million-year-old Jurassic greywacke rocks of marine origin, that support a very diverse range of marine habitats.

On land, these predator free islands have outstanding conservation values. These motu contain some of the finest indigenous vegetation to be found in the inner Gulf and are home to a range of native invertebrates and reptiles like gecko and wētāpunga. There are at least 15 nationally threatened and at-risk bird species recorded on the islands or from the sea around the islands.<sup>2</sup>

Importantly, the islands provide safe breeding grounds for seabirds with seabird diversity the highest in the inner Gulf including takahikare/white-faced storm petrel, oi/grey faced petrel, kuaka/northern diving petrel, Cook's petrel, pakaha/fluttering shearwater, korora/little blue penguin, Tara/white-fronted tern, tarapunga/red-billed gull, Kawau paka/little shag and the karuhiruhi/pied shag. Some of these seabird species are dependent on food from a balanced ecosystem that is severely disrupted by the reduced levels of sea life around the islands.

On land, other New Zealand native species are present including tui, bellbird/korimako, kakariki, grey warbler/riroriro, morepork/ruru and variable oyster catcher species.

The Noises encompass physical aspects of both inner and outer regions of the Gulf and are strongly influenced by tidal currents transiting between the inner and outer gulf.

The chain of islands are interconnected by extensive subtidal reefs and coarse soft sediment habitats. The strong tidal currents reduce the deposition of fine sediments in comparison to other parts of the Gulf.

As a result of this unique geographical location and physical setting, The Noises support a regionally significant range of biogenic habitats including macroalgae forests, diverse sessile invertebrate communities, rhodolith beds, extensive intertidal and subtidal mussel beds, and large soft sediment bivalve beds (e.g. dog cockles).

Of these, the expansive subtidal mussel and dog cockle beds, scallop habitats, shallow sponge gardens and rhodolith beds are particularly important habitats to protect within the context of the wider

<sup>2</sup> Department of Conservation 2014



Hauraki Gulf because of their increasing rarity and recognised role as marine biodiversity hotspots, juvenile nursery areas and ecosystem drivers. The importance the role of shellfish in these habitats is reflected in initiatives to restore shellfish beds in the Hauraki Gulf.

There is no doubt that the marine biodiversity around the Noises Islands is declining. As well as being visually clear to the Island's custodians the Neureuter family, mana whenua and connected iwi have expressed concern about the entire Hauraki Gulf area. The State of our Gulf 2020 report produced by the Hauraki Gulf Forum<sup>3</sup> confirms these concerns are valid and suggest that we do not have the balance right between economic growth and environmental health in the Hauraki Gulf.

<sup>3</sup> <https://www.aucklandcouncil.govt.nz/about-auckland-council/how-auckland-council-works/harbour-forums/Pages/auraki-gulf-forum.aspx>



# OPTIONS

## Summary of Options

There are a number of legislative and policy options that may support the Noises Project Team in its goal to restore and regenerate the environment on and around the Noises Islands. Table 1 below summarises the options we have identified. A more detailed description is attached in Appendix 1.

**Table 1: Available Options, Stewardship and Purpose**

	Legislation	Stewardship	Purpose
Marine Protection	Marine Reserves Act 1971	DoC	Preserving, as marine reserves for the scientific study of marine life, areas of New Zealand that contain underwater scenery, natural features, or marine life, of such distinctive quality, or so typical, or beautiful, or unique, that their continued preservation is in the national interest.
	Marine Mammals Protection Act 1978	DoC	Conservation, protection and management of marine mammals.
	Wildlife Act 1952	DoC	Protection of wildlife throughout New Zealand and New Zealand fisheries waters.
	Marine and Coastal Area (Takutai Moana) Act 2011	MoJ and DoC	To reflect the Treaty of Waitangi and to recognise and provide for the interests of whānau, hapū, and iwi and for public interests in the foreshore and seabed.
	Resource Management Act 1991	MFE and Local Councils	To sustainably manage natural and physical resources. The New Zealand Coastal Policy Statement sets policy parameters for the coastal environment, including marine, to achieve the purpose of the RMA.
Fishing	Fisheries Act 1996	MPI	To provide for the utilisation of fisheries resources while ensuring sustainability.
	Fisheries bylaws	MPI	Changes to fisheries management rules made by tangata whenua or tangata kaitiaki/tiaki (guardians) for their Crown settlement area or mātaihai reserve.
	Temporary closures and restrictions	MPI	Areas that are temporarily closed to fishing or certain fishing methods (Sections 186A and 186B closures). Anyone can request a temporary closure, but the legislation was designed for customary use. To be approved, the Minister must consider the temporary closure will benefit tangata whenua. (MPI).
	Taiāpure (local fisheries)	Tangata whenua and MPI	Estuarine or coastal areas that are significant for food, spiritual, or cultural reasons. They allow all types of fishing and are managed by local communities.
	Mātaihai Reserves	Tangata whenua and MPI	Recognise and provide for traditional fishing through local management. They allow customary and recreational fishing but usually don't allow commercial fishing.



	Legislation	Stewardship	Purpose
	Fisheries (Quota Operations Validation) Act 1997	MPI	To confirm and validate <ul style="list-style-type: none"> <li>• matters recorded in quota registers</li> <li>• landed catch allocated against quota</li> <li>• advice given on quota balances.</li> </ul>
	Māori Fisheries Act 2004	MPI	To implement the agreements made in the Deed of Settlement dated 23 September 1992; and to provide for the development of the collective and individual interests of iwi in fisheries, fishing, and fisheries-related activities in a manner that is ultimately for the benefit of all Māori.
	Maritime Transport Act 1994	Maritime NZ	To promote safety in maritime transport. To promote protection of the marine environment. To administer New Zealand's participation in the conventions and any other international maritime or marine protection convention, agreement, or understanding to which the Government of New Zealand is a party. To ensure New Zealand's preparedness for, and ability to respond to, marine oil pollution spills.
Other	Hauraki Gulf Marine Park Act 2000	Hauraki Gulf Forum members	To integrate the management of the natural, historic, and physical resources of the Hauraki Gulf, its islands, and catchments. To establish the Hauraki Gulf Marine Park. To establish objectives for the management of the Hauraki Gulf, its islands, and catchments. To recognise the historic, traditional, cultural, and spiritual relationship of the tangata whenua with the Hauraki Gulf and its islands. To establish the Hauraki Gulf Forum.
	Rāhui	Tangata Whenua	The tikanga (customary practise) that prohibits access to an area (either on water or land) or resources – not enforceable on its own but can be backed by regulation through section 186A of the Fisheries Act.
Special Legislation	Fiordland (Te Moana o Atawhenua) Marine Management Act 2005	Fiordland Marine Guardians	Establishes Fiordland (Te Moana o Atawhenua) Marine Area and 8 marine reserves in that area, implements measures to assist in the preservation, protection, and sustainable management of the marine environment and biological diversity, establishes the Fiordland Marine Guardians to advise and make recommendations to management agencies and Ministers on the management of the Fiordland Marine Area, acknowledges kaitiakitanga.
	Kaikōura (Te Tai o Marokura) Marine Management Act 2014	Kaikōura Marine Guardians	Provides measures to assist the preservation, protection, and sustainable and integrated management of the coastal and marine environment and biological diversity of Te Tai o Marokura and establishes the Kaikoura Marine Guardians provide advice on marine management matters.
	Potential special legislation to aid the implementation of Sea Change Tai Timu Tai Pari for the Hauraki Gulf	Not confirmed	A proposed Marine Spatial Plan for the Hauraki Gulf designed to safeguard it as a taonga.



# Applicability to the Noises Islands

## Not Applicable

Several of the above options can be eliminated from the analysis as they are not suitable for the specific context of the Noises Islands. These are:

- Marine Mammals Protection Act 1978 – as the team are not seeking protection for a specific marine mammal. It also does not support the team's vision of a holistic approach to restoring the ecosystem.
- Marine and Coastal Area (Takutai Moana) Act 2011 – this is no longer available as application for marine customary title must have been submitted by 2017 (although we note there are applications submitted prior to 2017 that impact the Hauraki Gulf including the areas surrounding the Noises Islands).
- Fisheries (Quota Operations Validation) Act 1997 – this is legislation to enable monitoring and enforcement of the Fisheries Quota Management system (we consider the matter of Quota Management in general in our examination of the Fisheries Act 1996)
- Maritime Transport Act 1994 – Hauraki Gulf and the Noises Islands are already subject to the protections in this legislation.
- Fiordland and Kaikōura special legislation – specific to those areas

## Applicable

The remaining options have potential to be applicable in the context of the Noises Islands. We examine each of these for practicality in the context and for their ability to support the goals of the team.

### Marine Reserves Act 1971

The Marine Reserves Act is dated in its approach to marine protection, as it does not allow for different configurations to meet varying requirements of local context. For example, it doesn't allow for community involvement in the management of the reserve or for resuming some level of access when ecosystems are restored. It also does not support the concept of Crown/Iwi partnerships for marine conservation with no specific provision for customary fishing. The wording in the Act is dated, stating the purpose of Marine reserves to be for scientific purposes or to preserve underwater scenery. It does not specify preservation of ecosystems as a purpose.

The only provisions for allowance to fish are in:

- Section 3 (3) where the Minister may issue notice in the Gazette of individuals permitted to take specified species by specified fishing methods and
- Section 11 (b) where the Director General can permit the take of marine life for scientific purposes.



Because the restrictions in the Act are in perpetuity, it does not support adaptive and responsive management.

This is known to officials and Ministers and the current government in its election manifesto, undertook to reform the Act.

There are aspects of Marine protection under this legislation that would be problematic in the context of the Noises Islands and the goals the team are committed to:

- There is no ability in this legislation to implement a balanced protection approach – the community would be unable to have a say in the ongoing management of the protected area
- Similarly, the permanent nature of the marine protection that this legislation supports, does not allow for customary fishing rights to be returned at any point in time and so is likely to be unpopular with the large number of iwi (over 20) who have connections to the area for kai moana.

These shortcomings are likely to be addressed with the reform of the legislation, however this has not yet commenced. Therefore, it is likely that the legislative reform will take years to be enacted and to have the potential to support the team's goals.

## **Resource Management Act 1991**

The Resource Management Act (RMA) is currently being reviewed following the report to Government from the Resource Management Review Panel chaired by Hon Tony Randerson QC.

The current RMA provides for management of biodiversity and ecosystems by Regional Councils and environmental planning of land use by Territorial Authorities.

Regional councils have an extensive list of responsibilities and functions in the current RMA. A number of these functions relate to the maintenance, protection of biodiversity across the region. Until recently there was little understanding or awareness that this may extend to the marine environment. However, the recent Court of Appeal relating to Mōtītī Island has, to some degree, clarified that this is the case. The following is a summary of the decision from the Bay of Plenty Regional Council.





## Mōtītī Island Protection<sup>4</sup>

The reef systems off the coast of Motiti Island support a range of plants and animals including fish and shellfish. In 2018 the Environment Court released an [interim decision](#) that found the outstanding attributes and values of these reef systems needed better protection.

On 24 April 2020, the Environment Court released its [final decision](#) which directs Bay of Plenty Regional Council to implement new rules within its Regional Coastal Environment Plan to protect three reef systems near Motiti Island and complete scientific monitoring to inform future integrated marine management solutions.

The use of the RMA to protect a marine environment, compared with the Fisheries Act 1986, was debated in the High Court and later the Court of Appeal. The Court of Appeal released its decisions in relation to this case on 4 November 2019. The decisions provide clarification to regional councils on their ability to manage indigenous biodiversity.

In summary the court found:

- Regional Council can include rules in its Regional Coastal Environment Plan to manage the effects of fishing if it is for the purpose of maintaining indigenous biodiversity or other resource management purposes where there is evidence of adverse effects on values from fishing
- The ability of Council to apply controls is based on the maintaining of indigenous biodiversity and cultural values
- In maintaining indigenous biodiversity, an objective assessment is required that includes consideration of necessity, type, scope, scale and location.

This means Council will only be able to apply controls in certain areas. It also means any new rules to protect indigenous marine biodiversity would require a considered approach, using research, include consultation with mana whenua and likely be run through a public plan process.

You can view the Court of Appeal decision [here](#).

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There are varying views as to the extent of the precedent that this sets and our understanding is that it may be further tested. In the interim it appears that the critical factor is the level of scientific evidence required for Councils to consider action necessary for maintenance of indigenous biodiversity.

On the face of it, the RMA appears to be the legislation most in line with the goals of the project team, having a requirement to consider the health and sustainability of the ecosystem. However, there are potential issues with the resources available for Regional Councils (in this case Auckland Council) to effectively manage and monitor restrictions under the RMA to protect marine areas. There is also potential for a lengthy process to prove that The Noises case is scientifically sufficient on its own to warrant the protection of indigenous biodiversity under the RMA.

<sup>4</sup> <https://www.boprc.govt.nz/our-projects/motiti-protection-area>



Our understanding is that the Mōtiti Island decision was a result of five years of debate and court cases. Despite that decision, the next case for consideration could take a similar length of time due to ambiguity around the levels of evidence required to trigger protection.

**Fisheries Act 1996**

The Fisheries Act 1996 is designed to provide for the utilisation of fisheries resources while ensuring their sustainability. This is managed by the Ministry for Primary Industries (MPI) through the Fish Quota Managing System (QMS)<sup>5</sup>.

**Quota Management System**

In general, for MPI to consider changes to the QMS, there must be evidence that there are species sustainability issues in specific species management areas. These areas are quite large and so the fishing areas around the Noises would be aggregated into a much larger area that may be showing an increase in species, regardless of the species declining around the Noises Islands. MPI would not be able to act in this case. For example, the areas that snapper are aggregated to are shown below.

**Figure 1: Snapper Quota Management Monitoring Areas**



<sup>5</sup> <https://www.mpi.govt.nz/legal/legal-overviews-legislation-standards/fisheries-legislation/quota-management-system/>



In considering restrictions through the Fisheries Act, we understand that MPI only considers fish stock numbers. This is at odds with the project team's goal to take a holistic approach that includes the entire ecosystem around the islands.

### **Fisheries Act and Marine Ecosystems**

Noting that this is not a legal opinion, there does appear to be a tension between the approach of limiting responsibility to the management of fish stock in isolation of broader marine biodiversity and the purpose of the Fisheries Act.

The purpose of the Act is "to provide for the utilisation of fisheries resources while ensuring sustainability". It goes on to say that ensuring sustainability means:

- 1 maintaining the potential of fisheries resources to meet the reasonably foreseeable needs of future generations
- 2 *avoiding, remedying, or mitigating any adverse effects of fishing on the aquatic environment* (emphasis added)

Section 9 of the Fisheries Act lists its environmental principles as:

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:

- a *associated or dependent species should be maintained above a level that ensures their long-term viability* (emphasis added):
- b *biological diversity of the aquatic environment should be maintained* (emphasis added):
- c habitat of particular significance for fisheries management should be protected.

The report on the future of commercial fishing by the Office of the Prime Minister's Chief Science Advisor notes that Section 9c of the Fishing Act has not been used, with no habitats of significance being defined since the Act has been in force. The Act is silent on the process for defining or proposing a habitat of significance.

The Act appears to be consistent on this throughout. It refers to 'stocks or areas' and 'stocks and aquatic environment in the context of setting or varying sustainability measures. The Act also states that uncertainty or absence of information should not be used as a reason for postponing or failing to take any measure to achieve the purpose.

Part 3 of the Fisheries Act contains provisions for sustainability measures. Section 11 provides the context while Sections 11A through to section 16 provide more detail on the establishment of Fisheries plans and total allowable catch for certain stocks. As with the application of Section 9, there has been a focus on fish stock in the application of this Section and it does not appear to have been utilised for broader environmental sustainability. This may be because the processes in the Act for implementation of sustainability measures focus on fish stock and allowable catch.

A fishing restriction under the provisions of the Fisheries Act may be quicker and easier to implement than other options and while the current preference to respond to evidence from aggregated areas



means a request to alter the QMS is liable to be unsuccessful, there are other tools in the Fisheries Act to consider.

### **Taiāpure**

Taiāpure are defined in the Fisheries Act as areas that have customarily been of special significance to iwi or hapū, as a source of food, or for spiritual or cultural reasons. They can only be established in estuarine or coastal waters.

All types of fishing – commercial, recreational and customary – are allowed in a taiāpure, unless its management committee recommends changes to the fishing rules and the Minister of Fisheries approves them.<sup>6</sup>

Any person may propose a Taiāpure, however as the proposal is required to set out why the area has customarily been of special significance to an iwi or hapū either for food gathering or spiritual or cultural reasons, it is unlikely to be successful without iwi endorsement.

### **Mātaitai reserves**

Mātaitai reserves are developed and managed by tangata whenua. They described in the Fisheries Act as being to recognise and provide for the special relationship between tangata whenua and their traditional fishing grounds non-commercial customary fishing.

Mātaitai reserves allow:

- customary fishing
- recreational fishing without needing a permit.

Mātaitai reserves don't:

- allow commercial fishing (unless reinstated by a regulation)
- allow landing of commercial catch or holding pots
- affect commercial fishing vessel activities like transiting and mooring
- affect recreational fishing rules unless there are bylaws in place
- control whitebait fishing
- affect access to beaches and rivers
- change restrictions on access to private land.<sup>7</sup>

The tangata kaitiaki of a mātaaitai reserve may recommend bylaws that restrict or ban fishing in the reserve. Recommendations are consulted on with the public and must be approved by the Minister of Fisheries.

### **Section 186A**

Section 186A of the Fisheries Act allows for temporary closures in respect of any species of fish, aquatic life, or seaweed, and/or restrictions on fishing methods for up to 2 years to recognise and

<sup>6</sup> <https://www.mpi.govt.nz/fishing-aquaculture/maori-customary-fishing/managing-customary-fisheries/>

<sup>7</sup> <https://www.mpi.govt.nz/fishing-aquaculture/maori-customary-fishing/managing-customary-fisheries/>



provide for tangata whenua customary fishing rights and management practices. The temporary closures apply to everyone (section 186B is not relevant as it only applies to the South Island).

An application for a section 186A restriction can be made by anyone, however it is unlikely to be successful unless it has the endorsement of tangata whenua. The application is made by writing to the responsible Minister detailing the case for the restriction. An example of such an application (Waiheke Island) can be seen at <https://www.mpi.govt.nz/dmsdocument/43921-Waiheke-Island-application>.

It should also be noted that while a temporary closure under Section 186A is for a 2-year period, it is possible to apply for further 2 year periods at the end of each 2 year term if there is sufficient evidence that the problem giving rise to the initial application has not yet been resolved.

## **Government Response Strategy to Sea Change Tai Timu Tai Pari**

Advice from interviewees about the status of the Government's Response Strategy to Sea Change Tai Timu Tai Pari (the plan) varied from person to person, but officials advised that the government response options are in front of Ministers for consideration. Until Ministers make decisions on this, it is difficult to evaluate how closely it will align with the goals of the project group. However, there are some aspects to being part of such a plan versus remaining outside it that we can assess.

Judging by recent government actions on marine protection – it is possible that the plan may result in special legislation, rather than use of the Marine Reserves Act or utilisation of the options in the Fisheries Act. If we assume that special legislation or something similar may progress, then there are advantages and disadvantages to the Noises Islands inclusion. We understand that the Noises Islands may not currently be included in the plan.

The disadvantage of being part of the plan is that the governance of the plan execution, the levels of inclusion of community and iwi and the scale and pace of iteration may be out of the project team's control, however there will be opportunities in the process for the team to assert their views and attempt to influence the model.

The advantage of inclusion in the plan is that the Noises will be part of a focussed effort by government to improve the biodiversity of the entire Hauraki Gulf and will benefit from the scale, resources and holistic approach that this brings. It also, in our view, provides the greatest chance of protection around the Noises being actioned by the government.

Without Ministers' decisions, it is impossible to evaluate the impact, but it is likely that any legislation will be more flexible than the Marine Reserves Act and depending on how the legislation is written there could be some flexibility as to how various areas are managed and how change is managed over time.

A significant matter to consider is, were a plan for the Hauraki Gulf to go ahead and be legislated in some form without including the Noises Islands, where that would leave the project team and its goals.

Any process to impose legislation on the marine environment in the Hauraki Gulf will require public consultation, if not in the policy formation at the Select Committee stage of the Bill passing. This will include considering input of all affected parties – those that agree with the plan and those that do not. In our view, a plan that just considers the Noises Islands is less likely to gain broad community buy-in, than a plan for the Hauraki Gulf in its entirety. In fact, there is a risk that if the Noises Islands are not



subject to the plan, and if that plan included significant restrictions on activities in other areas of the Hauraki Gulf, it could increase activity around the Noises Islands to the detriment of its environment.



# HAURAKI GULF CONTEXT

There is a significant amount of work being done in several related areas that is either directly relevant to the Noises Islands, or to the options being considered. This section provides a snapshot of the thinking and work being done that may have implications now or in the future for the protection options for the Noises Islands.

## Hauraki Gulf Forum

The Hauraki Gulf forum is the body established by the Hauraki Gulf Marine Park Act 2000 for the purpose of promoting sustainable management and conservation of the natural, historic and physical resources of the Hauraki Gulf, facilitating communication and coordination and recognising historic, traditional, cultural and spiritual relationships of tangata whenua.

In May 2020, the Hauraki Gulf Forum adopted an updated set of ambitions goals for the Gulf<sup>8</sup>:

- 1 At least 30 % marine protection
- 2 1000sqkm of shellfish-bed and reef restoration
- 3 Riparian planting of the Gulf's catchment
- 4 An end to marine dumping in or near to the Gulf.

## Iwi Associations

Because of the Hauraki Gulf's place in New Zealand history of supporting multiple tangata whenua as the boundaries of iwi, hapū and rohe changed with time, and the access to kai moana for iwi, hapū and rohe beyond tangata whenua, there are numerous iwi with historical connections to the Hauraki Gulf. The following is an excerpt from the Tai Timu Tai Pari Sea Change Plan:

*IWI OF HAURAKI AND TĀMAKI MAKAURAU* Mana whenua of Hauraki, Tāmaki Makaurau, and Mahurangi include Ngāti Whātua, its hapu Ngāti Whātua o Orakei, and Te Uri o Hau, whose combined rohe (ancestral areas of interest) extends from the Kaipara Harbour to Mahurangi and into central Auckland. The combined rohe of Te Kawerau-a-Maki, 2. MANA WHENUA MANA MOANA “Te mana Atua kei roto i te tangata ki te tiaki i a ia, he tapu” Sustain the divine power that sustains wellbeing, sacred essence. Ngāti Te Ata Waiohua, Ngāti Tamaoho, Ngāi Tai ki Tāmaki, Te Ahiwaru, and Te Akitai Waiohua extends from the Waikato River mouth to the western beaches north of Auckland, and across the Auckland Isthmus and inner Gulf Islands and back to the northern Kaipara coastline. The rohe of Ngāti Wai, and its two hapū Ngāti Manuhiri and Ngāti Rehua extends from around Whangarei in the north, Aotea (Great Barrier Island), Hauturu (Little Barrier Island), and back to Warkworth. The Marutuahu confederation consists of Ngāti Maru, Ngāti Tamaterā, Ngāti Paoa, Ngāti Whanaunga, and the aligned Te Patukirikiri. The Marutuahu rohe is almost the same area as the Hauraki Gulf Marine Park, although it extends south toward Tauranga. Waikato-Tainui has interests in Tāmaki Makaurau. Ngāi Tai also has lands in Hauraki, along with Ngāti Hako, Ngāti Hei, Ngāti Porou ki Hauraki, Ngāti

<sup>8</sup> <https://ourauckland.aucklandcouncil.govt.nz/articles/news/2020/05/ambitious-goals-for-ailing-hauraki-gulf/>



*Pūkenga, Ngāti Rāhiri Tumutumu, and Ngāti Tara Tokanui. This list may not be complete, and many of these iwi have multiple hapū (sub tribes) with ancestral areas and interests inside and outside of the Hauraki Gulf Marine Park.*

All together there are over 20 iwi with connection to and/or interest in the Hauraki Gulf. Since 2010 there have been active Treaty Settlement negotiations taking place with over 25 iwi and hapu in the catchments and islands of the Hauraki Gulf<sup>9</sup>. There is a complex weave of mana whenua interests in the area around The Noises. Native Land Court records from 1866 and 1867 show that Ngati Tai / Ngai Tai and Ngāti Pāoa claims to the islands were recognised at that time<sup>10</sup>.

## Sea Change Tai Timu Tai Pari

Sea Change Tai Timu Tai Pari<sup>11</sup> has been developed as a marine spatial plan for the Hauraki Gulf / Ko te Pātaka kai o Tīkapa Moana Te Moananui ā Toi. Government officials have considered the plan and have provided advice to Ministers on a range of response options. Ministers are yet to decide on the government's preferred approach, however responses by the Minister for Conservation to questions in Parliament<sup>12</sup> on 10<sup>th</sup> March 2021 indicate that the changes may include additional restrictions to fishing in areas of the Hauraki Gulf.

## Waiheke Island Rāhui

On 30<sup>th</sup> January, Ngāti Pāoa – mana whenua for Waiheke Island, placed a rāhui on the waters surrounding Waiheke for the purpose of protecting kai moana. This is significant both as the most recent rāhui for the purpose of marine protection and because of its close proximity to the Noises Islands.

The rāhui applies from the foreshore of the Island to one nautical mile out to sea and applies to four species: tipa (scallops), kūtai (mussels), kōura (crayfish) and pāua (abalone).

Rāhui are a ritual prohibition and most usually implemented to separate people from tapu things. A rāhui is marked by a visible sign like a pou rāhui. It is placed and lifted with appropriate karakia.

The rāhui itself is not enforceable by MPI fisheries officers, however with the Waiheke Island rāhui, Ngāti Pāoa has requested a Section 186A Temporary Closure under the Fisheries Act for a 2 year period that, if successful, will be able to be enforced by officers.

A public hui held by Ngāti Pāoa on the 21<sup>st</sup> January 2021 resulted in unanimous support<sup>13</sup> for the rāhui. In addition, a recreational fisher's advocacy group, LegaSea, has confirmed its support.<sup>14</sup>

<sup>9</sup> page 18 of 2017 State of the Gulf Report <http://gulffjournal.org.nz/wp-content/uploads/2018/03/State%20of%20our%20Gulf%202017.pdf>

<sup>10</sup> [www.thenoises.nz](http://www.thenoises.nz)

<sup>11</sup> <https://www.seachange.org.nz/>

<sup>12</sup> [https://www.parliament.nz/en/pb/hansard-debates/rhr/combined/HansD\\_20210310\\_20210310](https://www.parliament.nz/en/pb/hansard-debates/rhr/combined/HansD_20210310_20210310)

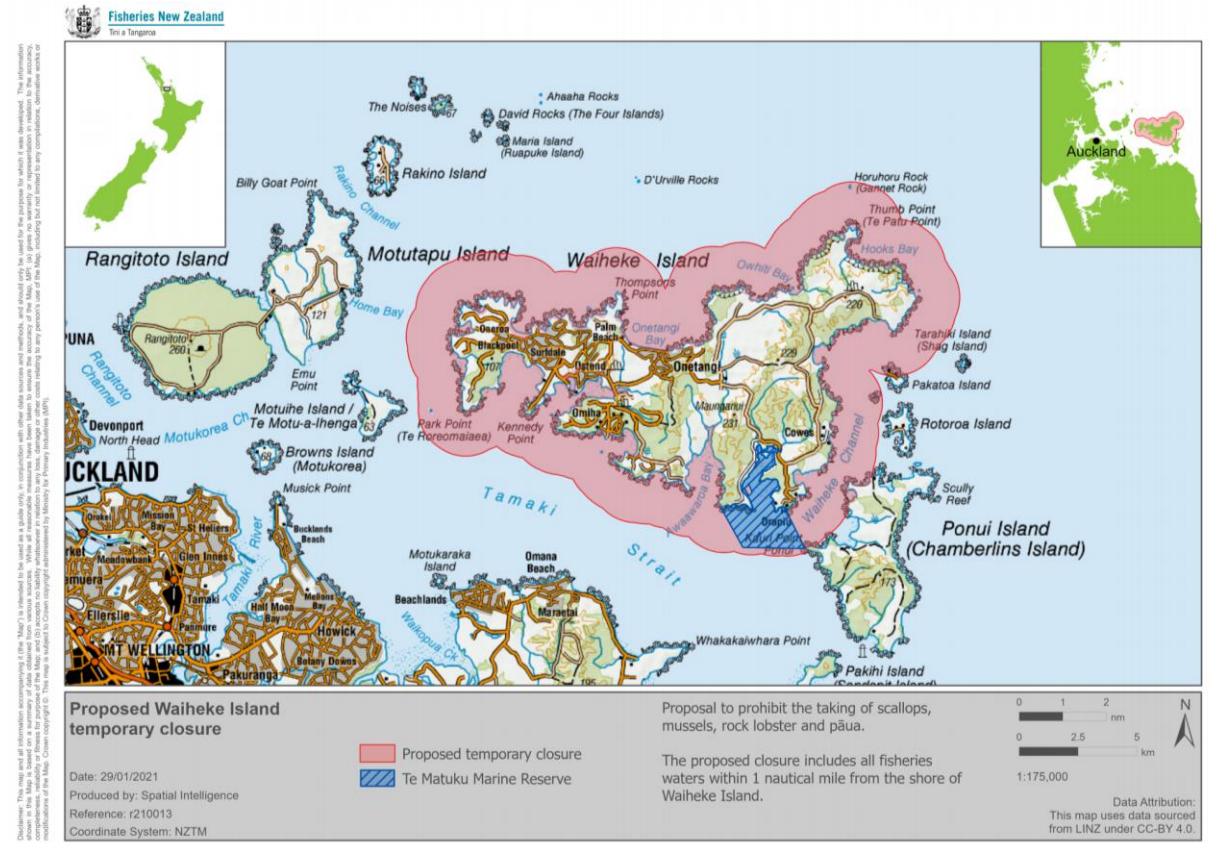
<sup>13</sup> <https://www.mpi.govt.nz/dmsdocument/43921-Waiheke-Island-application>

<sup>14</sup> <https://legasea.co.nz/2021/01/30/recreational-fishers-rallying-support-for-waiheke-rahui/>





Figure 2 - Waiheke Rāhui Area



Current rāhui across New Zealand includes:

- Manganui Bay/Deep Water Cove - temporary fish closure (except kina)
- Umupuia Beach - cockles
- Te Mata and Waipatukahu – pipi, cockles, muscles and oysters
- Marsden Bank and Mair Bank – shellfish
- Waimārama – pāua
- Kaikura-Wakatu Quay – all species.<sup>15</sup>

<sup>15</sup> <https://www.mpi.govt.nz/fishing-aquaculture/maori-customary-fishing/customary-fisheries-management-areas/>



## The Deed of Settlement Between the Crown and Ngāti Pāoa

On March 21<sup>st</sup> 2021 the Crown and Ngāti Pāoa signed a deed of settlement. This deed has details that are relevant to the Noises Islands in indicating the likely mana whenua status of Ngāti Pāoa.

- 1 The Deed includes in sites vested “Papakura Pā (1 ha) as a scientific reserve”. Papakura Pa is located on Tiritiri Matangi Island and is located close to the Noises Islands (North of). The Deed also includes a crown protected name change from Tiritiri Matangi Island Scientific Reserve to Papakura Pā Scientific Reserve
- 2 The Deed includes a statutory acknowledgment of the association of Ngāti Pāoa and Te Matuku Bay Scenic Reserve on Waiheke Island
- 3 The Crown offers Ngāti Pāoa the approval to fix or place a permanent pou whenua on Te Haupa Island Scenic Reserve (also in Hauraki Gulf, further North near Maharangi) and Papakura Pā to reflect Ngāti Pāoa’s association with those areas.

The significance of the above is the Noises Islands are located directly between Waiheke Island and Papakura Pā on Tiritiri Matangi. This provides a strong endorsement of Ngāti Paoa’s mana whenua status in relation to the Noises Islands, however it does not mean that its mana whenua status is exclusive.

## The Future of Fishing Report

On the 22<sup>nd</sup> of March the Office of the Prime Minister’s Chief Science Advisor (OPMCSA) released its report on the Future of Commercial Fishing in Aotearoa New Zealand.

While the report scope is limited to commercial fishing, the report acknowledges and touches on the broader aspects of marine biodiversity and protection. It examines the marine environment in the first three themes of the report:

- 1 *Strengthened leadership.*
- 2 *A bold Oceans Strategic Action Plan.*
- 3 *Te ao Māori | A connected worldview in 2040 and beyond.*

The remaining themes focus on commercial fisheries:

- 4 *A refined set of regulatory tools.*
- 5 *A data platform that enables informed commercial and environmental decision making.*
- 6 *An ecosystem approach to fisheries management (EAFM) is embraced within the current regulatory framework, including the Fisheries Act 1996.*
- 7 *Research and innovation are maximised.*



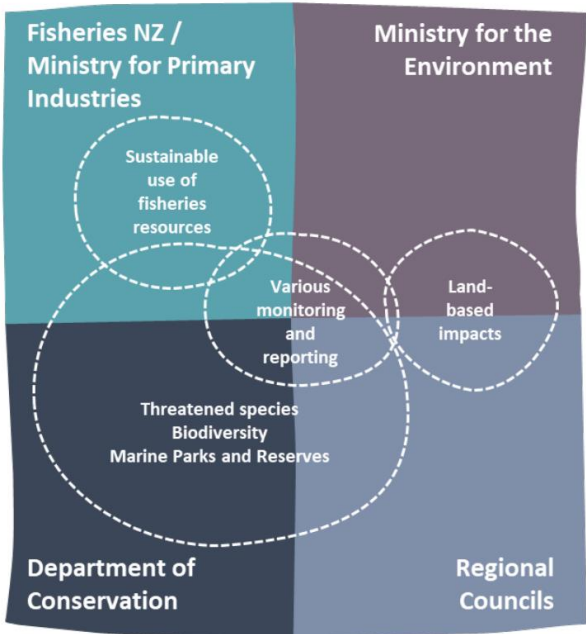
The key areas of interest for the project team’s goals for the Noises are in the first three Themes. The high-level recommendations are:

- 1 *We welcome the appointment of an Oceans and Fisheries Minister and Under-Secretary to ensure cohesive oversight of all marine activities within Aotearoa New Zealand’s territorial sea and EEZ. This will allow holistic management of the marine domain and productive, sustainable fisheries.*
- 8 *Develop a bold Oceans Strategic Action Plan for 2040 to protect and manage Aotearoa New Zealand’s territorial sea and EEZ, with a clear integrative framework to prioritise, coordinate, implement and measure outcomes to achieve 100% sustainably managed oceans.*
- 9 *Building on the other Themes, acknowledge that successful application of an ecosystem approach to fisheries management must take a holistic, long-term approach that considers future generations.*

The details of the recommendations are contained in a series of sub recommendations and factors for consideration that are set out in the report. But the key finding, that a holistic, long term approach that involves a strategic plan with priorities, implementation plans and outcome measures, is consistent with the ambitions of the project team for the protection of the marine environment surrounding the Noises Islands.

The report notes that the legislation surrounding fishing and the marine environment is complex with the responsibilities of the four key regulating departments at times overlapping or leaving potential for gaps. The report includes the following diagram to demonstrate.

**Figure 3 - Four of the key regulators in the marine fisheries space and some of their overlapping roles in the marine environment**



This shows the different roles the government agencies have and explains some of the tensions and difficulties in identifying clear options for the protection of the Noises Islands and the broader Hauraki Gulf.



# ANALYSIS

## Framework

The options for marine protection around the Noises Islands should first be considered against the goals and aspirations of the project team. The primary vision is to promote restoration and regeneration of the marine ecosystems around the Noises Islands to ensure holistic protection of the land and sea. For our analysis, we have suggested some principles that believe align with the team's vision:

- **Holistic approach** to the protection of the land and the sea
- **Restoring the marine ecosystems** surrounding the islands to support certain seabird species which are reliant on the surrounding marine environment as a food source for successful breeding
- Supporting **mana whenua as kaitiaki** and is consistent with Treaty of Waitangi principles
- Alongside this, accounts for the customary practices associated with kai moana and the significance of spiritual and cultural **iwi connections** – including the restoration of the ecosystem to support such activities and connections
- Wider **community engagement and involvement**
- Supports **scientific monitoring, research and Mātauranga Māori** activities
- Supports access for **education** purposes.

The options must also be considered alongside practical requirements such as:

- The **speed** with which the protection can be put in place
- **Agility** of the protection to respond to changes in the local context over time including impacts from climate change
- The level of restriction on activity that is required to **meaningfully protect the Noises Islands** and surrounding marine biodiversity and environmental wellbeing
- Ability to be **enforced**
- Accounting for the **impacts and interest of both commercial and recreational fishing**
- Acknowledging **impacts of stormwater contamination and sediment** run off from Auckland city, sediment and nutrient run off from the Hauraki Plains and supporting an evidence-based approach to the balance of work relating to fishing and population on land activities.




The preceding sections on Options and the Hauraki Gulf Context narrate some analysis of each option's likely effectiveness and practicality in providing protection for the Noises Islands. The following table provides a summary of each option against the criteria detailed above.



**Table 2: Summary of Options**

	Marine Reserves Act 1971	Resource Management Act 1991	Fisheries Act 1996	Rāhui	Taiāpure	Mātaitai Reserve	Government Response to Sea Change Plan	Special Legislation
Holistic approach					Specific Species	No restriction		
Mana whenua as kaitiaki			Section 186A				potentially	potentially
Iwi connections			Taiāpure / Mātaitai				potentially	potentially
Community involvement in ongoing management							potentially	potentially
Scientific research				potentially	potentially	potentially	potentially	potentially
Education				potentially	potentially	potentially	potentially	potentially
Speed								
Agility							potentially	potentially
Meaningful (to Noises context)								
Enforceable								
Impacts of fishing								
Impacts of stormwater and sediment							potentially	potentially

**Legend**

	Unlikely to support the principle
	May support in some circumstance but not clear
	Likely to support the goal

The above table provides analysis at a glance for the various options, however there are some complexities and things to note:

- A rāhui is enforceable by Ministry for Primary Industries when the Minister of Fisheries grants a temporary closure in line with it under Section 186A of the Fisheries Act
- A mātaitai reserve on its own does not provide any restrictions, but the tangata kaitiaki can apply for restrictions on taking of specific species or of using a specific fishing method
- Without the details of the options Ministers are considering in the Government’s Response Strategy to Sea Change, we cannot predict how the iwi connections, kaitiaki roles, community



involvement, scientific and education access will be treated. However, as it would be possible to provide special legislation for such a plan, it would be possible for it to support those objectives.

## Special Legislation Examples

As previously detailed, the Marine Reserves Act is not really fit for purpose and is overdue for reform. Because of this, recent marine protection efforts have been enacted by establishment of standalone legislation rather than inclusion in the Marine Reserves Act. Two examples of special legislation are the Bill proposing an Ocean Sanctuary around the Kermadec Islands, and the Fiordland Marine Management Act 2005.

### Kermadec Islands

Kermadec Islands waters are home to:

- over six million seabirds of 39 different species
- over 150 species of fish
- 35 species of whales and dolphins
- three species of endangered sea turtles
- many other marine species unique to this area such as corals, shellfish and crabs.

The region also provides an important migration path for species crossing the Pacific.

An Ocean Sanctuary is proposed to cover 620,000 kilometres northeast of New Zealand around the Kermadec Islands. The Kermadec Marine Reserve already covers some marine area within 12 nautical miles of the islands and Benthic Protected Areas cover some of the seafloor beyond the 12 nautical miles. However, the Kermadec Ocean Sanctuary Bill is required to establish the sanctuary in the Exclusive Economic Zone beyond 12 nautical miles from land.

The sanctuary would be classed as a category I protection area – a strict nature reserve/wilderness area by the International Union for Conservation of Nature (IUCN) would prohibit:

- commercial fishing and aquaculture
- recreational fishing
- fishing-related tourism
- oil, gas and mineral prospecting, exploration and mining.

The Bill was introduced to Parliament in 2016. It has been delayed due to Te Ohu Kai Moana concerns about fishing interests in the area.

The Kermadec Ocean Sanctuary is a good example of what holistic, full protection over a marine area could look like. The Sanctuary is meaningful on a global scale given the range of tropical, sub-tropical and temperate species of fishes, birds and marine mammals located in the area. It has also been relatively isolated to date with very low levels of human activity.



However, it is not a good model for the Noises Islands given the scale (35 times larger than the combined area of New Zealand's existing marine reserves) and the very different settings (Ocean sanctuary in the Economic Exclusion Zone vs. inshore coastal area).

The proposed Ocean Sanctuary is also a salient reminder of the importance of recognising Māori kaitiakitanga and the different iwi interests in the area. Without the Crown and iwi working together, it will likely be difficult to put protection in place in the short-term.

The Kermadec Ocean Sanctuary Bill states that Kermadec/Rangitāhua Conservation Board will be established to provide governance. The intent is that the Board be made up of one representative from Te Mānawa, one from Te Rūnanga Nui, one appointed by the Minister for Māori Development and four appointed by the responsible Minister.

## Fiordland Marine Management Act 2005

The Fiordland (Te Moana o Atawhenua) Marine Area was established through the Fiordland Marine Management Act 2005. The Act created eight new marine reserves in addition to two pre-existing reserves). In addition, some small, discrete areas which contain items of special significance are identified. These reserves and smaller discrete areas are subject to strict rules and regulations to protect special species and habitats.

The Act was the culmination of many years of advocacy by the Guardians of Fiordland's Fisheries and Marine Environment. Though it began primarily as a group of fishers looking to limit restrictions, it eventually became a diverse group of stakeholders including commercial and recreational fishers, environmentalists, charter boat and tourism operators, scientists, and tangata whenua (Ngāi Tahu). They achieved a single, shared vision and approach to the Fiordland area using an approach called 'gifts and gains'.

This group evolved into a statutory advisory body 'the Fiordland Marine Guardians' appointed by the Minister for the Environment. The Minister is required to ensure a diverse range of stakeholders are represented on the body. Current representatives include commercial and recreational fishers, tourism interests, recreational users, marine science, conservation, and the local community. One member must be nominated by Te Rūnanga o Ngāi Tahu.

The Fiordland Marine Guardians facilitate and promote the integrated management of the Fiordland (Te Moana o Atawhenua) Marine Area. The Guardians: advise the Ministry for the Environment, Ministry for Primary Industries, the Department of Conservation and Southland Regional Council, make recommendations on management measures, promote information sharing, assess the impacts of activities or threats to the area, and help monitor the health of the marine environment.

This legislative framework is a good example of what holistic protection for discrete locations could look like as part of a wider marine area strategy. The case study highlights the benefits of bringing together different stakeholders to develop a collective vision and promote the approach within the community. Not only did this model make it possible to establish the marine reserves, but it has likely contributed to the high levels of compliance and support within the community for the reserves.

However, the drawback from this approach is the 'gift and gain' required to bring the different stakeholders on board. Protection in Fiordland does not go as far as some scientists and environmental advocates argue is necessary. For instance, not all the habitats have received





protection, with none of the marine reserves positioned at the entrance to the fjords or on the outer coast. The reserves are also relatively small, so the full range of habitats and scientific baseline information has not been achieved.

It is possible that a similar model to the Fiordland Marine Management Act is being considered by the Government in response to the Sea Change Plan.



# CONCLUSIONS

Overall we believe, from our interviews and research that the Noises Island marine area is not likely to be considered suitable for a Marine Reserve classification or its own special legislation given the current consideration being given to the Hauraki Gulf as a whole. It is our view that the best options for legislative protections for the areas are:

- a temporary closure of the surrounding marine area under Section 186A of the Fisheries Act 2005, and/or
- a protection that is part of a plan for the entire Hauraki Gulf area.

## Temporary Closure

A temporary closure under Section 186A of the Fisheries Act 2005, will only be successful if it is endorsed by mana whenua. Ngāi Tai ki Tāmaki were confirmed as mana whenua for the Hauraki gulf Islands in its settlement signed 7 November 2015<sup>16</sup>, and as detailed in the section examining the recent Crown settlement with Ngāti Pāoa, there is sufficient evidence in the settlement to confirm the mana whenua association of Ngāti Pāoa. However, that does not mean that other iwi do not also have mana whenua association. If all iwi with mana whenua associations to the Noises Islands were able to agree to a rāhui and/or closure application, it would be much more likely to succeed.

The Minister would need to have a clear understanding of how such a closure would benefit tangata whenua, and the initial closure would only apply for a period of 2 years with a requirement to reapply if there were deemed a need to extend for further two-year term(s).

Our view is that this is worth exploring as a short-term option while awaiting decisions, and then potential time for consultation, drafting of legislation and enacting legislation to advance the Government's Response Strategy to the Sea Change Plan if that goes ahead.

## Inclusion in a plan for the Hauraki Gulf

We believe that the most effective action that the project team can take now, is to seek inclusion in the Government's Response Strategy to Sea Change for the Hauraki Gulf / Ko te Pātaka kai o Tikapa Moana Te Moananui ā Toi. Officials have indicated that they are open to understanding the scope that the project team would like for inclusion and while there may be a lack of clarity on governance models and engagement practices, there is a real risk of the plan proceeding in a way that could increase the pressure on the Noises Islands ecosystem if it is not included.

Should government decide not to proceed with a comprehensive set of marine protection restrictions for the Hauraki Gulf, the next approach may be to attempt to initiate the application of restrictions through the Resource Management Act, which would be done through Auckland Council.

<sup>16</sup> <https://www.govt.nz/browse/history-culture-and-heritage/treaty-settlements/find-a-treaty-settlement/ngai-tai-ki-tamaki/ngai-tai-ki-tamaki-deed-of-settlement-summary/>



It is also worth noting that the government has committed to reviewing the Marine Reserves Act 1971 and that the intent of that review is to reform the Act so that it is more flexible, includes a range of protection options and provides for a partnership with mana whenua. This is likely to take some considerable time, but should not be discounted as an option for the future.

## Excluded

We do not believe that the current Marine Reserves Act will be helpful in the context of the Noises Islands, however it would be appropriate to discuss the impending review, be prepared to submit on the proposed changes when they are announced, and consider whether there is a pathway for protection in the new Act once it is in place.

We also do not think it would be helpful to pursue a designation of habitat of significance under Section 9c of the Fisheries Act. As far as we are aware there are currently no processes established for proposing such a designation and if the Ministry of Primary Industries seeks to establish a process that is likely to take some time. It is also unlikely that they would consider the Noises Islands if the Sea Change Plan were progressing.

## Next steps

We recommend that the project team write to the Department of Conservation and request that a protection area for the Noises Islands be included in government response to the Sea Change Plan. We also recommend that the team submit the marine area they deem appropriate for protection, the governance model they would like to see in place and why, and a list of species the team are seeking to protect. This list should include species that the team is seeking to restore to the area as well as associated marine and land species that are impacted by food availability.

We also recommend that the team continue discussions with mana whenua to explore the option of a temporary closure under Section 186A of the Fisheries Act 2005. This can be applied for with or without an associated rāhui.

In other circumstances we would recommend that the team approach Auckland Council to discuss the option of protection under the Resource Management Act. However, the Government's Response Strategy to Sea Change is likely to provide the same outcomes in a timelier manner as well as having the advantage of planning across the entire Gulf area. We do recommend maintaining discussion with Auckland Council to ensure they have up to date information about the Noises Islands marine area.



# APPENDIX 1: EXISTING LEGISLATION AND OPTIONS

This is a summary of each piece of legislation we identified that has or could impact the Noises Islands.

## Marine Reserves Act 1971

### Description

The purpose of the Marine Reserves Act is to preserve, as marine reserves for the scientific study of marine life, areas of New Zealand that contain underwater scenery, natural features, or marine life, of such distinctive quality, or so typical, or beautiful, or unique, that their continued preservation is in the national interest.<sup>17</sup>

### Issues and opportunities

The Marine Reserves Act 1971, was considered world leading at the time of its introduction, however the Department of Conservation acknowledges that the Act has several shortcomings impacting its use today<sup>18</sup>. These include:

- no strategic approach across the range of tools for protection of marine biodiversity
- no clear process detailed in the legislation for establishment of marine protected areas
- no direct recognition of iwi/crown partnerships or the kaitiaki role of iwi/Māori.

### Process for inclusion

Order in Council.

### Contextual Relevance

- Lack of iwi role a backward step
- Long and potentially contentious process for inclusion
- Could be overtaken by current reform work (interviews).

<sup>17</sup> <https://www.legislation.govt.nz/act/public/1971/0015/latest/whole.html#DLM398102>

<sup>18</sup> <https://www.beehive.govt.nz/sites/default/files/2020-12/Dept%20of%20Conservation.pdf>



## Marine Mammals Protection Act 1978

### Description

This Act provides for the conservation, protection and management of marine mammals, including the establishment of marine mammal sanctuaries, within which activities known to harm particular marine mammal species can be restricted and strictly controlled by the Minister of Conservation. Such sanctuaries are in place to protect Hector's dolphins and New Zealand sea lions.

### Issues and opportunities

Whilst this Act provides a good mechanism for protecting specific species, it is only concerned with biodiversity of the ecosystem in so far as it is essential for the survival of the relevant marine mammal (ie ensuring food sources). The scientific evidence regarding the Noises Islands to date has not pointed to challenges for a marine mammal(s) around the islands to date. As such, this Act offers little protection for the Noises Islands ecosystem.

### Process for inclusion

Gazette Notice.

### Contextual Relevance

- Lack of iwi role a backward step
- Long and potentially contentious process for inclusion (few sanctuaries have been established)

## Fiordland (Te Moana o Atawhenua) Marine Management Act 2005

### Description

Establishes a Marine Area across Fiordland, including 8 marine reserves and puts in place tools to support the protection of the natural environment within that Marine Area.

### Issues and opportunities

This Act was the culmination of a stakeholder-led initiative, the 'Guardians of Fiordland', begun in 1995. The Guardians were comprised of representatives from commercial and recreational fishers, charter operators, Ngāi Tahu and local community interests. They also had advice from the Department of Conservation, Ministry of Fisheries and two marine scientists.

The Act demonstrates what is possible when a community works together to protect and manage a marine area.



## Process for inclusion

Primary legislation.

## Contextual Relevance

- A good example of how the community working together can protect the relevant marine area, although likely more applicable to the broader Hauraki Gulf area, rather than the Noises Islands
- Takes time to implement.

# Marine and Coastal Area (Takutai Moana) Act 2011

## Description

This Act takes account of the intrinsic, inherited rights of iwi, hapū, and whānau, derived in accordance with tikanga and based on their connection with the foreshore and seabed and on the principle of manaakitanga. It translates those inherited rights into legal rights and interests that are inalienable, enduring, and able to be exercised so as to sustain all the people of New Zealand and the coastal marine environment for future generations.<sup>19</sup>

## Issues and opportunities

The Act provides for customary marine title to be granted which then allows the iwi hapū or whānau group to manage resources in the area. However, an application for marine customary title must have been submitted by 2017.

## Process for inclusion

No longer available as required by 2017.

## Contextual Relevance

Not applicable for additional applications although it is understood that a number of iwi have interest registered that are relevant to the Hauraki Gulf area.

# Resource Management Act 1991

## Description

The Resource Management Act 1991 was intended to sustainably manage physical and natural resources, including in the marine environment. Substantial responsibility is devolved to local councils

<sup>19</sup> <https://www.legislation.govt.nz/act/public/2011/0003/latest/DLM3213133.html>



who have control over a wide-range of activities, including in the marine environment. National Policy Statements provide a policy framework for meeting the purpose of the Act and are to be applied as required by the relevant entities with responsibilities under the Act. With respect to the marine environment the New Zealand Coastal Policy Statement is most relevant.

## Issues and opportunities

Although the Act provides powers to local councils to manage the marine environment for biodiversity purposes, until recently these powers have been understood to be constrained by the exercise of the Fisheries Act. However, a recent Court of Appeal ruling has made clear that councils do have the power to control fishing and fisheries resources so long as it is not for a Fisheries Act purpose. An appropriate purpose for the Councils to manage fishing and fisheries resources would be to protect indigenous biodiversity.

## Process for inclusion

Regional Coastal Environmental Plan (under section 64 and schedule 1 of the RMA).

## Contextual Relevance

- Could be overtaken by reforms both to the RMA itself and by processes underway in the Hauraki Gulf, including the Sea Change Plan.
- Forest and Bird is keen to build on the success of the Mōtītī campaign in the Bay of Plenty and work with other hapū around the country to ensure their mana moana and ecological expertise is similarly expressed.

## Fisheries Act 1996

### Description

The Fisheries Act provides for the utilisation of fisheries resources whilst ensuring their sustainability. With some exceptions, no one may take fish, aquatic life or seaweed unless acting under the authority of a permit issued under the Act. A Total Allowable Catch is set for each fish stock in the Quota Management System.

### Issues and opportunities

The Fisheries Act includes protective powers which allow for fishing areas to be closed temporarily or the methods used to catch the species restricted to achieve sustainability measures. The Act also allows for a range of customary management areas which recognise tangata whenua and allow for their management of the resource in different ways. For instance, taiāpure are local fisheries and customary fishing in areas that have been on special significance to iwi or hapū. The management committee for a Taiāpure may recommend changes to the fishing rules that can then be approved by



the Minister of Fisheries. Mātaitai reserves allow for traditional and recreational fishing but not commercial fishing.

## Process for inclusion

Various application processes for customary management areas

Gazette notice for temporary closure

## Contextual Relevance

- Must be supported by relevant iwi and hapū.
- May allow for some traditional and recreational fishing to continue.

# Hauraki Gulf Marine Park Act 2000

## Description

The Act aims to integrate management of the Gulf, its islands and catchments across 21 statutes, including the Resource Management Act, Conservation Act and Fisheries Act. To support this work, the Act also established the Hauraki Gulf Forum which brings together the main governing entities including local and central government and tangata whenua to help build a shared picture of the main challenges facing the Gulf and how best to manage them.

## Issues and opportunities

Aside from improving integrated management, the Forum also advocates for the protection, restoration and enhancement of the Gulf's marine values and ecosystems. The Forum prepares a triennial 'State of the Gulf' assessment, the latest one in 2020.

## Process for inclusion

Geographical – Noises Islands and surrounding marine environment are included in the Act.

## Contextual Relevance

Project partner on the Sea Change – Tai Timu Tai Pari.

# Spatial Planning – Sea Change

## Description

The Sea Change – Tai Timu Tai Pari Hauraki Gulf Marine Spatial Plan (the plan) was released in December 2016 and was developed by a 14-member stakeholder working group. The group





represented mana whenua, environmental groups, and the fishing, aquaculture and agriculture sectors with support from central government.

The plan aims to improve the health of the Hauraki Gulf Marine Park with proposals for:

- marine protection and fisheries management
- habitat restoration
- catchment management
- localised co-management
- opportunities for economic development.

The Government is developing a response to the proposals in the plan, having worked with a Ministerial Advisory Committee.

## Issues and opportunities

The plan included a marine reserve and Ahu Moana areas at the Noises Islands. At the time, however, insufficient scientific evidence was available for accurately assessing the borders for these areas. Since then, University of Auckland's Dr Tim Haggitt and Dr Nick Shears undertook marine surveys around The Noises in 2017. This survey work was used to map an effective marine protected area for The Noises using Protected Area Design Guidelines.

## Process for inclusion

The government's draft response strategy.

## Contextual Relevance

There are questions about progress. Interviewees had mixed views on likely timing, however recent comments on 10 March 2021 from the Minister for Conservation indicates it is being considered and is likely to progress soon<sup>20</sup>.

<sup>20</sup> [https://www.parliament.nz/en/pb/hansard-debates/rhr/combined/HansD\\_20210310\\_20210310](https://www.parliament.nz/en/pb/hansard-debates/rhr/combined/HansD_20210310_20210310) see question 6.



# APPENDIX 2: INTERVIEW GUIDE

## Noises Islands Policy and Legislative Options Interview Guide

### Introduction

Thank you for agreeing to meet with MartinJenkins to discuss your views about the options for protection of the ecosystems on and around the Noises Islands.

MartinJenkins has been engaged by the Noises Islands project team consisting of Tāmaki Paenga Hira Auckland War Memorial Museum, the Noises Island Trust, the University of Auckland and iwi to provide independent advice on the options for marine protection and restoration. Our advice will focus on the policy and legislative options.

We are approaching this review through a variety of methods:

- Engagement with key people, including:
  - Public servants in related ministries and departments
  - Subject matter experts.
- Desk-based research, including:
  - Review of relevant legislation, reports, documents, data including examination of previous application of policy and legislation.

**Anonymity and confidentiality:** Anything you tell us will be treated anonymously: we will not share notes of the meeting outside of the MartinJenkins review team. If we want to quote you in our report, we will check the quote with you beforehand. That said, the project team is aware of who we are approaching to take part in the review.

If you have any questions about the review – please contact:

Philippa Bowron, Principal Consultant on 021 944 488 or [Philippa.Bowron@martinjenkins.co.nz](mailto:Philippa.Bowron@martinjenkins.co.nz)

### A little about the Noises Islands

Located in the Hauraki Gulf Marine Park / Tīkapa Moana / Te Moananui-ā-Toi (The Gulf), The Noises are a group of islands, rock stacks and reefs composed of 130 million-year-old Jurassic greywacke rocks of marine origin, that support a very diverse range of marine habitats.

On land, these predator free islands have outstanding conservation values. These motu contain some of the finest indigenous vegetation to be found in the inner Gulf and are home to a range of native invertebrates and reptiles like gecko and wētāpunga. There are at least 15 Nationally Threatened and At-Risk bird species recorded on the islands or from the sea around the islands.<sup>21</sup>

<sup>21</sup> Department of Conservation 2014



Importantly, the islands provide safe breeding grounds for seabirds with seabird diversity the highest in the inner Gulf including takahikare/white-faced storm petrel, oi/grey faced petrel, kuaka/northern diving petrel, pakaha/fluttering shearwater, korora/little blue penguin, Tara Tara/white-fronted tern, tarapunga/red-billed gull, Kawau paka/little shag and the karuhiruhi/pied shag. These seabird species are dependent on food from a balanced ecosystem that is severely disrupted by the reduced levels of sea life around the islands.

On land, other New Zealand native species are present including tui, bellbird/korimako, kakariki, grey warbler/riroriro, morepork/ruru and variable oyster catcher species.

The Noises encompass physical aspects of both inner and outer regions of Gulf, and are strongly influenced by tidal currents transiting between the inner and outer gulf.

The chain of islands are interconnected by extensive subtidal reefs and coarse soft sediment habitats. The strong tidal currents minimise the deposition of fine sediments, with muddy habitats occurring in deeper water compared to inner parts of the Gulf.

As a result of this unique geographical location and physical setting, The Noises support a regionally significant range of biogenic habitats including macroalgae forests, diverse sessile invertebrate communities, rhodolith beds, extensive intertidal and subtidal mussel beds, and large soft sediment bivalve beds (e.g. dog cockles).

Of these, the expansive subtidal mussel and dog cockle beds, shallow sponge gardens and rhodolith beds are particularly important habitats to protect within the context of the wider Hauraki Gulf because of their increasing rarity and recognised role as marine biodiversity hotspots and ecosystem drivers. The importance of some of these habitats is reflected in initiatives to restore shellfish beds in the Hauraki Gulf.

## General outline of topics to be explored when we meet

### Introduction

- 1 Introductions
- 2 Your role, background and interest relating to policy/legislation for Marine protection or in the Noises Islands.

### The options

As with other parts of the Hauraki Gulf Marine Park, the marine environment is under significant pressure and has experienced extensive coastal and marine degradation over the last century.

The Noises Marine Restoration and Protection project team has agreed that its kaupapa is to enable restoration and regeneration of the marine environment surrounding the Noises islands in the Hauraki Gulf Marine Park, Tikapa Moana / Te Moananui-ā-Toi, to deliver holistic protection – of the land and the sea.

- 3 In your view, what is the best approach to providing protection to the Noises Islands to support restoration and regeneration of its ecosystems?
- 4 Are you aware of any relevant examples that have worked?
- 5 Are you aware of any examples that have supported:
  - a iwi-crown partnerships?
  - b community involvement?



- c holistic approach involving biodiversity and environmental wellbeing across land and sea?
  - d scientific research and involvement?
- 6 Have you had any experience with protected or partially protected marine environments like Fiordland, Kaikoura, Kermadec Ocean Sanctuary? (if yes explore the rationale behind the type of protection and what can be learned that may be applicable to Noises).

### **Alignment with government priorities**

- 7 Do you have any views on government's interest in developing new marine protection areas – or establishing processes to protect marine life in an example such as this?
- 8 Are there any government plans for marine protection other than the Marine Protected Areas: Policy and Implementation Plan (2005)?(programme, timing expectations, areas of priority, thoughts on iwi and community, engagement with science, local initiatives etc)
- 9 Do you have any views or insights as to the likely arguments against marine protection for the Noises islands (within government and/or community)?
- 10 What are some of the barriers that the Noises islands may face in seeking a marine protection?

### **The Future**

The aim of the Noises Marine Restoration and Protection project is to identify solutions to and overcome current barriers for marine protection, using The Noises as an example.

- 11 Do you have a view on developing a process that would support easier establishment of marine/ecosystem protection in partnership with mana whenua and communities and any thoughts on what components that might require?

### **Anything else**

- 12 Is there anything we haven't talked about that you would like to add to the discussion?

