

BRUCE SCOTT

BARRISTER

19 May 2023

DIRECT: +64 4 890 4872

MOBILE: +64 274 430 174

EMAIL: bruce.scott@hawkestone.co.nz

Conservation Services Manger
Department of Conservation
Wellington

by email

Tēnā koutou

SUBMISSION ON CONSERVATION SERVICES PROGRAMME - COST RECOVERY FOR DRAFT ANNUAL PLAN

Introduction

- 1 This memorandum provides the submissions on the Department of Conservation's Draft Conservation Services Programme Annual Plan for 2023-24 (**CSP**) on behalf of Harbour Fish (**HF**).
- 2 HF submits that the CSP unlawfully includes programmes that do not fall within the definition of "conservation services" in the Fisheries Act 1996 (**Act**) and, therefore, cannot be included in the CSP or be subject to cost recovery from industry. This is because many of the proposed projects do not relate to the adverse effects of commercial fishing on protected species, as required by the Act. Rather the projects are aimed at gaining scientific knowledge more generally.
- 3 The unlawful inclusion of programmes in the CSP that do not fall within the definition of conservation services, has been consistently raised by industry representatives in respect of a range of different projects for which the Crown has sought to recover the costs from industry. Issues raised in previous submissions have not been addressed and remain unresolved. This is of increasing concern to the industry.

Background

- 4 HF is a LFR, retail and export company operating from Sawyers Bay in Dunedin and Bluff. HF has two retail operations in Dunedin and Queenstown and throughout the whole business employs 100 staff. HF started 20 years ago and has expanded its quota share ownership during that time to include predominantly inshore finfish species. HF is levied for the relevant stock-specific projects relating to the CSP.
- 5 The founding Director of HF, Damon Cooper, is an owner/operator with his own commercial fishing vessels and quota shareholding independent of HF. Damon and his partner Chanel Gardner have provided the information that forms the basis of this submission.



Overview

- 6 It is submitted that the CSP unlawfully includes programmes that do not fall within the definition of “conservation services” in the Act and, therefore, cannot be included in the CSP or be subject to cost recovery from industry.
- 7 In particular it is submitted that the following proposed services ought not be included in the CSP:
- 2.2. INT2021-04 Collection and curation of tissue samples from protected fishes and turtles
 - 2.4 INT2022-03 Identification, storage and genetics of cold-water coral bycatch specimens
 - 2.5. INT2022-04 Risk Assessment for protected corals
 - 2.8 INT2023-02 Species identification of camera-detected protected species captures in NZ fisheries
 - 2.10 INT2023-04 Identification of marine mammals, turtles and protected fish captured
 - 2.12 INT2023-06 Investigating the impact of fisheries on endangered hoiho diet, micro biome, and disease susceptibility
 - 2.13 INT2023-07 Expert identifications of protected corals
 - 2.17 INT2023-11 Understanding coral bycatch-assessing large catches
- 8 The disputed total amount to be cost-recovered from the industry as per the Cost Recovery Tables for these projects is \$400,092.

Cost Recovery Principles and Conservation Services

- 9 Cost recovery of services is only permitted to the extent allowed for under Part 14 of the Act. Section 262 sets out the Cost Recovery Principles. This section makes clear that cost recovery is limited to recovery of either “conservation services” or “fisheries services”.
- 10 Conservation services are defined in s 2 of the Act as follows (emphasis added):
- Conservation services* means outputs produced in relation to the **adverse effects** of commercial fishing on protected **species**, as agreed between the Minister responsible for the administration of the Conservation Act 1987 and the Director-General of the Department of Conservation, including—
- (a) Research relating to **those effects** on protected **species**:
 - (b) Research on measures to mitigate the **adverse effects** of commercial fishing on protected **species**:
 - (c) The development of population management plans under the Wildlife Act 1953 and the Marine Mammals Protection Act 1978.
- 11 What this means is that a programme can only constitute a “conservation service” if the outputs of that programme relate to the adverse effects of commercial fishing. A programme will not fall within the definition of “conservation service” where the purpose of that programme is only to investigate what effect (if any) commercial fishing is having on a protected species.
- 12 Put another way, DOC must already have sufficient information about the interaction of commercial fishing and a particular protected species on which to form a reasonable view that commercial fishing is having an adverse effect on that species (or that such an



adverse effect is likely) before a programme relating to commercial fishing and that species can fall within the definition of “conservation service”. That is hardly a surprising conclusion – before this selective tax can be imposed on those causing an adverse effect, it needs to have been established that their actions are having that effect. This does not, of course, mean that that the project cannot proceed. It just means that the Crown must itself pay for this research.

- 13 The need for DOC to have sufficient information to be able to show that commercial fishing is having an adverse effect on a protected species **before** it can constitute a conservation service and be liable for cost recovery was confirmed by the Office of the Auditor General in their 2002 and 2005 reports on the Conservation Services Programme.
- 14 The Office of the Auditor General stated in its 2005 follow up report that, without sufficient information to show that commercial fishing was having an adverse effect “*it is appropriate, in our view, for the Crown to fund this research (rather than the commercial fishing industry)*”.
- 15 While it is acknowledged that DOC has a legitimate interest in investigating the scope of the research projects above this does not mean that such research presently constitutes a conservation service that is subject to cost recovery from industry.
- 16 In addition, it is submitted that even if a disputed project does meet the definition of a “conservation service” (which is denied), 100% cost recovery from industry for projects is not permitted in accordance with the Act’s Cost Recovery Principles.
- 17 The Cost Recovery Principles specify that (emphasis added):
 - 17.1 “*a conservation service **cannot** be recovered if the service provided is in the **general public interest**”*: s262(c); and
 - 17.2 the costs of a conservation service aimed at avoiding, remedying or mitigating an adverse effect must “*be attributed to the persons who caused the risk or adverse effect*”: s262(d).
- 18 Many of the projects disputed in this submission fall into the “*general public interest*” for the purposes of cost recovery and as such cannot be recovered from industry.

Disputed inclusions

Species identification/classification projects

- 19 Several of the proposed projects in the CSP are aimed at what I refer to as “species identification work and classification”. Such projects do not constitute a “conservation service” for the purpose of the Act and are not cost-recoverable. On the whole, these projects constitute baseline research work aimed at increasing knowledge and ensuring better identification of bycatch species and do not relate to the adverse effects of commercial fishing. If the purpose of the project is to better identify species, it cannot be that the research relates to the adverse effect of commercial fishing on a particular protected species – given that the particular species is not even known.
- 20 These projects cannot constitute a conservation service as the output of the research is not related to the adverse effects of commercial fishing on particular protected species. DOC does not have sufficient information about the interaction of commercial fishing and the various species to know whether commercial fishing is having (or likely to have)



- an adverse effect. Instead, the outputs of these research projects are precursors, in the sense that they are aimed at increasing the accuracy of the identification of bycatch species in order to **subsequently** enable the impact of commercial fishing to be assessed.
- 21 DOC may try to argue that, given that the projects relate to bycatch, fishing is having an adverse effect on at least the individual fish caught. However, this does not meet the test for what constitutes a conservation service. To meet the definition of conservation service the outputs of the research must be in relation to the adverse effects of commercial fishing at the **species level**. Impacts (death or injury) on individual animals or birds caught as a by-catch are permitted under the Act, and a defence is provided. The fact that an individual fish is caught is not sufficient to constitute an adverse effect. Rather, the adverse effect must have an impact at the population level. This is clear from the text of the relevant provision and definitions in the cost recovery scheme, as well as a wider purposive approach to interpretation. The focus is **not** on the impact of fishing on individual animals but rather on the species as a whole.
- 22 It is accepted that these projects may well serve a useful purpose for DOC – as many are aimed at increasing the accuracy of catch identification by Fisheries Observers and other technology such as on-board cameras. However, these projects are correctly classified as being for the general public interest and therefore they are not liable for cost recovery. Specifically:
- 22.1 It is a public good to have DOC employees (such as Fisheries Observers) well trained and able to accurately identify bycatch species and to ensure consistency in the recording of such bycatch.
- 22.2 Similarly, it is a public good to research what is essentially gear trials of camera detection of species. The Cost Recovery Principles require that the Crown fund such research, not industry.
- 23 The purpose of the cost recovery regime is not to recover all of the costs that would be avoided if there was no commercial fishing industry. That “avoidable cost” regime was removed from the Act. This, taken with the requirement that the services provided in the public interest should not be recovered, is important. It means that all costs being incurred by DOC, to get itself in to position where its staff and observers have had the correct training as a necessary preliminary step to being able to assess if the adverse effect on the species population is occurring, ought to lie with the Crown (not with industry). Such costs are incurred as a precursor to being able to assess if fishing is having an effect on the species concerned.
- 24 The following projects fall into the species identification and classification category and are not liable for cost recovery:
- 2.2. *INT2021-04 Collection and curation of tissue samples from protected fishes and turtles*
- 24.1 The objective of this project is to provide co-ordinated storage and curation of tissue samples and to ensure that relevant meta-data associated with such samples is available to researchers. The stated purpose of the project is to collect and compile samples to provide “*valuable information on population structure, connectivity and size, and habitat preferences and feeding ecology*”



respectively". The output of this project is not related to the adverse effects of commercial fishing on a protected species.

2.4 INT2022-03 Identification, storage and genetics of cold-water coral bycatch specimens

- 24.2 This project does not fall within the definition of conservation service as the stated purpose of this project is to *"improve information on the nature of coral bycatch reported and collected through the Fisheries Observer Programme."* This taxonomic identification project is aimed at improving inconsistent Observer reporting. The rationale for the project states, *"expert verification of coral bycatch that is difficult or inconsistently identified by Fisheries Observers to the finest taxonomic level provides vital baseline information that can help to better inform research and marine protection ..."* Clearly this is baseline identification research that is a necessary precursor to enable subsequent research to be undertaken into the effects of fishing. Therefore, this project is not related to the adverse effects of commercial fishing and therefore ought not be funded by industry. Even if the coral bycatch specimen project does constitute a conservation service (which is denied), there is no legitimate basis for seeking full cost recovery from industry given the general public interest aspects of the research.

2.8 INT2023-02 Species identification of camera-detected protected species captures in NZ fisheries

- 24.3 Again, this project does not fall within the definition of conservation service as the objective of this project is to determine whether captured species can be identified through the examination of camera footage clips to see if cameras can replace Fisheries Observers in the future. The rationale for the project expressly recognises that it is a *"pilot to assess the incoming information associated with having cameras on vessels"*. This research project is tantamount to a gear trial. It does not relate to the adverse effects of commercial fishing – it is precursor identification research that may enable subsequent research to be undertaken into the effects of commercial fishing. Further, this camera project is in the general public interest - it is a taxonomic classification exercise that should be funded by the Crown, not the industry.

2.10 INT2023-04 Identification of marine mammals, turtles and protected fish captured

- 24.4 This project is a continuation of INT2020-02 and is designed to *"complement the existing seabird and coral identification projects"*. Again, this is precursor research aimed at improving the accurate identification of protected species by Fisheries Observers and to update Fisheries NZ databases. This research does not relate to the adverse effects of commercial fishing and is not cost recoverable. Again, given the public interest served by this research project, it should be Crown funded.

2.13 INT2023-07 Expert identifications of protected corals

- 24.5 The purpose of this project is to fund experts to come to New Zealand so that they can review coral samples previously collected to confirm the correct



taxonomic identification of those samples. This does not meet the test for cost recovery as it does not constitute a conservation service. Again, this is a precursor identification research project. The project description expressly states that there is currently a lack of “*understanding of the impact of commercial fishing on coral diversity*” – therefore it cannot be said that there is sufficient information to believe that commercial fishing is having an adverse effect on protected coral species. Accordingly, it is appropriate for the Crown (and not the fishing industry) to fund this research.

2.17 INT2023-11 *Understanding coral bycatch-assessing large catches*

- 24.6 This research project is aimed at assessing the reliability of Fisheries Observers’ reporting of large coral bycatch. Again, this does not fall within the definition of conservation services and is not cost recoverable. Further, given the public interest served by this research project, it should be Crown funded.

Risk Assessments

2.5. INT2022-04 *Risk Assessment for protected corals*

- 25 The purpose of this research project is to conduct a quantitative coral risk assessment. This is a baseline research project aimed at assessing the risk against “*varied fishing related metrics, for example target fishery, fleet/vessel category, fishing gear*”. Essentially, this research is assessing what effect fishing is having on corals. As such the output of this project is not related to the “adverse effects” of commercial fishing on the coral and cannot be subject to cost recovery from industry. DOC needs to have sufficient information to be able to show that commercial fishing is having an adverse effect on a protected species before it can constitute a conservation service and be liable for cost recovery.
- 26 This is recognised in the description of the research approach for the project, which states (emphasis added: “*risk assessment outputs [of this project] will be used in **future research**, and as a guide for prioritisation of coral conservation and fisheries management*”).

2.12 INT2023-06 *Investigating the impact of fisheries on endangered hoiho diet, micro biome, and disease susceptibility*

- 27 The stated outputs of this research project are:
- A written technical report outlining:
- i. the status of diet in the northern and southern populations of hoiho;
 - ii. characterising the hoiho micro biome, and identifying viral illnesses present at breeding sites over the time period 2017 to the present day;
 - iii. established similarities or differences in diet, micro biome and disease between the northern and southern sub populations of hoiho.
- This information, in combination with other studies into the feeding zones and health of hoiho, will deliver a clearer picture of the impact of fishing practices, such as bottom trawling, on the species.
- 28 This presents as a research proposal that may create data that could be used in future research to assess the impacts of fishing on hoiho, but as it stands the outputs



produced are not in relation to the adverse effects of commercial fishing. Accordingly, it is appropriate for the Crown (and not the fishing industry) to fund this research.

- 29 This project is of general public interest and not liable for cost recovery from the commercial fishing industry. The project expressly recognises that there could be adverse effects on hoiho health from factors such as climate change, therefore, at most shared cost-recovery from the Crown and industry might be appropriate.

Meeting and response by DOC needed

- 30 HF would welcome the opportunity to discuss the matters in this submission, and/or to receive a written response to the issues raised. I would be grateful for a notification if, notwithstanding the matters raised above, a decision is made to proceed with the projects and cost recovery from the fishing industry.

- 31 I look forward to your response.

Nāku noa, nā

Bruce Scott
BARRISTER

D +64 4 890 4872

M +64 274 430 174

E bruce.scott@hawkestone.co.nz