Environmental Law Initiative
Submission:

Proposed amendments to non-fish and protected species reporting requirements

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Tiakina te mauri o te taiao

ABOUT ELI

The Environmental Law Initiative (*ELI*) thanks you for this opportunity to submit on Fisheries New Zealand Discussion Paper No: 2023/20 (*proposals*).

ELI uses litigation, advocacy and education to protect Aotearoa's marine, freshwater and terrestrial environments and biodiversity.

ELI is a registered charitable trust, advised by a small team of experts in environmental law, policy, science, ecology and management.

Though operating independently, we partner with a range of other groups and individuals — including iwi, hapū, governmental agencies, charities, and organisations— to achieve common outcomes for the environment.

For more information, see www.eli.org.nz

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General Comment

1. This consultation results from ELI's litigation against the Ministry for Primary Industries (*MPI*) and the Department of Conservation (*DOC*) in *Environmental Law Initiative v Director-General of Ministry for Primary Industries & Ors,* CIV-2022-485-300 (*litigation*). The litigation may (or may not) result in a range of possible consultation outcomes being unavailable to Fisheries New Zealand (*FNZ*). We are therefore disappointed not to see the litigation referred to in the consultation documents, as such reference would have provided fundamental contextual information for submitters and a clear rationale for the specifics of the proposals.

2. ELI takes the view that the consultation and proposals represent a breach of comity between FNZ and the Courts, and properly FNZ ought to pause this work pending release of the judgment in the litigation.

3. Given this, ELI considers it inappropriate at this time for FNZ to ask submitters, including fishing permit holders in particular, if they:

    a. "Agree" with proposals when FNZ awaits judicial guidance on whether various of the proposals are or may be *required* of FNZ as a matter of law; and

    b. "Are confident [they] will be able to meet [their] obligations" when, through the lens of possible legal errors arising from past "gaps" in reporting regimes, FNZ awaits the Court's clarification on the precise extent of those obligations.

4. The effect of asking these questions now will be to:

    a. Afford non-parties to the litigation opportunities to opine on issues before the Court, or else afford parties further opportunities. These opinions seem almost certain to be cited in FNZ decision-making on NFPS reporting issues alongside judicial guidance (which for consultation responses cannot simply be ignored); and

    b. Give submitters the false impression that their views for possible changes to NFPS reporting will and must be taken into account, when in the absence of a judgment on the litigation the field of lawful potential changes is not yet known.

5. Rather than try to pre-empt the outcome of the litigation, or possibly even indirectly shape it, in ELI's view, the more responsible course would have been for FNZ to await the Court's judgment, and then implement it.

6. In taking that approach, consultation may not have been required, with relief in a Court decision able to prevail over a consultation requirement in secondary legislation. Alternatively, the judgment could have shaped the appropriate consultation if the relief does not imply specific outcomes for NFPS reporting.

Structure of specific ELI comments

7. Issues of relief on the scope of NFPS reporting came to be discussed in the litigation in three categories. These were the "species issue", the "kills or injures issue" and the "conditions and "circumstances issue". Our comments are structured accordingly.

8. ELI gives our views on these issues only because FNZ has put proposals to consultation. To repeat, however, our view is that the Court's judgment in the litigation ought to guide the resolution of all the issues, and properly FNZ ought to pause this work pending release of that judgment.

Species issue

9. From a risk perspective the proposed additions at paragraph 16 of the consultation paper may arguably be appropriate, on rationale along lines explained by Dr Debski in his affidavit in the litigation.[1] ELI recognises that experts may take different views on taxonomic issues with separating out every species, and practical limits to how faithfully a long list would be recorded against.

10. However, the proposed additions do not reflect the best available information, which must be uncontested evidence before the Court on this very issue. In ELI's view it is not open to FNZ to depart from best available information comprised in recent and uncontested evidence admitted before the High Court.

11. In that regard:

    a. In relation to seabirds, the consultation list differs from the list in the affidavit of Dr Stephanie Borrelle, an ELI deponent in the litigation. In her evidence, Dr Borrelle lists additional seabirds to those in the proposals.[2] In his evidence, Dr Debski did not seriously contest Dr Borrelle's list;

    b. Dr Borrelle's list differs from the list presented in Annexure CLCS-8 to the affidavit of Ms Catriona Clemens-Seely,[3] a DOC deponent in the litigation, but Ms Clemens Seely does not justify her own list generally or insofar as it departs from Dr Borrelle's;

    c. The consultation list *also* differs from Ms Clemens-Seely's list, but the consultation document does not justify the departure from either Dr Borrelle's or Ms Clemens-Seely's evidence.

    d. Similarly in relation to marine mammals, the affidavit of Prof Rochelle Constantine, another ELI deponent in the litigation, contains a general comment to similar effect.[4] We understand Prof Constantine to take the view that the old NFPS circular contained 17 marine mammals where there are at least 57 species found in New Zealand waters. On our review none of this was contested by any FNZ, DOC or industry deponent in the litigation.

Kills or injures issue

12. In ELI's view the "kills or injures" issue would not seem to be resolved (at least satisfactorily) by the definition now proposed in the consultation paper. It seems to mix up two distinctions – between kill/injure and free/not free. It is not clear if the definition takes in all four permutations. For example, the second limb of the proposed definition appears to assume that injured wildlife will always be able to move freely. Yet ELI envisages that circumstances in all four permutations are possible, and indeed all four are mentioned in the evidence in the litigation.

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1 See Affidavit of Igor Debski dated 13 April 2023 at [35].
2 See Affidavit of Stephanie Belle Borrelle dated 8 February 2023 at [49]-[50].
3 See Affidavit of Catriona Lisbeth Clemens-Seely dated 1 May 2023 at Annexure CLCS-8.
4 See Affidavit of Professor Rochelle Lee Constantine dated 8 February 2023 at [34].

13. We record example possibilities in Table 1 below.

Table1: example possibilities for kill/injure and "caught/not caught" pairings.

	Free	**Not free**
Kill	Animal suffers hard ship strike and is killed	Animal drowns in net, or is hooked and dies
Injure	Animal suffers ship strike, is dazed and later drowns	Animal is hooked and freed injured but alive, or suffers hard ship strike and is badly injured and unable to move freely

14. ELI finds it is concerning that the consultation paper offers no justification for the proposed definition, and again that FNZ would set itself on a course of defining an important term when the issues are before the Court.

15. Additionally, we are aware that a Crown memorandum in the litigation explains some drafting changes to the proposed definition but not others. The addition of the words "if physically able to" to the second limb of the proposed definition go unexplained.

Circumstances issue

16. The "conditions and circumstances" issue seems to be the most clearcut of the "gaps". Fishers are either legally required to report this information or they are not. As this question is directly before the Courts, the framing of this proposal is potentially misleading. Submitters have not been provided the crucial information that the Court may well find that this information is mandatory. As such, the provision of potentially mandatory information is not a proper subject for consultation. How this information is provided, whether by the notes field or otherwise, could be the subject of a consultation. Again this would have been better implemented once the Court has provided its judgment on the litigation.

17. Insofar as ELI takes a view on this subject, we do so again in terms of best available information. On this issue there is clear evidence on the "circumstances" gap from affidavits in the litigation,[5] none of which was seriously or obviously contested.

18. Finally we comment on one issue beyond the scope of the litigation.

19. Insofar as "best available information" is defined to have a future-facing character – information that might be obtained without unreasonable cost, effort, or time – ELI considers that FNZ should seriously consider requiring biopsy material from bycaught individuals wherever practical, along with a mandatory "biopsy: y/n" electronic reporting field. This would go some way to resolving the significant issues that exist with misidentification and the unreliability of fisher reported data, a subject commented on alike by FNZ, DOC and ELI deponents in the litigation.

20. Practically speaking, all that would be required would be for a fisher to retain a feather or small tissue sample, which could be stored straightforwardly on board vessels and given to FNZ staff on shore. Dr Constantine gives some evidence on how such a scheme might be initiated in respect of observers,[6] and in ELI"s view a

[5] See for example at Affidavit of Prof Rochelle Constantine at [35] and Dr Dan Goodoy dated 7 February 2023 [58]-[59].

[6] See for example at Affidavit of Prof Rochelle Constantine at [32].

similar and non-onerous scheme could straightforwardly be initiated for non-observed fishers.