

# Council Meeting

2 March 2023

## Separately Circulated Attachment

(as indicated this is circulated separately to the Agenda)

This attachment relates to Item 7  
in your Agenda

*Attachment 7.1 –  
Recommendations of Commissioners to Marlborough  
District Council and Submitters in respect of Draft  
East Coast Beach Vehicle Bylaw 2022*



# Report of Recommendations of Commissioners to Marlborough District Council and Submitters in respect of Draft East Coast Beach Vehicle Bylaw 2022

## COMMISSIONERS:

Rob Enright (Chair) | Ma-rea Clayton | Councillor David Croad

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## HEARINGS:

23, 24, 25 November 2021, 3, 4 May 2022

## DATE PROVIDED TO COUNCIL:

18 July 2022

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## SUMMARY OF RECOMMENDATIONS

- 1 For the reasons set out below<sup>1</sup>, we recommend that Council amend the proposed Bylaw to retain ATV/UTV access for the community in the area that is most popular for hunter / gatherer, fishing, customary practices, and general access.
- 2 Our recommended amendments open up approximately 9 kilometres of vehicle access to ATVs/UTVs, between Marfells Recreation Reserve, and the "Airstrip", south of the Lighthouse at Te Karaka / Cape Campbell. We have called this area, the "Yellow Zone".
- 3 The Yellow Zone enables vehicle access for fishing, diving, cray-potting, wider customary practices, and equitable motorised access for people otherwise unable to reach the Cape via the beach. 2-wheel motorbikes and other 4WD vehicles are not permitted. It is intended to restore some equivalence to pre-EQ quad bike access, while at the same time introducing stronger controls, and some environmental bottom lines, to protect the cultural and natural character values, and rare and threatened biodiversity, from the adverse effects of vehicle access in this outstanding coastal environment.
- 4 ATVs and UTVs are more commonly known as quad bikes, and small side-by-side vehicles, not exceeding 1000 kg. They are often designed for off-road access only.
- 5 With some additional qualifications (identified below), we have otherwise largely recommended approval of the proposed Bylaw as it was notified **(the as-notified Bylaw)**.
- 6 Our recommendations are set out in two stages:

**Stage One:** Recommendations that we consider are within scope of the as-notified Bylaw, and outcomes sought by submitters, and otherwise within the statutory framework. If these recommendations are approved

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<sup>1</sup> Our reasons are set out throughout this report and our Appendices, therefore it should be read in full. For clarity, the Appendices form part of our reasons.

by Council, then the proposed Bylaw can be put into immediate effect, in time for the summer season 2022/2023.

**Stage Two:** Recommendations that we consider may require additional consultation with the community, **before** being implemented. These are as follows:

- (a) Remove **public** vehicle access to Ward Beach, because of safety concerns associated with this section of coastline. If vehicles are banned, then smaller boats, like dinghies, will still have access to the water (subject to their own personal risk assessment)
- (b) Introduce an additional "buffer zone", south of the Waima (Ure) Rivermouth, to protect shorebird habitat from vehicle use. The area of the buffer zone (where vehicles are prohibited under the bylaw) would mirror, or closely match, the footprint of the corresponding DOC reserve land.<sup>2</sup> This will better protect the terrestrial and coastal values in this area, including Banded Dotterel (and other shorebird) habitat, and enable more integrated management with the DOC Estate.
- (c) Introduce a licensing regime, so that ATV / UTV bike riders must be licensed to use their vehicles in the new Yellow Zone. Licensing is required by Tauranga City Council under their comparable beach access bylaw, and we consider there is benefit in requiring licensing (for monitoring, enforcement, and education). If Council decides to introduce a licensing regime, then we recommend that Council consider delegating authority to Iwi Authorities to issue licenses for ATVs/UTVs within the Yellow Zone, on the same terms and conditions, as Council. However, we recognize that such an approach would require a wider examination of Council's partnership relationship with Iwi and Hapū, and this goes beyond the scope of our role.

- 7 Our formal recommendations are set out at the conclusion of this Report. We now set out our reasons, in this Report, and our Appendices.

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<sup>2</sup> The relevant DOC Estate land is shown in green in MDC's Issues and Options Paper, at Figure 20.

## INTRODUCTION

- 8 The 2016 Kaikōura earthquake resulted in significant damage to Marlborough's East Coast (the Limestone Coast). Landforms were extensively changed by the tectonic forces, with uplifts of between 0.5 and 2.5 metres in the foreshore and coastal marine area between the Awatere and Waima (Ure) rivers (being a distance of about 48.5km). The high tide mark shifted as much as 200 metres, leaving more exposed beach.<sup>3</sup>
- 9 Human and ecological communities were significantly affected. For the rare and threatened indigenous flora and fauna that inhabit this area, these effects were both unavoidable, and ongoing.
- 10 An unexpected irony from this massive disruption, was that it created greater opportunities for coastal vehicle access, within the areas identified by Council's proposed bylaw. This is particularly the case for the popular stretch of coast between the DOC reserve at Marfells Beach and Te Karaka / Cape Campbell, all the way to Long Point, where there has been a substantial increase in post-EQ vehicle use and disturbance in an area previously restricted to low-tide (and intertidal) access.<sup>4</sup>
- 11 Once vehicles are past the Lighthouse, they have essentially unrestricted (all-tide) access, all the way to Long Point, and indeed, most of the way to the Chancet Rock Scientific Reserve.<sup>5</sup> The Chancet Rock reserve includes remarkable limestone formations, 'fossil sponges', and other trace evidence to mark the end of the Age of the Dinosaurs.<sup>6</sup> In more recent times, the reserve functions as a haul-out and resting area for seals, and (potentially) other marine mammals.
- 12 In short, what was once<sup>7</sup> limited (and low-impact), use of quad bikes for customary, and harvesting purposes, at low-tide from Marfells Beach Recreation Reserve, has quickly evolved into an unregulated, and (during

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<sup>3</sup> MDC Technical Report (July 2021) at [1], p1; MDC Issues and Options Paper, at p1

<sup>4</sup> See for example the ECPG material provided post-hearing 2 (Basemaps, nesting frequently disturbed; Ecological Survey Report (Nov 21 to Dec 21, Sonya Roxburgh)

<sup>5</sup> We were able to observe much of this area, during our site visit on 4 March 2022, where we walked from Canterbury Gully to Ward Beach (refer Minute 3).

<sup>6</sup> MDC Technical Report (July 2021), p9

<sup>7</sup> MDC Technical Report (July 2021) maps the relevant areas used by vehicles pre-EQ

summer) relatively high-use coastal highway, with all-tide access, day and night.<sup>8</sup>

- 13 A theme from many of the submitter presentations was that: we are all connected. Effects on the natural world have effects on the human world. And vice versa. Unregulated vehicle use has created, and continues to create, potentially significant adverse effects on natural character values, including indigenous flora and fauna, much of which is threatened and at risk. It has also resulted in public safety issues, with pedestrians, beach users, and families, now sharing beach areas with motor vehicles (including quad bikes, motorbikes, and 4WD vehicles). We heard evidence that, while many or most are responsible drivers, some are not, driving dangerously or at excessive speeds, an “open season” on the beaches.<sup>9</sup>
- 14 But, in contrast, the Rūnanga representing the two Iwi submitters that presented during our hearing (Ngāti Kuia and Rangitāne o Wairau) emphasized the importance of (mainly) quad bike access to undertake fishing, harvesting, and customary practices within the Bylaw area.
- 15 We accept the submissions and evidence provided by a range of submitters, and community groups, that the Marlborough community must adopt and respect environmental bottom lines<sup>10</sup> to protect these taonga species and their habitat from uncontrolled vehicle access. But, in contrast, we also accept that limited and regulated ATV<sup>11</sup>/UTV access enables Māori, and the wider community, to access the Te Karaka / Cape Campbell coastline for social, cultural, recreational, and food gathering purposes. In short, people are part of the environment too.

## **THE PROPOSED BYLAW**

- 16 Rules require enforcement. Council has responded to these competing priorities, and incommensurable values, through notification of the proposed Bylaw.

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<sup>8</sup> See, for example, presentation by Sally Peter, Hearing 1 (24 Nov 2021); Ailsa McGilvary (Kaikoura Branch, Forest & Bird; The Banded Dotterel Group), Hearing 1 (24 Nov 2021).

<sup>9</sup> For example, Herb and Pip Thomson address this topic (Hearing 1, 24 Nov 2021). We also heard competing evidence that educated drivers could operate quad bikes safely, on the basis that “..the proper education delivers the right results..” (Mark Wills / RAWE at Hearing 1, 24 Nov 2021).

<sup>10</sup> Or at least, we have called them “bottom lines”. Our findings, based on the extensive evidence on biodiversity and natural character, support ecological and cultural bottom lines for “red zones” where all vehicles are prohibited.

<sup>11</sup> See, for example, RAWE presentation by Roger Hambleton, Hearing 1 (23 Nov 2021).



- 17 The draft East Coast Beach Vehicle Bylaw was notified on 15 July 2021 for submissions, with the submission period closing on 8 September 2021.<sup>12</sup> There were 193 submissions received, with 50 submitters indicating they wished to be heard in support of their submission.
- 18 Public notification was preceded by a substantial period of engagement with stakeholders, and tangata whenua. A timeline of this engagement process was identified in supplementary information provided by Council officers on tangata whenua engagement (in response to Minute 7).<sup>13</sup>
- 19 The process of consultation and engagement with tangata whenua (prior to, and following, public notification of the proposed Bylaw) was important to the positions subsequently adopted by the relevant Iwi Authorities.<sup>14</sup> Further detail is set out in our **Appendix 2**.
- 20 Our recommended changes are within the scope of the Bylaw as notified, and relief requested by submitters.<sup>15</sup> We have had regard to the relevant statutory purpose, Council's relevant statutory functions and powers for Bylaws, submitter relief, and the relevant information provided to us during the hearings process.
- 21 We have also had regard to the relationship of the following Iwi Authorities (who participated in the Bylaws process, whether by the engagement process, or as submitters):
- Te Rūnanga o Ngāi Tahu, Te Rūnanga o Kaikōura, Ngāti Kuri hapū
  - Te Rūnanga o Rangitane o Wairau
  - Ngāti Toa Rangatira
  - Ngāti Toa Rangatira ki Wairau Trust
  - Te Ātiawa o te Waka-a-Maui
  - Te Rūnanga o Ngāti Kuia Trust
  - Ngāti Kōata Trust
  - Te Rūnanga o Ngāti Rārua

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<sup>12</sup> Depending on context, referred to as the proposed Bylaw, or the as-notified Bylaw.

<sup>13</sup> We also acknowledge evidence and legal submissions received from Te Rūnanga a Rangitanē o Wairau, including trenchant criticism of Council's consultation and engagement process as (essentially) fatally flawed. We do not agree that the process was fatally flawed, in the sense that we have not been precluded from assessing the merits of the proposed bylaw, and we been able to complete our recommendatory role. Further context is provided in **Appendix 2** to this Report.

<sup>14</sup> Including Te Rūnanga o Ngāi Tahu and Te Rūnanga o Kaikōura, which elected not to lodge a submission for reasons stated in their letter dated 12 October 2021.

<sup>15</sup> We have already identified that our Stage 2 recommendations may require further consultation.

- Ngāti Tama Ki Te Waipounamu Trust
    - with their ancestral lands, waters, and moana; their tikanga and beliefs (to the extent identified to us); relevant Treaty principles, such as active protection of the exercise of rangatiratanga and taonga; and (to the extent identified by submitters or the Iwi Authorities), relevant Treaty settlement legislation, which includes the statutorily recognized takiwā of Ngāi Tahu Whānui, under s5 of the Te Rūnanga o Ngāi Tahu Claims Settlement Act 1988; the Te Rūnanga o Ngāi Tahu Act 1996; the Ngāti Apa ki te Rā Tō, Ngāti Kuia, and Rangitāne o Wairau Claims Settlement Act 2014; and the provisions of the Regional Policy Statement (which identifies relevant Iwi Authorities within the Marlborough District).
- 22 We exercised our powers under s83(3) LGA 2002 to ensure that Te Rūnanga o Ngāi Tahu and Te Rūnanga o Kaikōura (who were not submitters) had reasonable opportunity<sup>16</sup> to provide relevant information on tangata whenua related issues, in particular, matters raised by Te Rūnanga o Rangitāne o Wairau (and Commissioners) during the submissions and hearings process. This was in addition to information provided by all of the Iwi Authorities during the pre-notification engagement process conducted by Council.
- 23 While we have identified these Iwi Authorities generically as “tangata whenua”, we have not undertaken an exercise of identifying the relative strength of relationship of te iwi and te hapū, with the coastal areas that are the subject of the proposed Bylaw. We have concluded, for reasons set out in this Report and our **Appendix 2**, that it is not necessary or appropriate for the Commissioners to undertake a “strength of relationship” assessment, for the purposes of the proposed Bylaw. Accordingly, our references to “tangata whenua” do not address any competing claims to whakapapa, ahi kā, mana whenua, or mana moana, by different Iwi and Hapū, in relation to particular areas or rohe. We do not consider that we have the resources, capacity, delegation, or jurisdiction, to undertake such an assessment.

## COMMISSIONER ROLE

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<sup>16</sup> In response to our Minutes, multiple opportunities were given to all Iwi Authorities (and other submitters) to comment on the tangata whenua related issues: refer our Minutes 1, 3, 4, 5, 7, 8

- 24 Council delegated recommendatory powers to three Commissioners, who sat as a panel, being Rob Enright (Chair), Councillor David Croad, and Mairea Clayton. Many submitters appeared before Commissioners during our initial hearing in November 2021, and some submitters (as well as statutory agencies) took a further opportunity to appear before Commissioners during our second hearing in May 2022. These appearances are recorded in **Appendix 6**. Following directions from Commissioners, further information was provided by the Department of Conservation (09 May) and other submitters (up to 24 May 2022).
- 25 Following final receipt of information, Commissioners have reviewed and deliberated on the draft Bylaw proposal, submissions, and the relevant information identified below, and this Report (and our Appendices) records our recommendations, and sets out our reasons.

### **APPROACH TO DECISION-MAKING**

- 26 We acknowledge the efforts of submitters and other participants, including Iwi Authorities (that participated in pre-notification engagement processes, and provided information to us during the hearings process), representatives of the East Coast Protection Group (**ECPG**, many of whom were landowners or locals that have put countless hours into bird and species monitoring, pest and weed control to enhance the natural environment), ATV and UTV users, including members of RaWE (who emphasized that quad-bike drivers can be responsible and respectful users of the beach environment, as they have been for many years), local 4WD users and their clubs (who sought opportunities for continued 4WD access), fishers and divers, the Royal Forest & Bird Protection Society (**RFB**) and the Marlborough Branch of RFB, Banded Dotterel protection groups and advocates, Nelson Marlborough Conservation Board, Department of Conservation (**DOC**), the Harbour Master, Ministry of Primary Industries, and the many passionate locals (and others) who exercise stewardship over this precious coastline, protecting the intrinsic values, and the vulnerable flora and fauna present, while enjoying the remote East Coast.<sup>17</sup> While many merit mention, we also note Eve Anderson, (who, along with her father, Mark) spent many hours

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<sup>17</sup> Relevant submitters, including those that presented evidence at our hearings, are identified in Appendix 6.

identifying Katipō habitat potentially affected by vehicle movements along the East Coast.

- 27 In providing this Report, we have reviewed the following relevant information:

**MDC & background Papers**

- MDC Statement of Proposal (July 2021)
- MDC Proposed East Coast Beach Vehicle Bylaw (Summary)
- MDC Technical Report (v5, July 2021)
- MDC Issues and Options Paper (Nov 2019)
- Background Reports identified in Appendix 14 to Technical Report
- Memorandum of MDC in response to Minute 7 (updated timeline of engagement with Iwi and Hapū resulting in notified Bylaw, and subsequent engagement, covering period 2 Feb 2017 to 23 Nov 2021). Additional emails relating to engagement, provided by Te Rūnanga a Rangitanē o Wairau (attached to Memorandum dated 2 May 2022)
  
- Dr Shane Orchard (Published Article, "*Managing Beach Access and vehicle impacts following reconfiguration of the landscape by a hazard event.*")

**Information and feedback provided by Iwi Authorities including :**

- Relevant correspondence from Te Rūnanga o Ngāi Tahu and Te Rūnanga o Kaikōura dated 12 October 2021, email dated 17 Nov 2021, letter dated 3 December 2021, letter dated 2 May 2022
  
- Memoranda from Te Rūnanga a Rangitane o Wairau dated 22 Nov 2021, 25 November 2021, 8 Feb 2022, 2 May 2022 (including additional material relevant to the engagement process), Memorandum dated 16 May 2022, letter (Radich Law) dated 3 Feb 2022.<sup>18</sup>

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<sup>18</sup> At the hearing on 3 May 2022, Te Rūnanga a Rangitane o Wairau sought leave to produce an affidavit relating to a matter arising during the hearing. Following consideration of the affidavit, the Chair ruled that the affidavit was of a personal or irrelevant nature, and did not assist our enquiry, and was not admitted to the record.

- Memorandum of MDC in response to Minute 7 (updated timeline of engagement with Iwi and Hapū resulting in notified Bylaw, and subsequent engagement, covering period 2 Feb 2017 to 23 Nov 2021)
- Written submissions from Te Rūnanga o Ngāti Kuia, Te Rūnanga o Rangitanē o Wairau, Te Rūnanga o Ngāti Rārua, and oral presentations from their Counsel and representatives <sup>19</sup>

**Submissions lodged on the proposed bylaw and information/evidence presented at subsequent hearings** (these are identified on the Council website and not listed herein).

**Post-hearings information** provided after Hearing 1,<sup>20</sup> submitter responses (4 Feb 2022) and submitter responses (22 Feb 2022).<sup>21</sup>

**Post-hearings information** provided after Hearing 2 (including DOC, ECPG, Te Rūnanga a Rangitanē o Wairau, Burkhart Fisheries / Lanfar Holdings)

**Memoranda and information filed by Counsel for Burkhart Fisheries Ltd & Lanfar Holdings Ltd (discussed in our Appendix 4)**

**Commissioner Site visits** on 19 November 2021 (identified in Minutes 2 and 3) and 4 March 2022 (identified in Minute 6)

**Our Minutes 1 to 8,** and information provided in response by Iwi Authorities, submitters, Council officers, and statutory agencies.

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<sup>19</sup> Te Rūnanga o Ngāti Rārua elected not to present an oral submission during the hearing; according to Council's timeline of engagement, this Iwi Authority withdrew their submission on the Bylaw on 23 Nov 2021.

<sup>20</sup> Including James Bentley report, Burkhart Fisheries / Lanfar Holdings memorandum, DOC Appendix A, Ecological values), Dominion Salt Ltd (various attachments), ECPG (various reports), Eve Anderson / Mark Anderson (Katipo map update and population information), MDC (SNA Map, Harbourmaster report, Officer report in reply to questions in Minute 4), MPI (various attachments in reply to Minute 4), RFB (response to further information, additional information, Banded Dotterel hot-spots), Te Rūnanga a Rangitane o Wairau (second substantive response), speaker material (Craig Marfell, Ted Howard)

<sup>21</sup> These responses also included the Banded Dotterel Group, Te Rūnanga a Rangitanē o Wairau, Nelson Marlborough Conservation Board, RFB Society, ECPG, Jan Roxburgh, Rob Peter.

**In addition**, we have had regard to the relevant information posted on the Council website ([www.marlborough.govt.nz](http://www.marlborough.govt.nz)) in relation to the proposed Bylaw and its' process, prior to the date of this Report.

- 28 Recommendations on the submissions received are collated in this Report rather than on individual submissions. Many of the submissions were similar in both content and reasons for either their support or opposition to vehicle restrictions under the proposed Bylaw. We have grouped our responses accordingly.<sup>22</sup>

### **MDC REPORTS**

- 29 The Bylaws process has its own whakapapa. Following the Kaikōura earthquake in 2016, public awareness started to spread of the accessibility of the East Coast for vehicles. In places where access was previously restricted by tides, it is now possible to walk or drive at virtually any time. Popularity of the area has increased as a result of more beach area.<sup>23</sup> By 2018, landowners and other stakeholders (such as Royal Forest & Bird, and the East Coast Protection Group) raised their concerns with Council relating to the environmental effects from increased vehicle use.
- 30 In parallel, Council advised that it commenced engagement processes with the relevant Iwi Authorities from 2019/2020 onwards. We discuss these engagement processes in **Appendix 2**.
- 31 As part of its information-gathering and assessment of options, Council identified relevant biodiversity, natural character, and other values in its' Technical Report (v5, June 2019).
- 32 We acknowledge that substantially more information on these values has been gathered since release of the Technical Report, as referenced by submitters.<sup>24</sup> With that caveat, we adopt as relevant Appendices 2 to 7 of the Technical Report, which set out important background information. We have regard to, but do not adopt the assessment in the Technical Report

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<sup>22</sup> We understand that Council will in due course (and following decisions on our recommendations) advise individual submitters as to whether their submissions are accepted, accepted in part, rejected in part, or rejected entire.

<sup>23</sup> MDC Issues and Options at p1

<sup>24</sup> For example, this includes substantial data sets provided by ECPG during Hearings 1 and 2.

of cultural matters, because it is not comprehensive (in terms of the relevant cultural relationships and associations of different Iwi and Hapū).<sup>25</sup>

- Appendix 2: identifies indigenous flora, including areas of likely habitat
  - Appendix 3: provides a non-comprehensive identification of threatened and at-risk indigenous fauna, including areas of likely habitat
  - Appendix 4: maps relevant marine ecosystems (such as pea gravel beach, hard sand beach, mussel and pipi beds, crayfish, paua, kelp beds, mudstone reef, limestone outcrops/reefs).
  - Appendix 5: provides a non-comprehensive description of marine mammal species, and their likely locations. This includes breeding and haul-out areas for NZ fur and elephant seals. The Report also identifies marine mammal laws and regulations administered by DOC, that prohibit human interaction with seals and other marine mammals, within specified distances.
  - Appendix 6: Identifies actual and potential public access points within the proposed bylaw area.
  - Appendix 7: maps (in a non-comprehensive way), the types of activities undertaken by people in their beach environment. This includes bird-watching, walking, swimming, boating, dog-walking, horse-riding, cray-potting, fishing, diving, customary practices, vehicle-use, and other activities.
- 33 Appendix 8: maps likely areas of pre- and post-EQ vehicle activity. This includes the following sectors:
- (a) Clifford Bay: Awatere River to Marfells Beach. This long stretch of beach has been used for both pre- and post-EQ vehicle access,

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<sup>25</sup> Paragraph [2.1] of the Technical Report sets out the cultural values and associations for Ngāti Kurī, as identified by Te Rūnanga o Kaikōura. This is further discussed in our **Appendix 2**.

although 4WD vehicle use has probably increased, post-EQ. It includes several areas of DOC estate, including the Muritai Scientific Reserve, Blind River Recreation Reserve, and Marfells Beach Recreation Reserve. It also forms part of the Clifford and Cloudy Bay Marine Mammal Sanctuary (administered by DOC, with the landward boundary being the MHWS along the coast.<sup>26</sup> The proposed bylaw (as-recommended) removes all vehicle access to this beach area, except two public access points for boats, and business-related access to the salt-works jetty for Dominion Salt Ltd, and the Burkhart/Lanfar commercial fishing interests.

- (b) Marfells Beach Recreation Reserve (southern-most entry point), Mussel Point to Long Point – pre-EQ access was generally limited to ATV access, given topography and tidal restrictions. Post-EQ, there are few tidal restrictions between Mussel Point, Long Point, and an area that is in close proximity to Chancet Rocks Scientific Reserve. The proposed bylaw (as-recommended) removes all 2-wheel motorcycle and vehicle access, except for ATV/UTV access in the Yellow Zone.
- (c) Chancet Rocks to Needles Point – this beach area, which includes large areas of pea gravels, has historically accommodated quad bike access, both pre- and post-EQ. The proposed bylaw (as-recommended) removes all vehicle access, with limited exceptions at Ward Beach to enable commercial fishing access for the Burkhart fishing interests. Our Stage 2 recommendations suggest removing public vehicle access to Ward Beach, given safety concerns around the suitability of this boat access area.
- (d) Needles Point to the southern MDC boundary (Tirohanga Stream). This beach area has historically supported ATV access, both pre- and post-EQ. Limited 4WD access is now available, post-EQ. We have recommended no vehicle access between Needles Point and Waima (Ure) river-mouth. We have also recommended (subject to further consultation, as part of a Stage 2 process), a further “Red Zone” of no-vehicle access. The new Red Zone (where vehicles are

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<sup>26</sup> MDC, Statement of Proposal, p13



prohibited under the bylaw) would mirror, or closely match, the footprint of the corresponding DOC reserve land. The balance of this beach area (southwards from the Waima (Ure) rivermouth) is a "Green Zone" for all vehicle-access, as proposed in the as-notified Bylaw.

## **ISSUES AND OPTIONS**

34 Council has relevantly identified issues, options, values and threats. These are set out in the MDC Issues and Options paper (Nov 2019). The 2 primary issues were:

- (a) Uncontrolled motor vehicle access along the east coast is damaging the environment following the 2016 Kaikōura earthquake;
- (b) Uncontrolled motor vehicle access along the east coast is causing a danger to public safety and public enjoyment of the coast.

35 The paper summarises potential threats posed by vehicle movements along the coastal environment. These included:

- Damage to juvenile shellfish crossing the intertidal zone (below high tide mark), which is also threatening recruitment
- Damage to reef structure and limiting recolonization of marine plants and algae
- Damage to newly established dune systems, preventing establishment of indigenous communities
- Damage to original dune systems, damaging threatened plant and animal communities, and (potentially) archaeological sites
- Public safety effects to beach users
- Disturbance of wildlife, driving through dotterel nesting areas and other bird roosting and nesting areas, disturbing breeding seals

- Motor vehicle noise and tracks impacting naturalness, remoteness, ambience, aesthetics
- Vehicle tracks facilitating predator movement between locations

36 While the above summary of Issues and Threats provides a useful starting point, it does not reflect some of the positive dimensions to enabling ATV / UTV use in controlled areas (including customary practices, fishing and craypotting access, recreational access).

37 The Issues and Options paper identified 4 options as follows:

- Option 1: do nothing (unrestricted access)
- Option 2: prohibit all motor access along the length of Marlborough's East Coast
- Option 3: Use physical constraints to restrict vehicle access to and along the East Coast
- Option 4: Identify locations where motor vehicle use is appropriate and prohibit the use of motor vehicles from the balance of the coast (restrict access)

38 The Issues and Options paper identified the relevant pros and cons of each option. It also noted that:

"Options 1 and 2 are absolute, either the environmental and ecological values are favoured or motor vehicle users are. The third option is an option that would work alone or be complimentary to options 1 and 4. Option 4 is a compromise."

39 The Officer recommendation supported Option 4, subject to conditions. This was a "compromise option" that allowed some motor vehicle use while protecting key values identified as the most important by the NZCPS (p31). Accordingly, their advice (p.42) was to prepare a bylaw under the Land Transport Act that:

"Restricts motor vehicle access between the Awatere River and the Waima / Ure River except for boat launching at Ward Beach and Marfells Beach.

For the balance of the East Coast allow motor vehicles access to the beach between Waima / Ure River and the District Boundary in the south with a speed restriction of 30km/hr.

Provision is made for emergency or law enforcement purposes.”

- 40 Reference to option 4 being a “compromise” is arguably correct, but perhaps too simplistic, as Option 4 balances competing wellbeing considerations, including the importance of cultural values and practices, as well as ecological bottom lines. The Commissioners support a variant of Option 4 (which falls within the spectrum of outcomes sought by submitters).
- 41 The Issues and Options paper identified relevant policy instruments (such as the NZ Coastal Policy Statement 2010), and the Proposed Marlborough Environment Plan. We have considered these instruments, as relevant to background, and therefore adopt without repeating Section 5 of the Issues and Options paper. Perhaps more relevantly, we received information and a Report from independent expert, James Bentley. Mr Bentley provided additional information on the outstanding landscape values, high to very high natural character values present, and how these values may be at-risk from uncontrolled vehicle access within the proposed bylaw area.<sup>27</sup> This included the Awatere and Blind River mouths and the extent of coastline from Marfells Beach to the Waimea (Ure) River (high or very high levels of natural character); marine environments around Te Karaka/Cape Campbell, and the coastal erosional features of the Needles and Chancet Rocks (outstanding natural character). Mr Bentley’s considered opinion was that any sustained and continued vehicle use in this sensitive environment will adversely affect the landscape values and reduce natural character qualities; Mr Bentley supported Council’s attempt (through the as-notified Bylaw) to limit vehicle use on these beaches.

## **STATEMENT OF PROPOSAL**

- 42 The Statement of Proposal was issued in parallel with the Technical Report (v5) in July 2021. The proposal was notified for public consultation using the Special Consultative Procedure of the LGA 2002. Under the LGA,

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<sup>27</sup> James Bentley Report (13 Dec 2021), Mr Bentley also appeared (virtually) at the May 2022 hearing to answer our questions

Council was required to consider whether a Bylaw is the most appropriate way of addressing the perceived problem. Council considered 6 options, as follows:

- (1) Do nothing, unrestricted vehicle access;
- (2) Use voluntary methods and actions to influence and change behaviour;
- (3) Use physical methods to stop access to all or parts of the east coastal some or all of the time;
- (4) Stopping the unformed legal road under s342 and Schedule 10 LGA 1974;
- (5) Add zone rules to the Marlborough Environment Plan;
- (6) Make a Bylaw under the Land Transport Act 1988 and the LGA 2002.

43 Having set out the advantages and disadvantages of each option, Council determined that a Bylaw (Option 6) was more appropriate than Options 1 to 5, and that Options 2 and 3 could be complementary to Option 6. Council noted (and we agree) that a Bylaw recognizes and provides for preservation of natural character and protection of areas of significant indigenous flora and fauna, and that it is “..easier to maintain values than try to reintroduce them at a later time..”

44 In terms of the disadvantages to Option 6, Council relevantly (and presciently) identified that:

“..There is no definition of beach in the LTA..which makes it important to carefully define the area the Bylaw will apply to..”

“There is private land and DOC administered conservation areas and reserves along the coast that Council does not control..”

“Commercial activities may be affected..”

“Long standing users that were using vehicles to access fishing and diving spots will be impacted by a change in management of vehicles..”

## **STATUTORY FRAMEWORK**

45 The relevant statutory framework is identified in the MDC Statement of Proposal in Section 4 (pp13 to 17). We adopt without repeating that general summary, which includes the requirement that Council must

determine the most appropriate intervention. If a Bylaw is “most appropriate”, then Council must also address the most appropriate form of Bylaw:

“Under the LGA, once a local authority has determined that a Bylaw is the most appropriate way of addressing the perceived problem, it must before making the Bylaw determine the most appropriate form of Bylaw..” (p13)

- 46 We bear in mind that our role is simply recommendatory, and accordingly Council will exercise the relevant statutory powers to confirm (or otherwise) our recommendations. The Statement of Proposal candidly notes (at p15) that nominating a route for vehicles has “..proven a difficult task..” In relation to the NZ Bill of Rights Act 1990, the paper notes that :

“Access to customary fishing at Cape Campbell / Te Karaka by Te Rūnanga a Rangitane o Wairau remains but access using ATV vehicles is not an option under the draft Bylaw.”

- 47 In contrast to the as-notified Bylaw, our recommended approach enables quad bike access for customary fishing (and other uses) within the Te Karaka / Cape Campbell area. This reflects evidence provided at the hearing by Te Rūnanga a Rangitane o Wairau and Ngāti Kuia, as well as other submitters, that some form of vehicle access was reasonably required to undertake hunter/gatherer activities.

## **OVERVIEW OF SUBMISSIONS RECEIVED**

- 48 As identified at the hearings, a wide spectrum of outcomes was sought by submitters. This ranged from full support for the as-notified Bylaw (thereby removing all vehicle access<sup>28</sup> north of Waima (Ure) River); through to total rejection of the proposed Bylaw, on the basis that no restrictions should be imposed on any form of vehicle access (whether ATV/UTV or 4WD). Some submitters were open to limits on access, such as spatial, seasonal, or vehicle restrictions.
- 49 Many submitters provided detailed evidence in support of their positions, and additional information is set out in our **Appendices 2, 3, 4**. Some of the high-level themes (in no particular order) included:

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<sup>28</sup> There was minimal opposition to Dominion Salt Ltd continuing access to the Saltworks jetty, and boat access as identified in the as-notified Bylaw.

- Families/whanau with small children, elderly, people who are time-poor, need vehicle access to kai moana to feed themselves and those they care for
- People don't need vehicles to access these areas, walking access is enough, and more respectful of nature
- Quad-bike access is equitable access
- Seals, sea lions, and other marine mammals need buffer zones, not vehicles, they can be found in any part of the beach environment, many parts of the beach are narrow with pinch-points above and below the high-tide mark, and encounters with marine mammals and sea-birds are inevitable all along the coast
- The entire east coast area is important habitat for shore birds, and seasonal habitat for migratory birds. Bird counts (including banded Dotterel, variable Oystercatcher) confirm risks posed by vehicles, vulnerable periods (breeding, nesting, feeding, resting) can occur throughout the calendar year, but especially when the beach areas are most popular in spring/summer/shoulder seasons
- Public rights of access to the coast, by foot, boat, or vehicle, are an important Kiwi birthright; boat access along the east coast is often unsafe, vehicle access is better and more efficient
- Vehicle travel causes far more disturbance along greater stretches of coast than walkers alone <sup>29</sup>
- rare and threatened species are already at risk, and declining, this part of the coast is (or should be) inaccessible to humans (except on foot, or from private land) to reduce or contain that risk
- high natural character and outstanding landscape values are threatened by vehicle access, especially above the high-water mark, where (given high use) wheel tracks can become permanently established (outside of storm events)
- Pimelea looper (moth) and Kiwaia (mat daisy jumper, small flightless moth). Both species totally dependent on survival of host plants. Host plants are at risk from damage by 4WD vehicles driving off formed tracks.<sup>30</sup>
- the area from Cape Campbell southwards for 3km is an important transit feeding and rest point for migratory as well as shore birds,

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<sup>29</sup> ECPG Supplementary Information (Vehicle Bylaw Hearing Points, May 2022)

<sup>30</sup> DOC Supplementary Information (09 May 2022)

any vehicles disturb this important ecological function. This includes the intertidal zone where quad bikes might otherwise travel.

- ATV/UTV users can be trusted in these sensitive areas, if they know the rules, they will respect them
- Wheel marks over sand dunes (and elsewhere) are highly damaging to protected fauna, lizards, katipo habitat, and demonstrate ATV/UTV users cannot be trusted
- Banded Dotterel are highly vulnerable to vehicle movements, with a breeding and nesting season occupying much of the year
- sand dunes include protected flora, such as pingao, spinifex, knobby clubrush, *Raoulia australis*, already these have been destroyed by vehicle access<sup>31</sup>
- tangata whenua concerns that the bylaw must actively protect their exercise of rangatiratanga, kaitiakitanga, and their ability to exercise customary fishing rights by their chosen means
- a minority of irresponsible drivers spoil it for everyone else

50 There was also variance between submitters on “where the line should be drawn” (if there was to be a line), in terms of preventing vehicles (or quad bike-type vehicles) entering unsuitable and protected habitat.

51 Commissioners are grateful to submitters for the candid expression of views provided (both in written submission, and in evidence). In short, there was a large measure of agreement on the values, but not how to protect those values.

### **TANGATA WHENUA ISSUES**

52 We received evidence from Council officers that, prior to notification, Council followed a process of consultation and engagement with the relevant Iwi Authorities, which have asserted customary or contemporary associations with the area of the proposed bylaw. A timeline of engagement was provided by Council in response to our Minute 7. Following that process of engagement, Te Rūnanga o Ngai Tahu and Te Rūnanga o Kaikōura, did not lodge submissions on the proposed bylaw, for reasons stated in their letter dated 12 October 2021.

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<sup>31</sup> See for example DOC Appendix A, Ecological values on the East Coast (rare ecosystems), post-hearing 1 information provided to Panel

- 53 At least two of the Iwi Authorities adopted sharply contrasting positions on the issue of mana whenua, mana moana. As it is not relevant to our recommendatory role, we have not addressed the issue of competing tikanga or competing strength of relationship with the proposed Bylaw area (including whakapapa, mana moana, mana whenua), refer our **Appendix 2**.
- 54 The substantive position of the two remaining Iwi Authorities that were submitters on the Bylaw was relatively similar, in the sense that both Ngāti Kuia and Rangitanē o Wairau supporting continued quad or vehicle access to enable customary and fishing practices. Our proposed Yellow Zone in part responds to this evidence.
- 55 In contrast to the position of support for the as-notified bylaw, as identified by Te Rūnanga o Ngāi Tahu and Te Rūnanga o Kaikōura, we received strongly expressed opposition to the proposed bylaw, in light of the process followed by Council in promulgating the bylaw, by Te Rūnanga a Rangitanē o Wairau.
- 56 This criticism was not limited to the draft bylaw, and extended to a range of procedural (and substantive) issues, identified by their Counsel in correspondence and legal submissions. It also extended to personal criticism of Commissioner Clayton as exhibiting objective risk of bias. This criticism was, in our view, both unjustified and unreasonable. Equally, we did not accept the assertion that the process was fatally flawed, or that Commissioners could not undertake an independent assessment of the relevant cultural effects and issues that impact the merits of the bylaw. These are matters that were traversed in our Minutes 1, 3, 4, 5, 7, 8, and the related material filed by Te Rūnanga a Rangitanē o Wairau, and relevant responses provided by Te Rūnanga o Ngāi Tahu / Te Rūnanga o Kaikōura.
- 57 We acknowledge that Te Rūnanga a Rangitanē o Wairau provided a merits-assessment of the proposed bylaw (without prejudice to their process-related (and other) criticisms). As with the contributions of all the Iwi Authorities, we found their merits assessment informative and beneficial to our assessment of the bylaws.



- 58 We recognize the importance of motorized access for customary activities, but we also recognize that Tangata Tiaki / kaitiaki have customary fishing rights preserved under the Fisheries Act 1996 (and related regulations) to gather kai moana through the "Authorisation to take for Customary Purposes". Our understanding is that this enables Māori to continue to gather kai moana within the area of the bylaw. We consider that this entitlement is not affected by the proposed bylaw (as-recommended).
- 59 Finally, for reasons initially explored in our Minutes, we do not consider that the proposed bylaw can identify or resolve the competing views of the Iwi Authorities as to the exercise of rangatiratanga, ahi kā, and mana whenua, mana moana. The Bylaw (as-recommended, see our **Appendix 1**) does not differentiate between the relevant Iwi Authorities and Hapū. Indeed, it would have been error of law, and irrelevant to our function, to do so. Further reasons are set out in **Appendix 2** to this Report.

#### **FINDINGS ON SUBMITTER THEMES**

- 60 While there was disparity between submitters on the appropriateness of regulation through bylaws, there was almost universal recognition of the outstanding landscape and natural character values, especially remoteness, wildness, dominance of nature over people, opportunities provided by the coast for fishing, harvesting, and securing kai, and the cultural landscape markers, both natural and spiritual.
- 61 Coastal and natural character values are a drawcard for people, but uncontrolled vehicle access has already created significant adverse effects to the natural environment, as evidenced by wheel and track marks embedded above the high-water mark, in some cases extending to protected sand dune areas.
- 62 Absence of vehicle controls since the Kaikōura earthquake has resulted in some anti-social activities, including careless or dangerous driving on beaches and sand dunes, night-time driving in areas that are habitat for protected marine mammals, "hooning" as evidenced by wheel marks and "doughnuts" above and below high water tide mark, and including sand dunes, and the ongoing risk to protected flora and fauna.
- 63 As is often the case, the few can spoil it for the many. A number of the submitters that presented evidence and information were emphatic that

responsible use of ATV/UTV's (and/or other 4WD vehicles) could be undertaken responsibly, on the premise that "respect gets respect".

- 64 We were to some extent persuaded by that evidence, reflecting a strongly held community belief that people are stewards (and tangata whenua are kaitiaki) of their natural environment. This community-trust model is reflected in our recommended option, which continues ATV/UTV access (to a greater extent than identified in the Statement of Proposal).
- 65 There were, of course, competing views, to the effect that the natural environment was too vulnerable to be exposed to ongoing risk of harm; and compelling evidence was provided of actual and potential adverse effects caused by responsible and irresponsible vehicle use throughout the proposed bylaw area. A number of species are regionally, nationally, or internationally rare, some only found along this stretch of coast. Some species, such as Banded Dotterel, are highly vulnerable to all forms of vehicles, especially during breeding and nesting season. Marine mammals are protected species, and (by law<sup>32</sup>) people must keep minimum distances away from seals, sea lions, and other marine mammals.
- 66 Given the wide-ranging views held by submitters, our proposed changes are more enabling of ATV/UTV access than the proposed bylaw (as-notified). ATV / UTV access during daylight hours, within the Yellow Zone, provides for the wellbeing of tangata whenua, and the wider community, and enables continued exercise of customary gathering, kaitiakitanga, stewardship, and recreational use, while enforcing environmental bottom lines intended to protect rare and vulnerable flora and fauna from adverse effects of vehicle use.
- 67 Our recommended changes to the proposed Bylaw do not address or impose any restrictions on customary fishing rights recognized by Treaty settlement legislation. This was outside the scope of our powers and the proposed Bylaw. Equally, we have not undertaken an exercise of recognizing the strength of relationship of any one particular Iwi or Hapū, in priority or preference to any other Iwi or Hapū. This was also outside the scope of our powers and the proposed Bylaw, for reasons identified in

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<sup>32</sup> We refer to the Marine Mammals Protection Regulations 2002, noting that it is the Department of Conservation's duty to enforce these regulations.

this Report (and our earlier Minutes, which were the subject of detailed legal submissions, as noted in **Appendix 2**).

- 68 In summary, we consider that enabling UTV/ATV access, from the DOC reserve at Marfell's Beach, in a 9km corridor south of the Lighthouse to the "Airstrip", during daylight hours, provides for the wellbeing of tangata whenua, and the wider community, while avoiding, remedying, and mitigating effects to the native flora and fauna.
- 69 This level of ATV/UTV access is intended to give limited equivalence to vehicle access "pre-earthquake". It represents about 9.09 km of additional vehicle access to that proposed by the draft Bylaw. By contrast, there will be greater opportunity for nature, and coastal processes, to restore a natural balance in the "Red Zone" areas where all vehicles are prohibited.

#### **EXISTING BUSINESS ACTIVITIES**

- 70 We received submissions from existing businesses that rely on vehicle access at Ward Beach, and the Saltworks jetty (being Burkhart Fisheries Ltd, Lanfar Holdings (No.4) Ltd, and Dominion Salt Ltd.) These businesses would be materially affected if the proposed Bylaw prevented their continuing vehicle access, for the purposes of exercising existing use rights and/or resource consents. In the case of Lanfar and Burkhart, the safety of their commercial fishing ventures would be compromised if they were unable to maintain ingress and egress for their fishing fleet at Ward Beach. We have therefore recommended amendments to the proposed Bylaw. A further explanation is set out in our **Appendix 4**.

#### **WAIMA (URE) BUFFER ZONE**

- 71 We are also concerned with the vulnerable ecology and habitat at (and surrounding) the Waima (Ure) estuary and river-mouth. The lower riverbed and river mouth was identified by ECPG as a major migratory roost and feeding area for black-billed gulls, and other bird species (including banded dotterel, white fronted tern, black fronted tern).<sup>33</sup>
- 72 We have therefore recommended an enlarged buffer zone, where vehicle use would be prohibited. This additional "Red Zone" may require further consultation by Council (as this area was shown as a "Green Zone" (i.e.

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<sup>33</sup> ECPG Vehicle Hearing Bylaw Points (Hearing 2, May 2022)

vehicles allowed) in the notified Bylaw); and (in any event), we recommend that Council consult with Te Rūnanga o Ngai Tahu/ Te Rūnanga o Kaikōura, as we understand that their statutory nohoanga is located directly adjacent to the Waima (Ure) rivermouth, and may be affected positively or negatively by any vehicle prohibition in this area.

- 73 If Council does not accept our recommendation to create a new buffer zone at Waima (Ure) river-mouth, then our fall-back recommendation is to support the notified "Green Zone" area, which has a smaller buffer zone. For our part, we see that as undesirable given the ecological values of the Waima (Ure), and potential restoration over time (if traffic is prohibited). Keeping vehicles away from the Waima (Ure) reduces the risk of vehicles crossing the river, and heading further north to the Needles. This buffer area should not be treated as a "sacrifice-zone" for vehicles.

## LICENSING

- 74 Finally, we recommend that Council consider whether to require that ATV / UTV users obtain a license from Council for use within the Yellow Zone. We consider that a licensing requirement is likely to assist with identification of ATV/UTV users; it may also promote an educative function, about the cultural, natural character, and biodiversity values present. By analogy, Tauranga City Council requires that ATV users hold a licence under their Beaches Bylaw 2018.
- 75 We recognize that this is something of a departure from the proposed Bylaw (as notified). Accordingly, we have not drafted changes to the proposed bylaw to reflect this recommendation pending Council deliberations (and any further consultation process).
- 76 In this context, it is perhaps relevant to note that Dr. Shane Orchard's paper acknowledges (on a qualified basis) that

"..in theory, a combination of low-impact vehicle access and environmental protection could generate win-win outcomes from the landscape changes, but is difficult to achieve in practice."<sup>34</sup>

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<sup>34</sup> Dr. Orchard's paper (Abstract) also identified the substantial risks posed by vehicle strikes to nesting success, with 91% and 83% of nests destroyed in high and moderate-traffic areas; detailed information on sensitive areas is (in his opinion) required to guide regulatory action.

- 77 Dr Orchard’s paper also notes that difficulties for the enforcement of regulatory measures in remote areas suggest a need for motivational strategies that incentivize low-impact behaviours. Licensing, and early monitoring of the efficacy of the Bylaw (if implemented) may assist in that process.
- 78 In contrast to Tauranga City Council’s Beaches Bylaw 2018, we do not consider that the sole purpose of ATV/UTV use should be for fishing. Many of the submitters, including Iwi Authorities, noted that quad bikes are mostly used for fishing, but may also provide access for other customary activities, or (for the wider community) stewardship of the general environment, or simply a general appreciation of remote nature.
- 79 Another issue relating to licensing (which was outside the scope of the notified Bylaw), is that Council may wish to consider delegating authority to Iwi and Hapū Authorities, to issue licenses, albeit on exactly the same terms (and at the same cost) as Council. This could be a step towards a wider partnership that recognises the customary authority of the relevant Iwi and Hapū in the coastal environment, while maintaining a single license system for all.

### **BYLAW DRAFTING**

- 80 We have suggested some minor technical edits to the proposed Bylaw, in an attempt for clarity. Depending on perspective (and legal or officer advice), these may be considered helpful, or unhelpful. If Council decides to adopt our Yellow Zone for ATV/UTV, then a definition of those vehicles will (of course) be required.
- 81 Our key amendments are spatial ones, and relate to mapping the proposed Yellow Zone (for ATV/UTV access), exemptions for business-related activities at Ward Beach (and the Saltworks jetty), and (for Stage 2), the newly proposed buffer area, which extends the Red Zone, at Waima (Ure) River.
- 82 We agree with the proposed exemption in the as-notified Bylaw for “Agency” vehicles (such as police, fire, ambulance, and including DOC, Council, and coast-guard/life-savers). These services are generally under statutory duties, that require vehicle access to coastal areas. With

privilege, comes responsibility. These agencies can rightly expect that the wider community will monitor whether the exemption is appropriately respected.

## RECOMMENDATIONS

83 Accordingly, we recommend that Marlborough District Council (**Council**)

(1) Adopt a 2-staged approach to our recommendations:

### Stage One (for immediate introduction):

- (a) Confirm the proposed bylaw (as-notified) but introduce a “Yellow Zone” to enable legal vehicle access during daylight hours, at or below mean high water springs, for ATVs and UTVs only, from the DOC reserve at Marfells Beach, to north of a line adjacent to the “Airstrip” (which is proximate to Te Karaka/Cape Campbell). This area restores to the community, a degree of quad bike access not dissimilar to what was available before the 2016 earthquake, while introducing environmental bottom lines for protection of cultural, natural character, and biodiversity values.
- (b) For clarity, the Marfells entry point for the Yellow Zone should be at the southern-most vehicle access point shown in Appendix 8, Vehicle Access Map 1, to the MDC Technical Report (July 2021); or, if agreed by DOC, then the southern-most vehicle access point available from the DOC Recreation Reserve at Marfells Beach.<sup>35</sup> The indicative area of the Yellow Zone is identified in the **Plan** attached to this Report.
- (c) Confirm business vehicle access for Dominion Salt Ltd at the Saltworks jetty area at Marfells Beach; and confirm business vehicle access for Burkhart Fisheries Ltd / Lanfar Holdings (No.4) Ltd, at the Saltworks jetty area, and at Ward Beach (within identified corridors), as generally

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<sup>35</sup> We acknowledge that DOC may need time to respond to having the main access point through the camp portion of the recreation reserve. Although in practice, we understand this already happens. The intent is to minimize ATV/UTV travelling in front of the DOC reserve, along the beach, (in keeping with submitter requests) to avoid vehicles on the beachfront where families may be congregating for picnics, swimming or other activities. See for example, RAWE presentation by Roger Hambleton, Hearing 1 (23 Nov 2021: “..**people using vehicles in this area are not fishermen or sightseers, but are people using vehicles as toys. This is the main area used by families and children playing on the beach..**”

identified in our **Appendix 4**, but with the final lines to be confirmed by Council, following a ground-truthing and GPS exercise.

- (d) Subject to those amendments, we otherwise recommend that the Bylaw be approved in its as-notified form, but with consequential amendments shown in tracked changes in Appendix 1 to this Report.

**Stage Two (subject to further public consultation):**

- (e) extend the “Red Zone” and prohibit all vehicle access, in a new buffer zone from the true right bank of the Waima (Ure) River southwards, the intent being to create a buffer zone for the vulnerable stream and estuarine ecology, and habitat for indigenous flora and fauna (particularly banded Dotterel). The area of the buffer zone (where vehicles are prohibited under the bylaw) would mirror, or closely match, the footprint of the corresponding DOC reserve land.<sup>36</sup>
- (f) remove public vehicle access at Ward Beach, in light of safety concerns;
- (g) establish a licensing system for ATV/UTV users within the Yellow Zone;
- (h) introduce an early review of the efficiency and effectiveness of the proposed Bylaw, in third quarter 2025, to assess whether ATV/UTV access in the Yellow Zone is being undertaken responsibly and in a manner that protects the biodiversity, natural character, and cultural values present.

**Advice Note:**

We recognize that Council officers will need to undertake GPS and/or ground-truthing to map the Yellow Zone, and the business-exempt areas at Ward Beach and the Saltworks jetty. This may result in some minor changes to the areas identified in our recommendations.

**Dated** this 15th day of July 2022

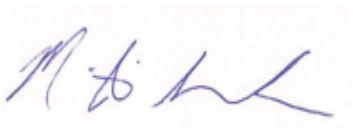


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**Rob Enright**  
**Chair**

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<sup>36</sup> The relevant DOC Estate area is shown in green in the MDC Issues and Options Paper, at Figure 20.



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**Ma-rea Clayton**  
**Independent Commissioner**

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**Councillor David Croad**



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# Appendix 1: Marked-up Version of Bylaw as recommended

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## 5. Draft Bylaw

### Marlborough District Council East Coast Beach Vehicle Bylaw [Insert Year]

This Bylaw is made under sections 22AB(1)(d), 22AB(1)(f) and 22AB(1)(g) of the Land Transport Act 1998. The Local Government Act 2002 applies to this Bylaw.

#### 1. Title

This Bylaw is the Marlborough District Council East Coast Beach Vehicle Bylaw [year].

#### 2. Commencement

This Bylaw comes into force on [date].

#### 3. Application

This Bylaw applies within the Marlborough District.

#### 4. Purpose

The purpose of this Bylaw is to—

- (a) protect the environment;
- (b) allow the environment to recover from the effects of the Kaikōura earthquake in 2016;
- (c) protect and preserve sites of significance to tangata whenua;
- (d) protect and preserve historic heritage;
- (e) protect, promote and maintain public health and safety; ~~and~~
- (f) ~~protect the public from nuisance; and,~~
- (g) enable limited day-time access at or below mean high water springs within the Yellow Zone (but excluding reef structures), for ATVs and UTVs, to enable fishing, harvesting, customary practices, and equitable access for Marlborough communities.

By regulating the use of motor vehicles on Beaches in the Marlborough District.

### Part 1 Interpretation

#### 5. Definitions

In this Bylaw, unless the context requires otherwise,—

##### ATV / UTV js defined as:

ATV = All Terrain Vehicle (Quad Bike)

UTV = Utility Task Vehicle (Side by Side)

ATV/UTV means a vehicle with or without motorcycle controls and equipment that:

- Is principally designed for off-road use
- Has 3 or more wheels running low pressure tyres
- Has a gross weight of less than 1000kg.

##### Does not include:

- Utes or light trucks, even if modified for off-road travel, these are originally constructed for road use and are too heavy to meet the definition. For clarity, dune buggies are also excluded from the definition of ATV/UTV.

**Authorised agency** means Marlborough District Council, New Zealand Police, Fire and Emergency New Zealand, any Emergency Ambulance Service, Department of Conservation, any Central Government Department or Ministry, the National Institute of Water and Atmospheric Research and any surf lifesaving club registered with Surf Life Saving NZ:

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**Beach**<sup>1</sup> means the foreshore being any area covered and uncovered by the ebb and flow of the tide, and any adjacent area which can reasonably be considered part of the beach environment including areas of sand, pebbles, shingle, dunes or coastal vegetation or the confluence of any river, but does not include any private property or land administered by the Department of Conservation. The definition of "beach" is not relevant where a Bylaw made under any provision aside from sections 22AB(1)(d) and s22AB(1)(f) Land Transport Act 1998.

**Council** means the Marlborough District Council or any officer authorised to exercise the authority of Council:

**Daylight hours** means insert standard definition, allows for summer, winter variance

**Dune** means any natural hill, mound or ridge of sediment, or any series of such, landward of a coastal beach or on the border of a large lake or river valley that is deposited by wind action or storm over wash, and sediment deposited by artificial means and serving the purpose of storm damage prevention or flood control and includes three metres of the beach immediately adjacent to the toe of the dune, but does not include any private property or any land administered by the Department of Conservation:

**Motor Vehicle** has the same meaning as in section 2(1) of the Land Transport Act 1998.

At the time of commencement of this Bylaw, motor vehicle —

- (a) means a vehicle drawn or propelled by mechanical power; and
- (b) includes a trailer; but
- (c) does not include—
  - (i) a vehicle running on rails; or
  - (ii) repealed; or
  - (iii) a trailer (other than a trailer designed solely for the carriage of goods) that is designed and used exclusively as part of the armament of the New Zealand Defence Force; or
  - (iv) a trailer running on 1 wheel and designed exclusively as a speed measuring device or for testing the wear of vehicle tyres; or
  - (v) A vehicle designed for amusement purposes and used exclusively within a place of recreation, amusement, or entertainment to which the public does not have access with motor vehicles; or
  - (vi) A pedestrian-controlled machine; or
  - (vii) A vehicle that the Agency has declared under section 168A is not a motor vehicle; or
  - (viii) A mobility device.

"Business-exempt areas" are identified in Pink and Purple hatching in Schedule 1

"Yellow Zone" is the area identified in Yellow hatching in Schedule 1

## Part 2 Access to the east coast

### 6. Access to the east coast by motor vehicle

1. Subject to (2) and (3) below, no person may cause any motor vehicle to enter any beach as defined at Part 1 of this Bylaw at any time. The extent of the beach area is identified with red hatching in Schedule 1 for the purposes of guidance only. This part of the Bylaw is authorised by s22AB(1)(f) LTA.
2. Subject to (3) below, persons may drive a ATV / UTV at a maximum speed of 30 kilometres an hour in the area identified in the Yellow Zone during daylight hours and at or below the mean high water mark. No ATV/UTV use is permitted on reef structures. In case of emergency, persons may drive an ATV / UTV above the mean high water mark, but not on or in any dunes. For clarity, only ATV / UTV may be driven in the Yellow Zone. No other motor vehicles are allowed under any circumstances.
3. No person may cause any motor vehicle to enter any dune on Council controlled land at any time. This part of the Bylaw is authorised by s22AB(1)(f) LTA.
4. No person may cause any motor vehicle to enter the unformed legal road identified in Schedule 1 at any time. This part of the Bylaw is authorised under s22AB(1)(g) LTA.
5. No person may drive a motor vehicle at a speed of more than 30 kilometres an hour on the Beach as defined in Part 1 of this Bylaw, ~~from the edge of the buffer zone (which is located 250 metres from the~~

<sup>1</sup> Drafting note for Council: whether the definition of "Beach" needs to be linked to the area identified in Schedule 1, this may further clarify the scope of the Bylaw 2.

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southern edge of the Waima (Ure) River) and the southern edge of the Marlborough District Boundary. The extent of the beach area where vehicle use is permitted is identified with yellow hatching in Schedule 1 for the purposes of guidance only. This part of the Bylaw is authorised by s22AB(1)(d) LTA.

## 7. Exemptions

1. Notwithstanding Bylaw 6, any person may cause a motor vehicle to enter an area where motor vehicle access is otherwise prohibited:

- (a) To launch or retrieve a vessel provided that the person causes the motor vehicle to only:
  - (i) Enter a boat launching area at Marfells Beach. The extent of the launching area is identified as solid blue areas on Map XY in Schedule 1 for the purposes of guidance only; and
  - (ii) take the most direct route between the entry point and the sea; and
- (b) To access any part of the beach set aside for motor vehicles, such as a driveway, a carpark, or a shared path.

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2. Nothing in this Bylaw applies to an employee, contractor or nominee of an authorised agency who is carrying out the lawful functions or activities of that agency.

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### Business-exempt Areas

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3. Nothing in this Bylaw applies to Dominion Salt Ltd, and its successors, assignees, employees, contractors, or nominees, in the area identified in the Pink Zone (being the same corridor widths as identified by Appendix 21 to the Marlborough Environment Plan).

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4. Nothing in this Bylaw applies to Burkhart Fisheries Ltd and Lanfar Holdings (No 4) Ltd, and its successors, assignees, employees, contractors, or nominees, in the area identified in the Purple Zone, being:

(a) the spatial area at Ward Beach that is identified in resource consent U191050, including any relevant successor resource consent;

(b) 55 metres either side of the centre point of the Salt-works jetty, as shown on the map.

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## 8. Further conditions of access

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1. Any person operating any vehicle, on any part of the beach must show due consideration for other users of the beach.

2. Any person operating any vehicle on the beach, shall operate that vehicle in a courteous, appropriate, safe and responsible manner, giving due consideration to other vehicle operators and to other users of the beach at all times.

3. Any person operating any vehicle on the beach shall not operate that vehicle in such a manner as to present a real or implied danger or threat to the wellbeing and safety of any other user of the beach at all times.

4. For the purposes of clauses (1) to (3), "other users of the beach" includes people, marine mammals, avifauna, and protected, rare or threatened indigenous flora and fauna.

9. Application

1. For the avoidance of doubt, nothing in this Bylaw affects—
  - (a) any persons access to the dunes and to the rest of the beach as defined in Part 1 other than by motor vehicle; and
  - (b) any persons access to the east coast for commercial fishing to the extent that that right to access was permitted before the commencement of this Bylaw.

[Note: Walking, cycling, horse riding, and access by vehicles that are not motor vehicles as defined in the LTA, continue to be unrestricted on the whole of the east coast].

### Part 3 Enforcement and penalties

10. Breaches of Bylaw

1. Any person who fails to comply with this Bylaw commits an offence under the Land Transport Act 1998, as set out in Schedule 2. The following penalties apply:
  - (a) Breach of Bylaw made under LTA (infringement offence): \$150.
  - (b) Breach of Bylaw made under LTA (ordinary offence): fine not exceeding \$1000.

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## Schedule 1: Draft Bylaw Maps

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### Legend

- Pedestrian Access Point
- Vehicle Access Point
- Boat Launching Site
- Vehicles Prohibited
- Vehicles Allowed
- Only ATV/UTV Vehicles Allowed, during daylight hours at or below MHWS
- State Highway 1
- Roads

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## Schedule 1 : East Coast Beach Vehicle Bylaw Map 1 - Overview





**Legend**

-  Vehicles Prohibited At All Times
-  Unformed Legal Road within bylaw area
-  DOC Public Conservation Area
-  Legal Road Parcels (outside bylaw area)

*Clifford and Cloudy Bay Marine Mammal Sanctuary*



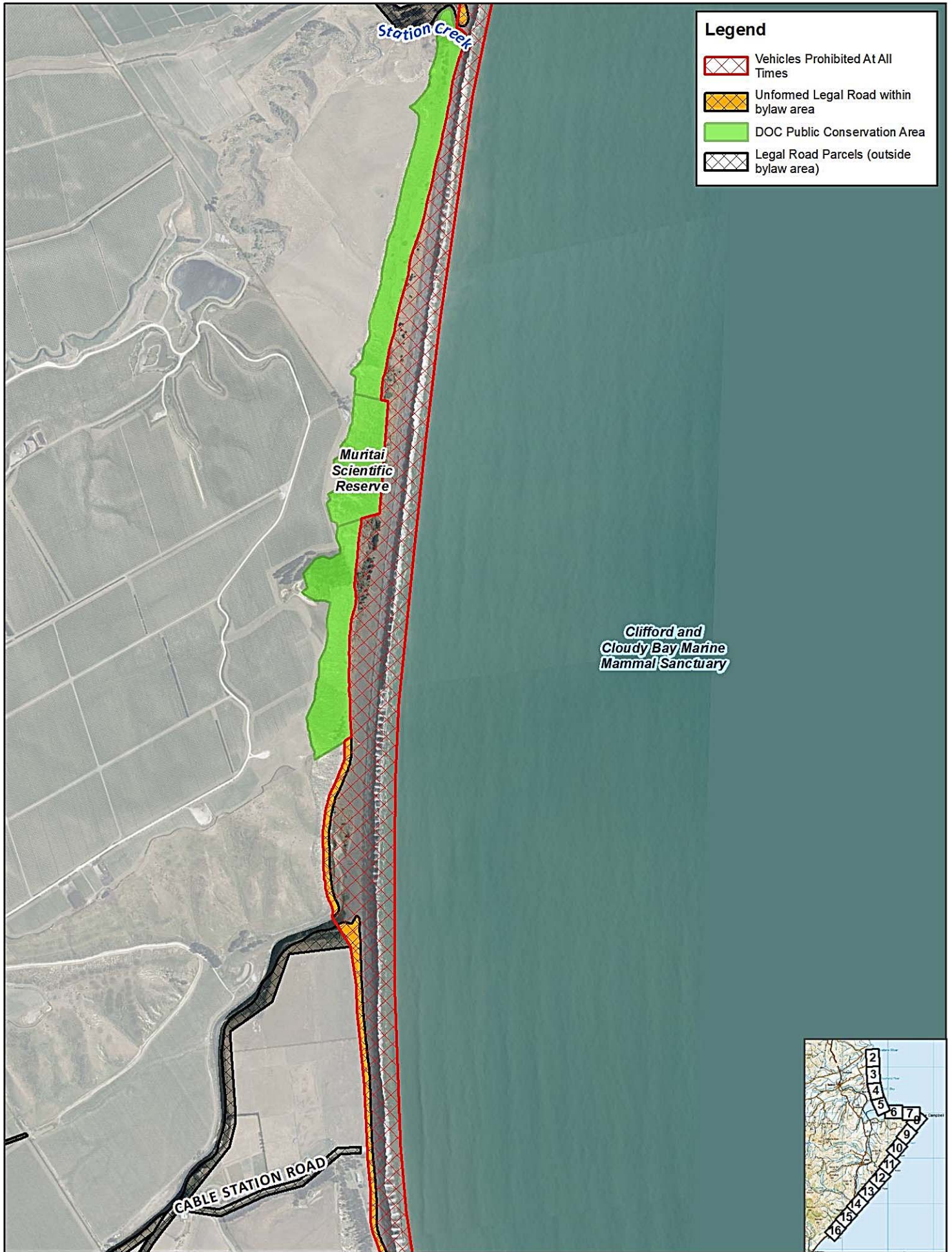
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**Schedule 1 : East Coast Beach Vehicle Bylaw  
Map 2**

 **MARLBOROUGH DISTRICT COUNCIL**





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**Schedule 1 : East Coast Beach Vehicle Bylaw Map 3**

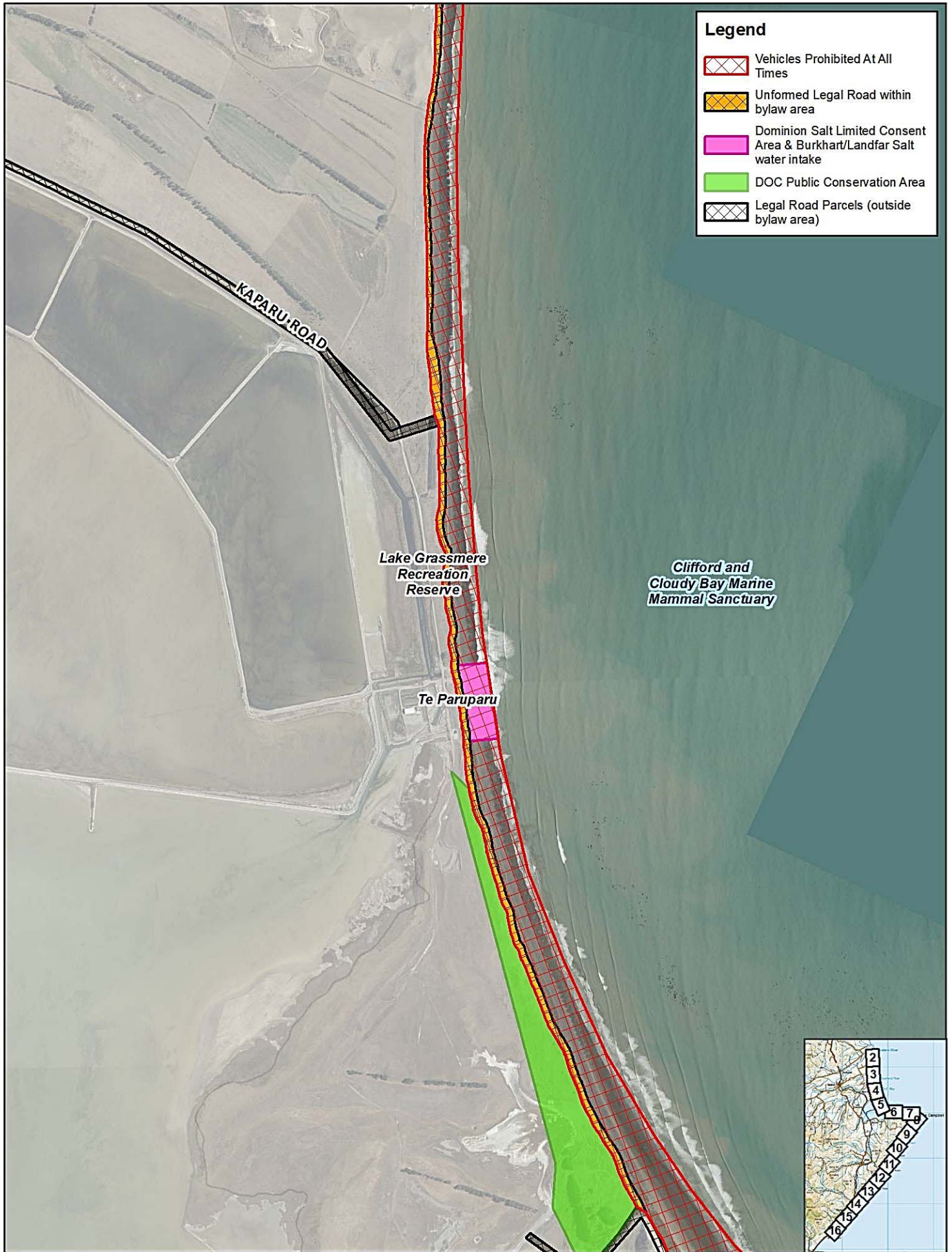




The accompanying material has been released by Council from its information repositories. Council does not accept any responsibility for the initial and ongoing accuracy to the material. It is the responsibility of the recipient to make such checks as the recipient considers appropriate to ensure accuracy. Services layers are schematic only and actual positions and level should be confirmed from Council's hard copy records.

**Schedule 1 : East Coast Beach Vehicle Bylaw Map 4**





**Legend**

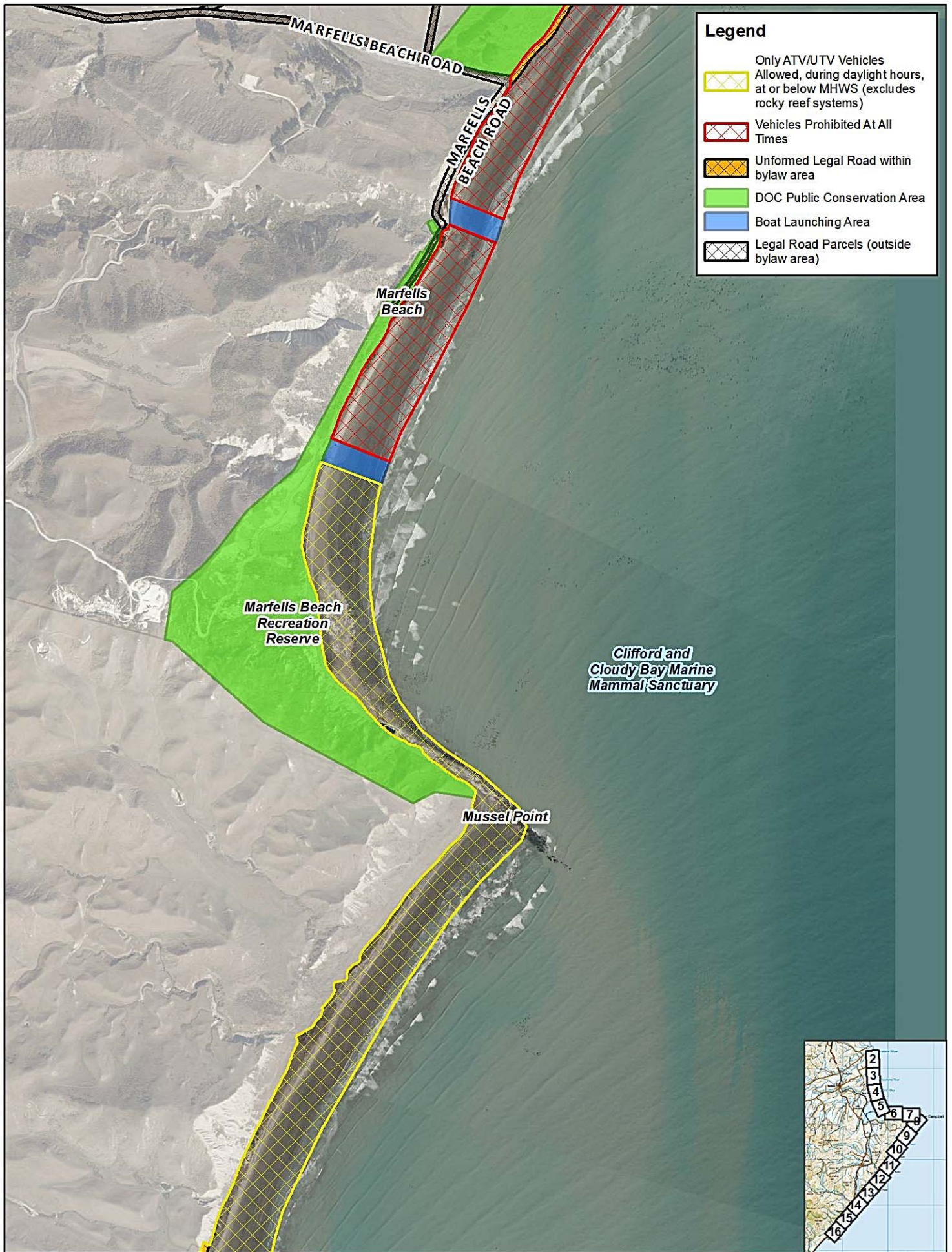
-  Vehicles Prohibited At All Times
-  Unformed Legal Road within bylaw area
-  Dominion Salt Limited Consent Area & Burkhart/Landfar Salt water intake
-  DOC Public Conservation Area
-  Legal Road Parcels (outside bylaw area)

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**Schedule 1 : East Coast Beach Vehicle Bylaw Map 5**





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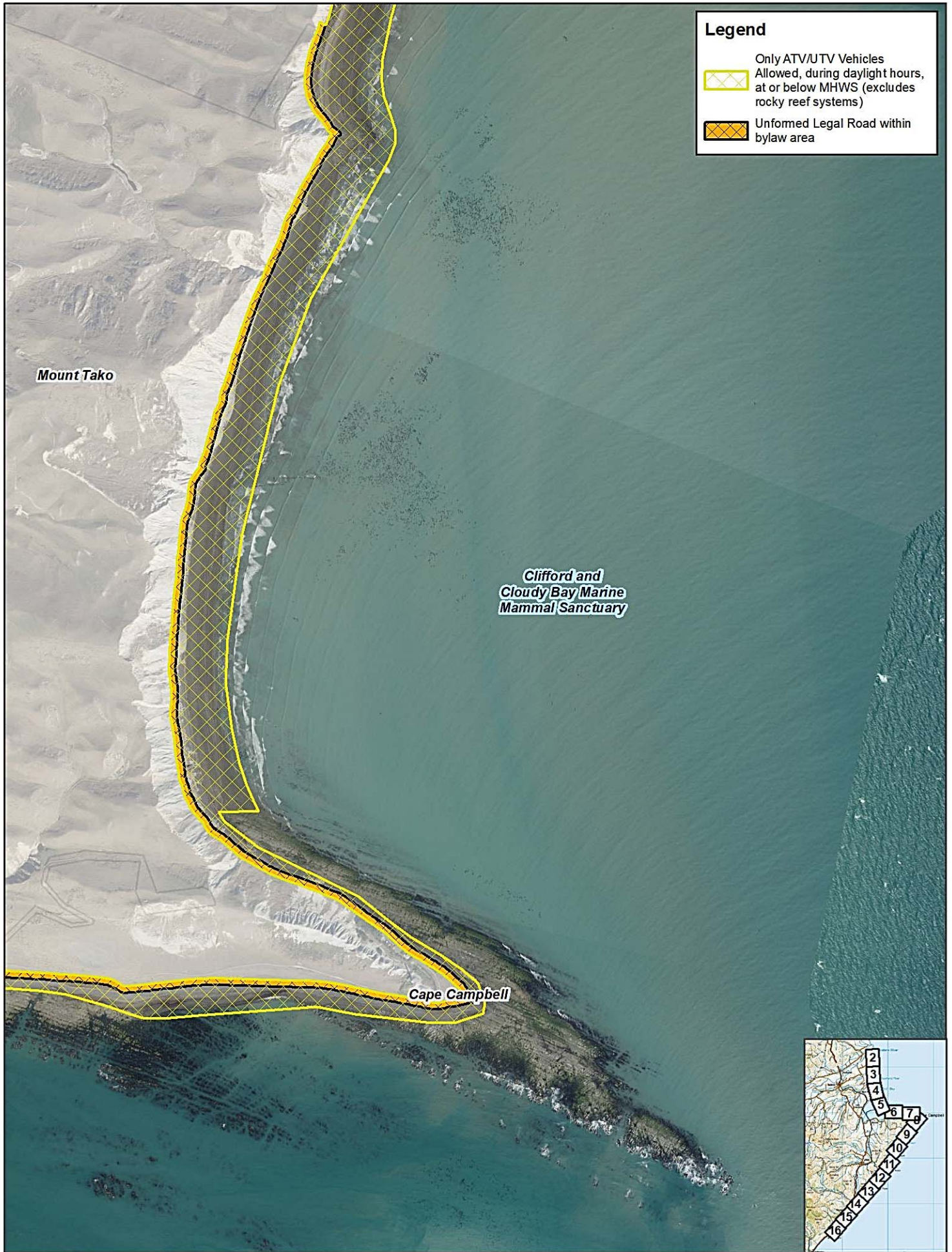
The accompanying material has been released by Council from its information repositories. Council does not accept any responsibility for the initial and ongoing accuracy to the material. It is the responsibility of the recipient to make such checks as the recipient considers appropriate to ensure accuracy. Services layers are schematic only and actual positions and level should be confirmed from Council's hard copy records.

### Schedule 1 : East Coast Beach Vehicle Bylaw Map 6






Printed By: mbe@NC7914 Date: 19/07/2022

File Name: T:\Information Systems\East Coast\Bylaw\2020\Bylaw Maps\MXD\Final Maps\East Coast\42 Vehicle Bylaw Maps.mxd



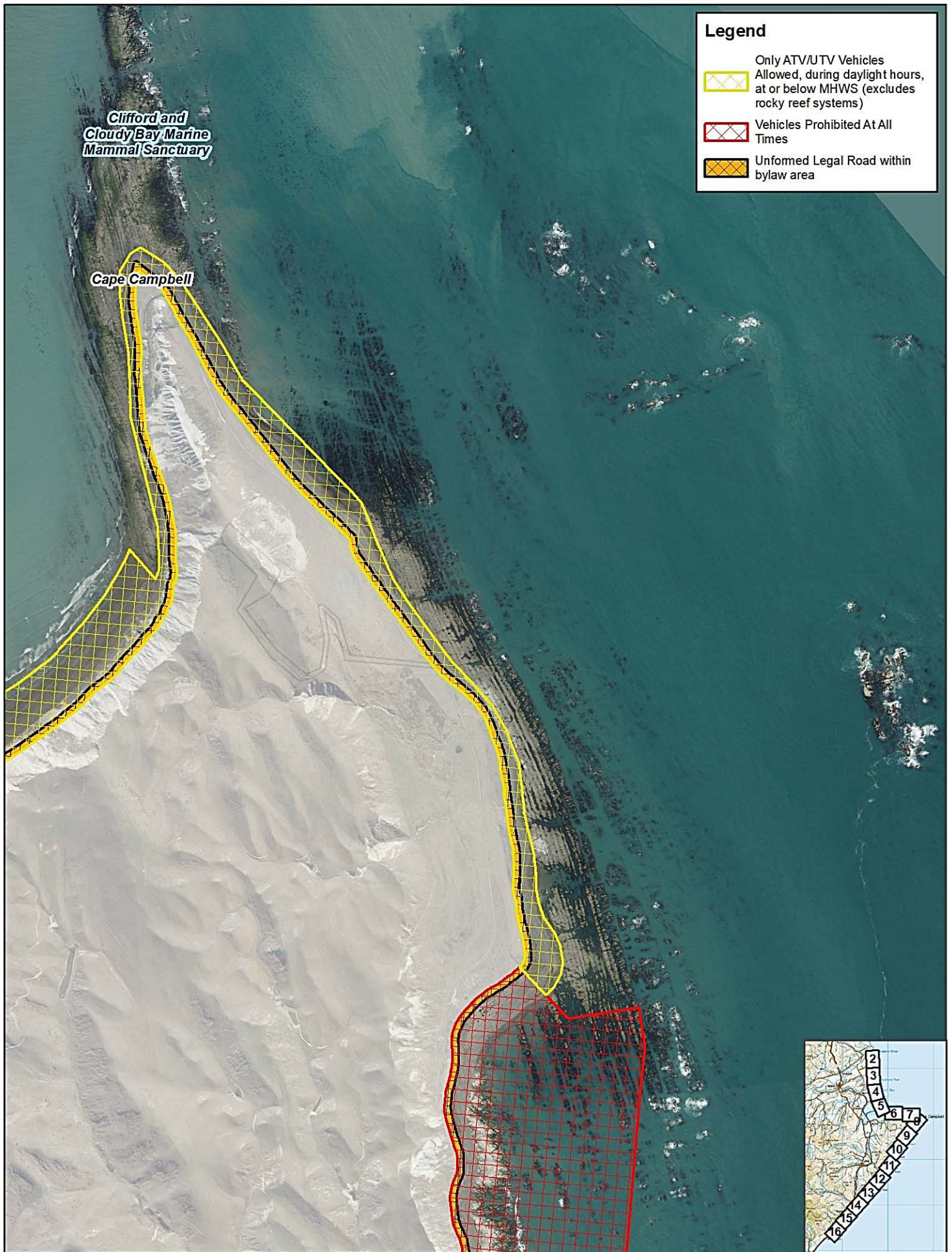
**Legend**

-  Only ATV/UTV Vehicles Allowed, during daylight hours, at or below MHWS (excludes rocky reef systems)
-  Unformed Legal Road within bylaw area

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 The accompanying material has been released by Council from its information repositories. Council does not accept any responsibility for the initial and ongoing accuracy to the material. It is the responsibility of the recipient to make such checks as the recipient considers appropriate to ensure accuracy. Services layers are schematic only and actual positions and level should be confirmed from Council's hard copy records.

**Schedule 1 : East Coast Beach Vehicle Bylaw Map 7**





**Legend**

-  Only ATV/UTV Vehicles Allowed, during daylight hours, at or below MHWS (excludes rocky reef systems)
-  Vehicles Prohibited At All Times
-  Unformed Legal Road within bylaw area

Clifford and Cloudy Bay Marine Mammal Sanctuary

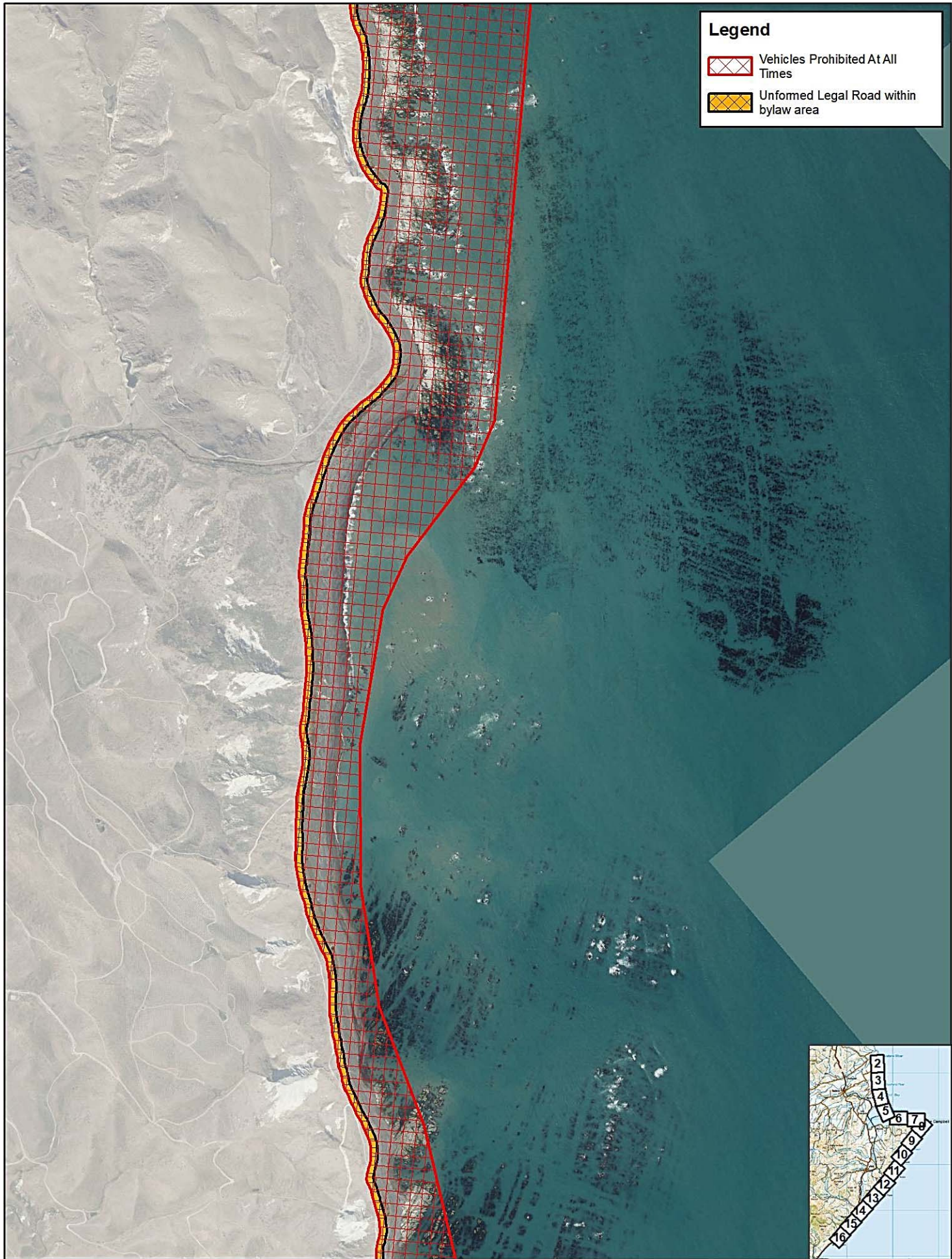
Cape Campbell

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**Schedule 1 : East Coast Beach Vehicle Bylaw Map 8**





**Legend**

-  Vehicles Prohibited At All Times
-  Unformed Legal Road within bylaw area

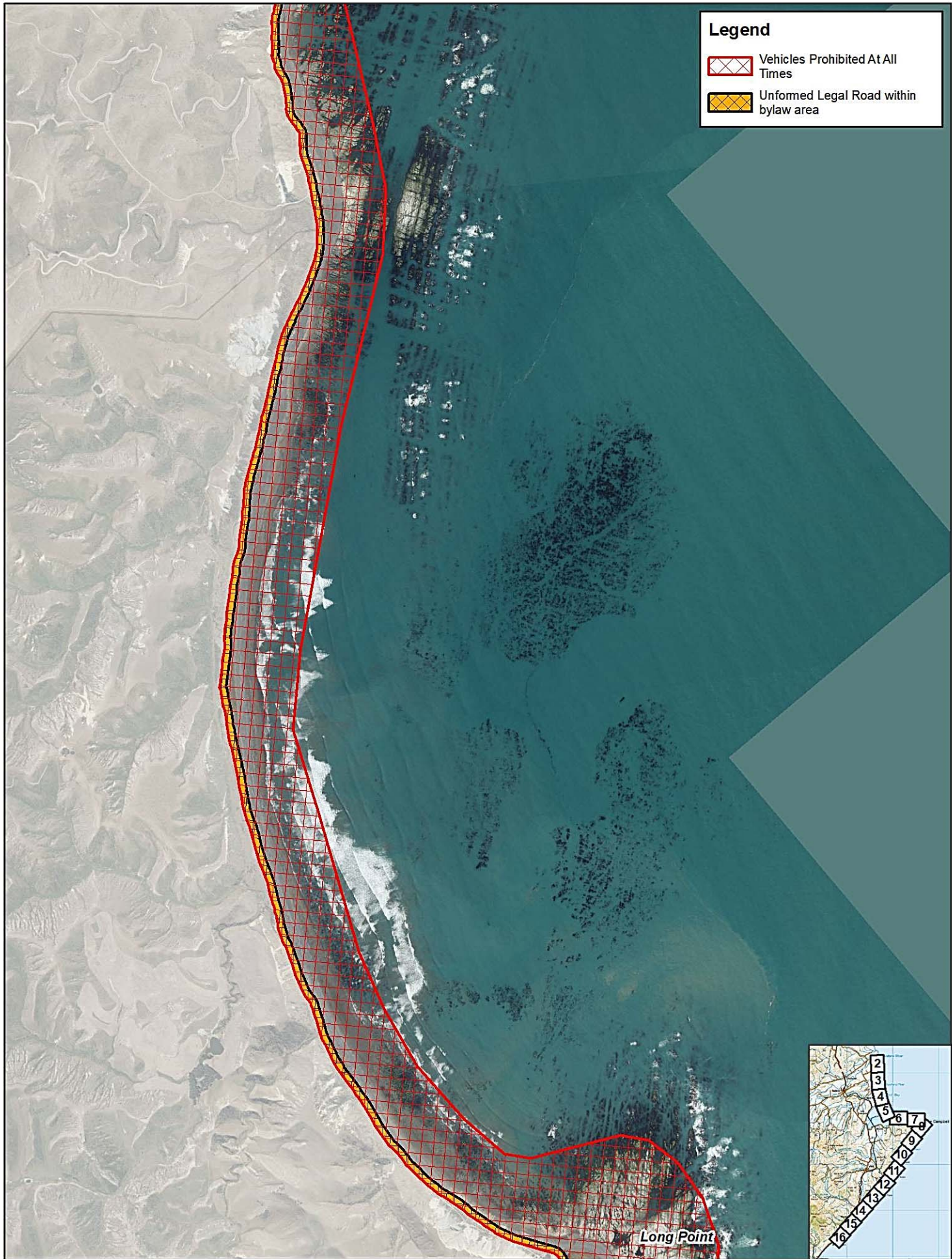
  
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The accompanying material has been released by Council from its information repositories. Council does not accept any responsibility for the initial and ongoing accuracy to the material. It is the responsibility of the recipient to make such checks as the recipient considers appropriate to ensure accuracy. Services layers are schematic only and actual positions and level should be confirmed from Council's hard copy records.

**Schedule 1 : East Coast Beach Vehicle Bylaw  
Map 9**



Printed By: mhe@ NC7914 Date: 20/07/2022



**Legend**

-  Vehicles Prohibited At All Times
-  Unformed Legal Road within bylaw area

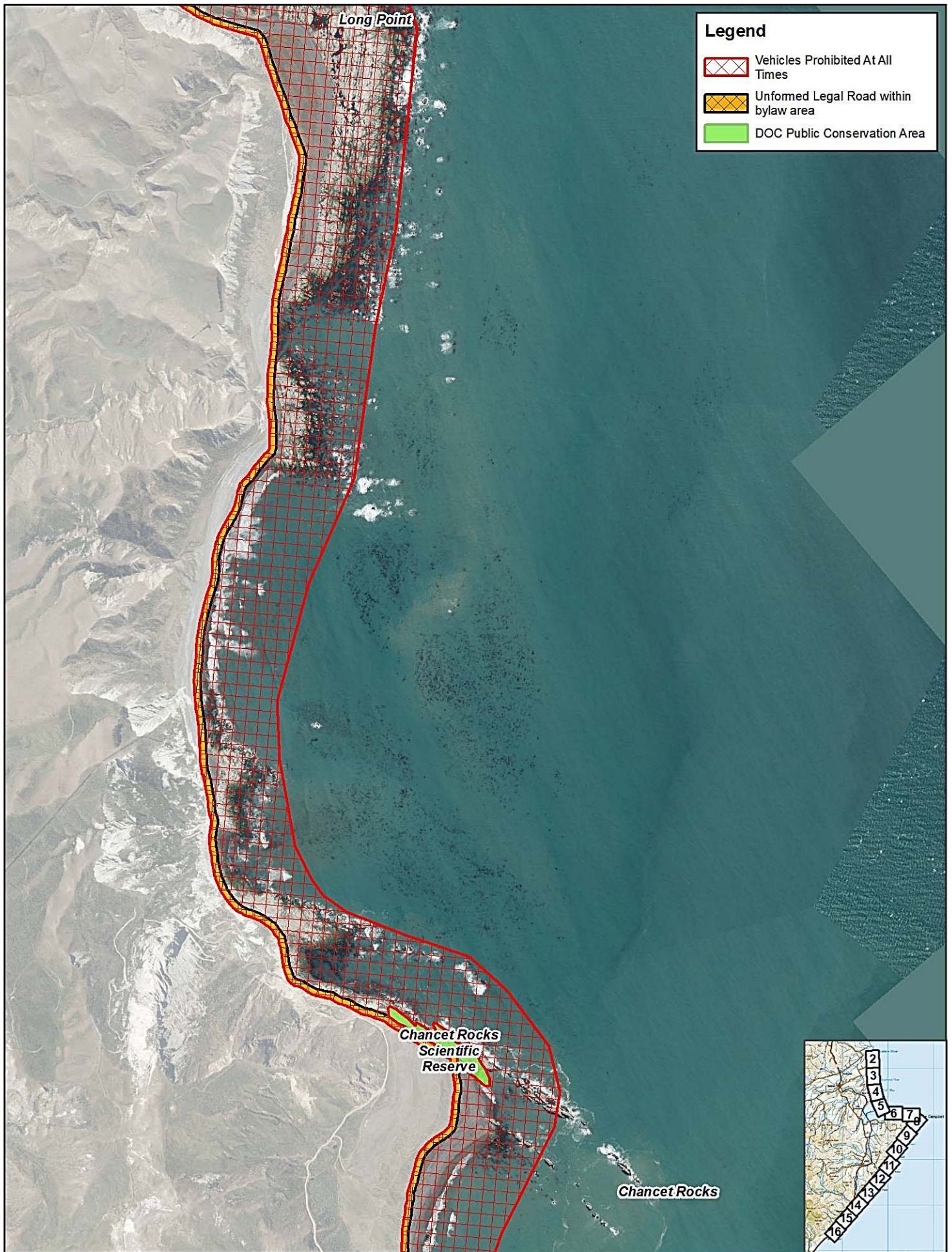
  
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The accompanying material has been released by Council from its information repositories. Council does not accept any responsibility for the initial and ongoing accuracy to the material. It is the responsibility of the recipient to make such checks as the recipient considers appropriate to ensure accuracy. Services layers are schematic only and actual positions and level should be confirmed from Council's hard copy records.

**Schedule 1 : East Coast Beach Vehicle Bylaw Map 10**







**Legend**

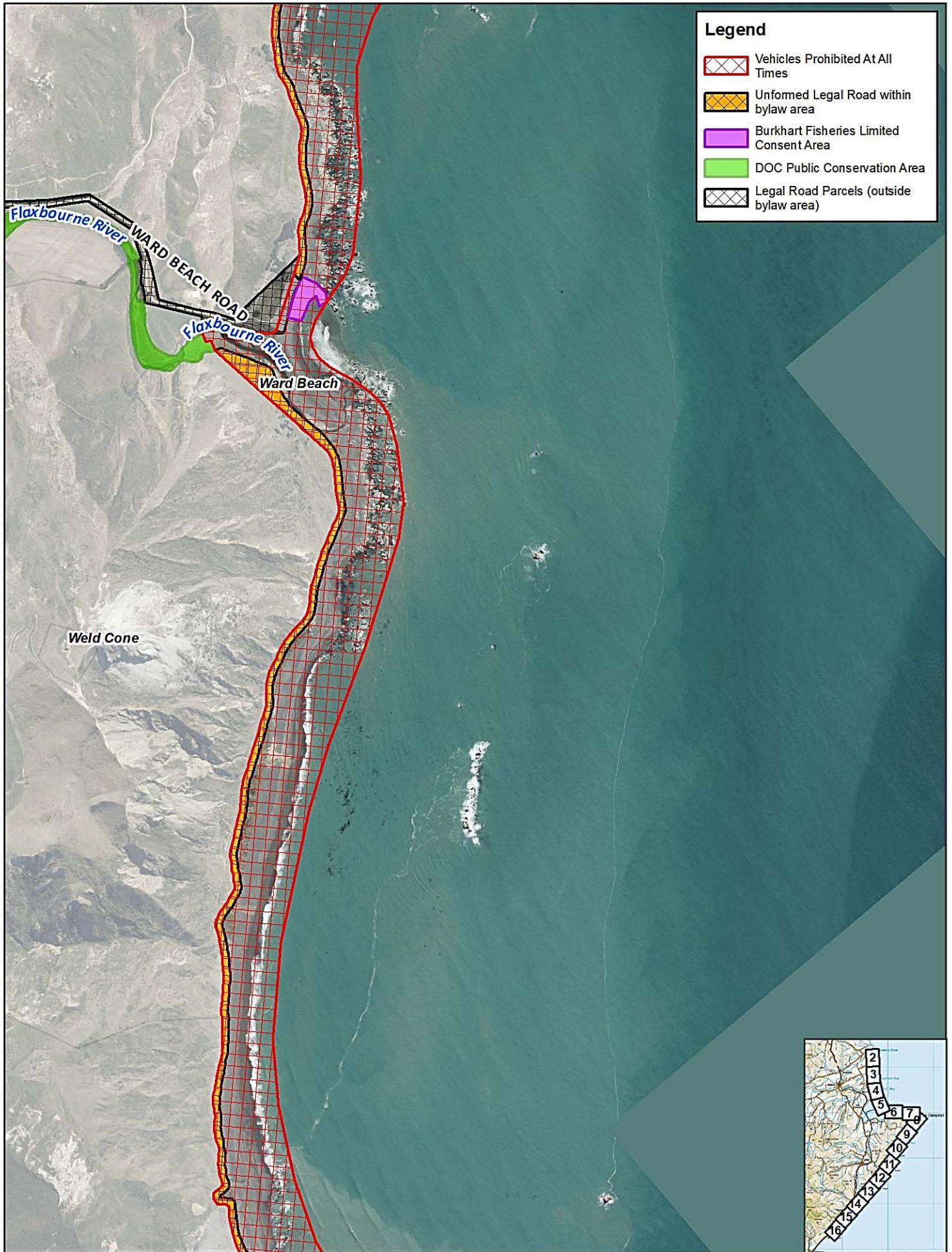
-  Vehicles Prohibited At All Times
-  Unformed Legal Road within bylaw area
-  DOC Public Conservation Area

  
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The accompanying material has been released by Council from its information repositories. Council does not accept any responsibility for the initial and ongoing accuracy to the material. It is the responsibility of the recipient to make such checks as the recipient considers appropriate to ensure accuracy. Services layers are schematic only and actual positions and level should be confirmed from Council's hard copy records.

**Schedule 1 : East Coast Beach Vehicle Bylaw  
Map 11**





**Legend**

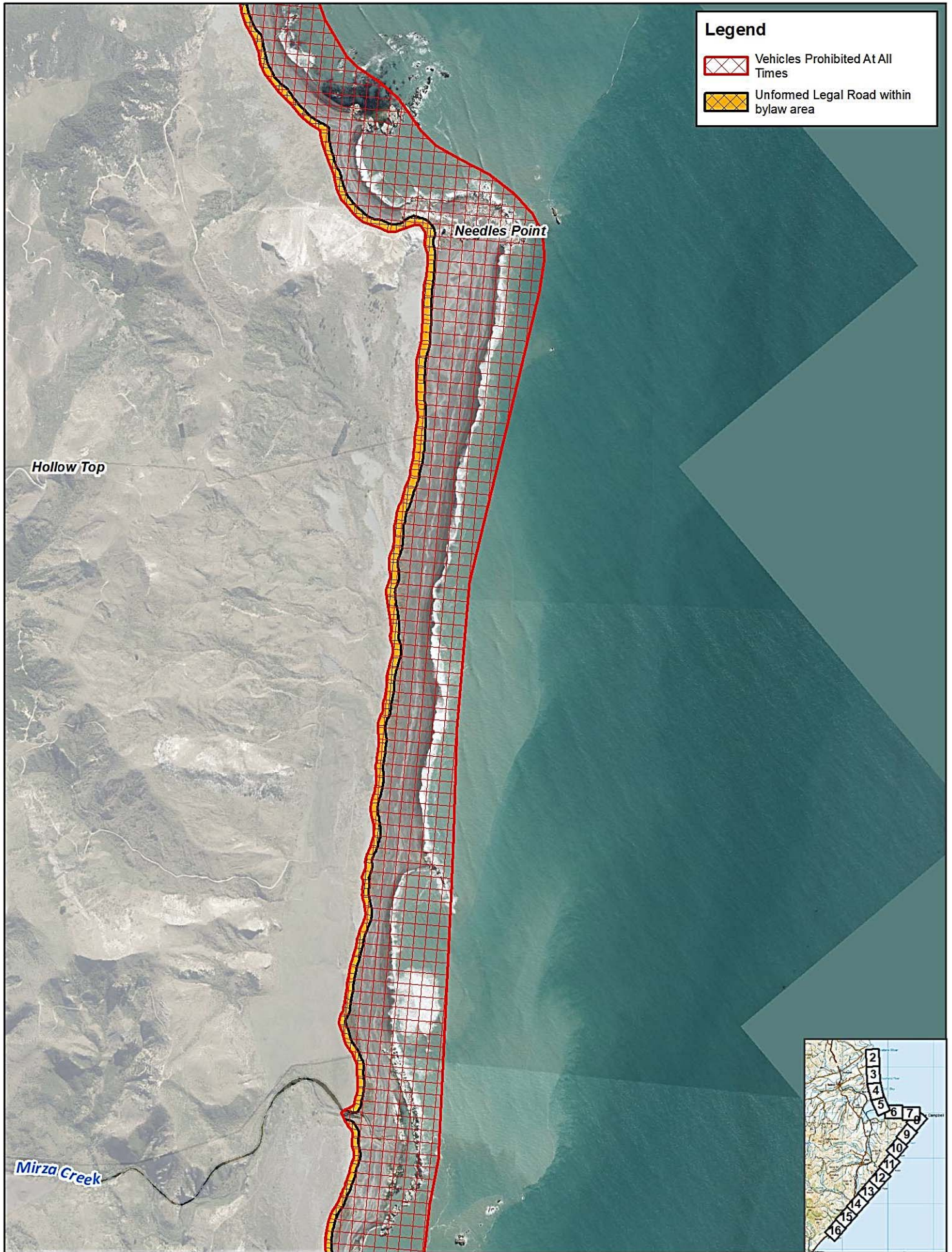
-  Vehicles Prohibited At All Times
-  Unformed Legal Road within bylaw area
-  Burkhart Fisheries Limited Consent Area
-  DOC Public Conservation Area
-  Legal Road Parcels (outside bylaw area)

  
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The accompanying material has been released by Council from its information repositories. Council does not accept any responsibility for the initial and ongoing accuracy to the material. It is the responsibility of the recipient to make such checks as the recipient considers appropriate to ensure accuracy. Services layers are schematic only and actual positions and level should be confirmed from Council's hard copy records.

**Schedule 1 : East Coast Beach Vehicle Bylaw Map 12**





**Legend**

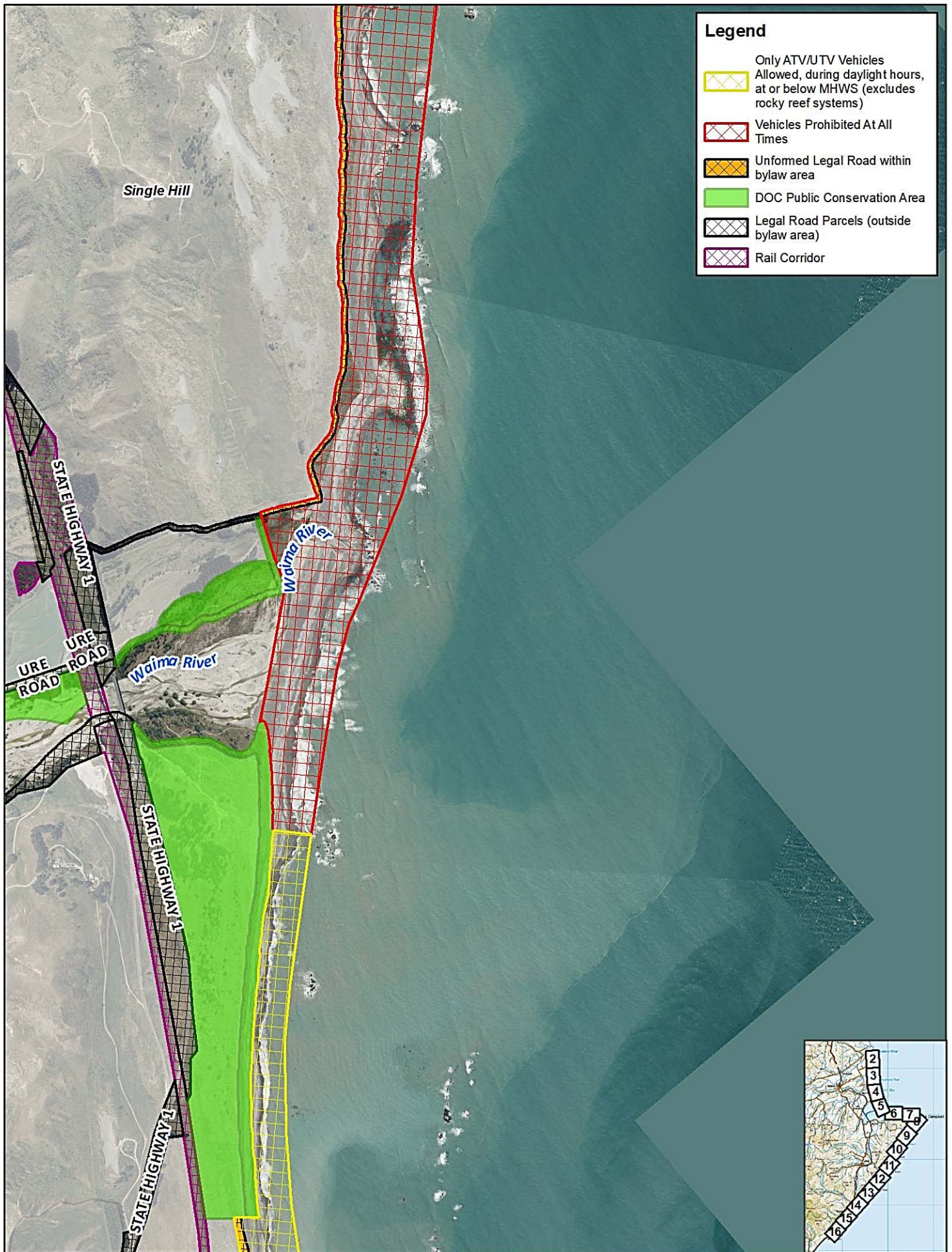
-  Vehicles Prohibited At All Times
-  Unformed Legal Road within bylaw area

  
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The accompanying material has been released by Council from its information repositories. Council does not accept any responsibility for the initial and ongoing accuracy to the material. It is the responsibility of the recipient to make such checks as the recipient considers appropriate to ensure accuracy. Services layers are schematic only and actual positions and level should be confirmed from Council's hard copy records.

**Schedule 1 : East Coast  
Beach Vehicle Bylaw  
Map 13**





**Legend**

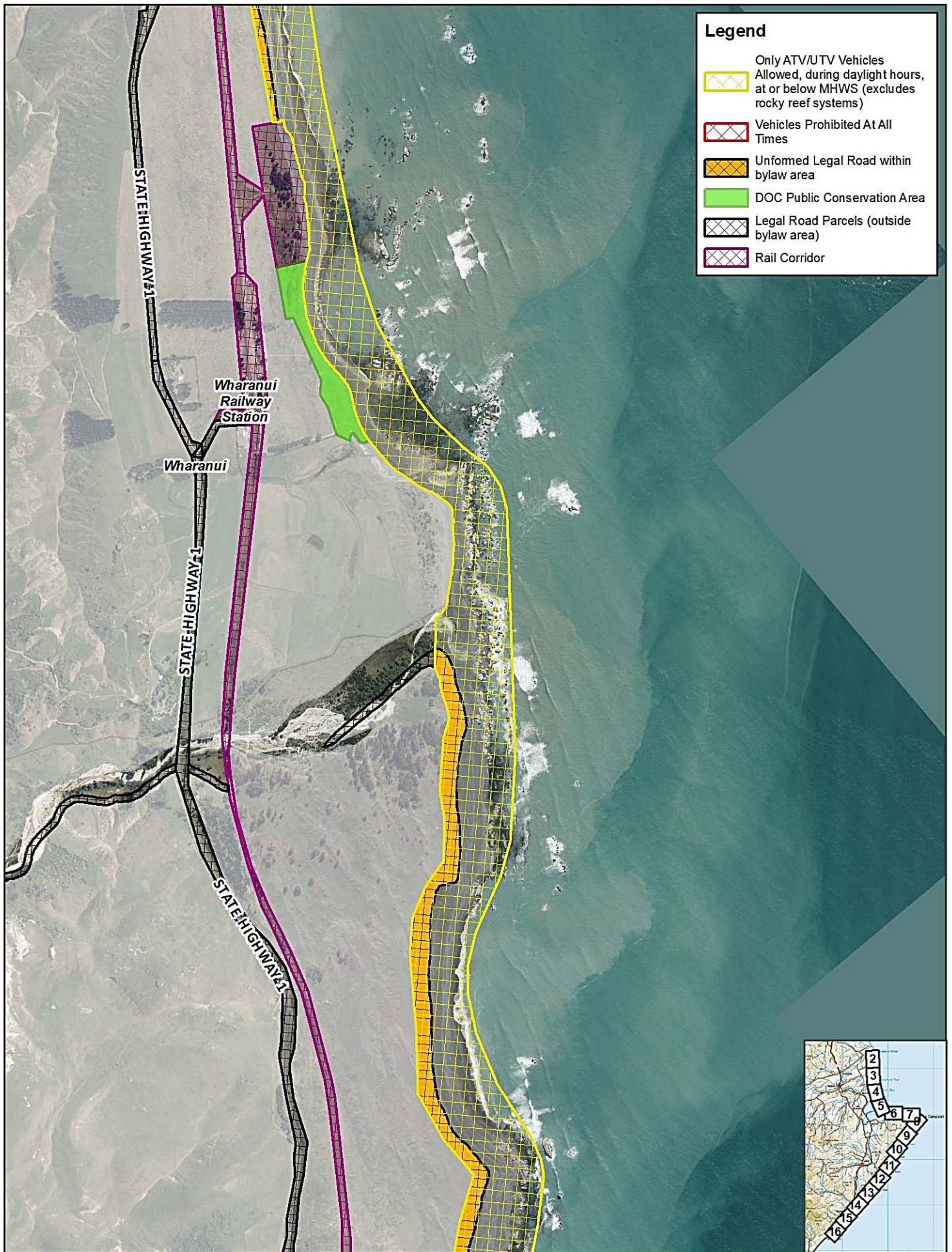
-  Only ATV/UTV Vehicles Allowed, during daylight hours, at or below MHWS (excludes rocky reef systems)
-  Vehicles Prohibited At All Times
-  Unformed Legal Road within bylaw area
-  DOC Public Conservation Area
-  Legal Road Parcels (outside bylaw area)
-  Rail Corridor

  
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The accompanying material has been released by Council from its information repositories. Council does not accept any responsibility for the initial and ongoing accuracy to the material. It is the responsibility of the recipient to make such checks as the recipient considers appropriate to ensure accuracy. Services layers are schematic only and actual positions and level should be confirmed from Council's hard copy records.

**Schedule 1 : East Coast Beach Vehicle Bylaw  
Map 14**



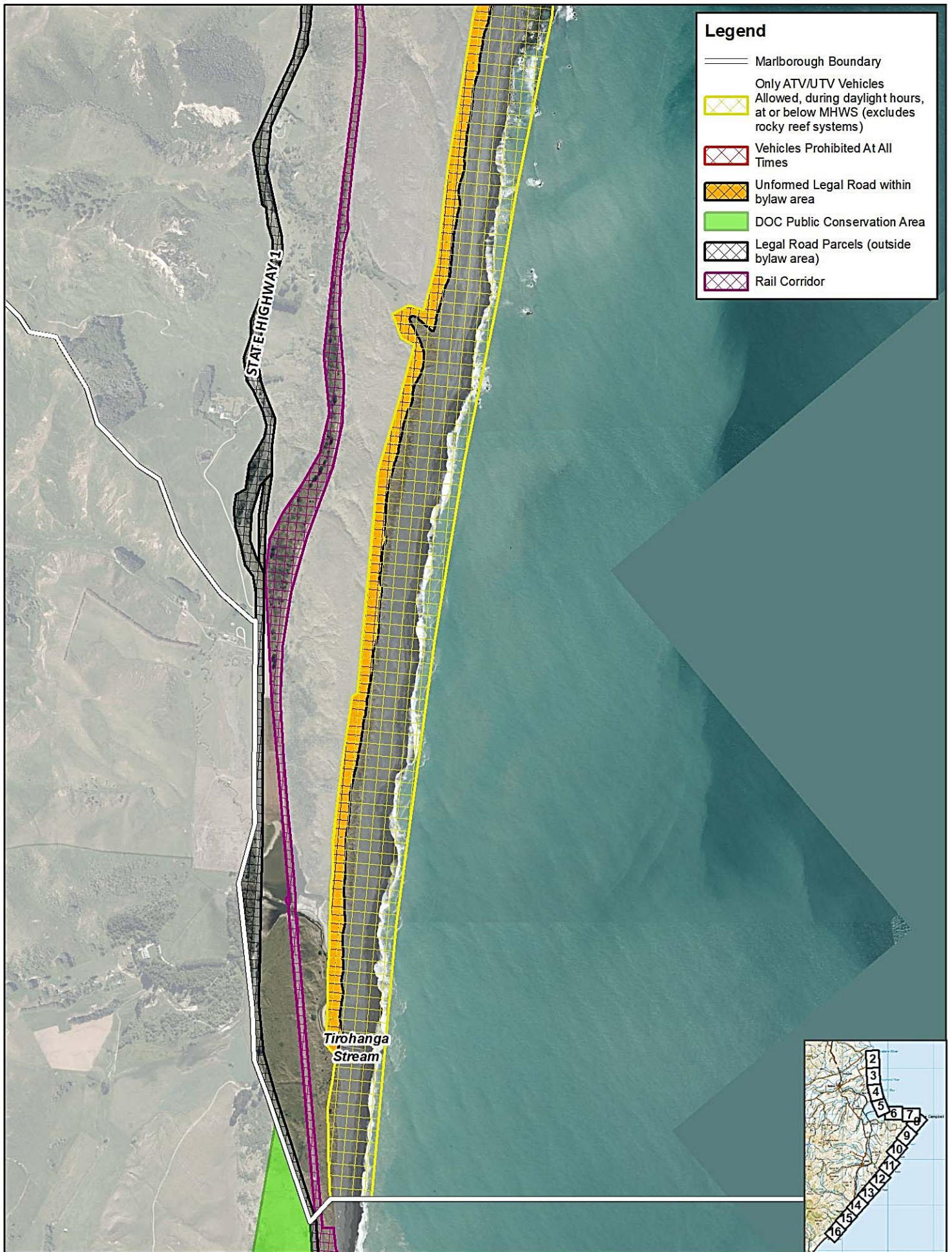


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The accompanying material has been released by Council from its information repositories. Council does not accept any responsibility for the initial and ongoing accuracy to the material. It is the responsibility of the recipient to make such checks as the recipient considers appropriate to ensure accuracy. Services layers are schematic only and actual positions and level should be confirmed from Council's hard copy records.

### Schedule 1 : East Coast Beach Vehicle Bylaw Map 15





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The accompanying material has been released by Council from its information repositories. Council does not accept any responsibility for the initial and ongoing accuracy to the material. It is the responsibility of the recipient to make such checks as the recipient considers appropriate to ensure accuracy. Services layers are schematic only and actual positions and level should be confirmed from Council's hard copy records.

**Schedule 1 : East Coast Beach Vehicle Bylaw Map 16**



## **Appendix 2: Tangata whenua**

**He hara taku toa i te toa takitahi,  
engari he toa takitini**

**My strength is not as an individual but as a collective**

### **Introduction**

- 1 The Commissioners acknowledge and thank all of the Iwi Authorities involved with this process upholding te tino rangatiratanga (right to exercise authority) within the whenua o te Kaupapa Taiao our natural resources.
  
- 2 This includes the contributions of:
  - Te Rūnanga o Ngāi Tahu, Te Rūnanga o Kaikōura, Ngāti Kuri hapū
  - Te Rūnanga o Rangitāne o Wairau
  - Ngāti Toa Rangatira, Ngāti Toa Rangatira ki Wairau Trust
  - Te Ātiawa o te Waka-a-Maui
  - Te Rūnanga o Ngāti Kuia Trust
  - Ngāti Kōata Trust
  - Te Rūnanga o Ngāti Rārua
  - Ngāti Tama Ki Te Waipounamu Trust
  - Acknowledgment to Te Poha O Tohu Raumati, Te Runanga o Kaikoura Environmental Management Plan.
  - Acknowledgment to the 'Pakohe Management Plan', for Ngāti Kuia.
  
- 3 We also acknowledge Ngāti Apa Ki Te Rā Tō (who advised Council that the proposed Bylaw area was not in their rohe).

### **Preliminary comments on engagement**

- 4 We do not consider that we are required to forensically review the process of engagement followed by Council, in order to provide our recommendations. That said, we have carefully reviewed the relevant paper trail, and the submissions (and information) provided by the Iwi Authorities that specifically identified concerns and

interests with engagement, and/or, the scope of the proposed Bylaw, being

- Te Rūnanga o Ngāi Tahu, Te Rūnanga o Kaikōura, Ngāti Kuri hapū
- Te Rūnanga o Rangitāne o Wairau
- Te Rūnanga o Ngāti Kuia Trust<sup>1</sup>

- 5 The timeline provided by MDC officers includes relevant emails, agendas, letters and other correspondence. <sup>2</sup> It does not include the context of kanohi-based engagement that has taken place, bearing in mind that partnership involves two-way communication between Council and their Treaty partners. We recognize that the Crown is technically the “Treaty partner”, but of course Council holds delegated authority via legislation, exercised (in effect) on behalf of the Crown, and Treaty principles and tikanga (where supported by evidence) are relevant considerations (in our view) for Council when assessing the proposed Bylaw.
- 6 It appears that Council first engaged with Te Rūnanga o Kaikōura and Ngāti Kuri, in relation to the “way forward”, with a hui held on 5 August 2019. Council’s wider engagement (with other Iwi, including Rangitāne o Wairau and Ngāti Kuia) largely commenced after release of the Issues and Options Paper in November 2019, with (importantly) the Mayor taking a direct leadership (Rangatira to Rangatira) role to initiate Kanohi ki te Kanohi based engagement in February 2020. This process of engagement continued until notification of the proposed Bylaw on 15 July 2021.<sup>3</sup>
- 7 This timeframe likely reflects the decision-making process being followed by Council, which required identification of issues and options (in November 2019), followed by consultation and

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<sup>1</sup> Te Rūnanga o Ngāti Rārua also lodged a written submission, which generally supported the proposed Bylaw (as-notified), to protect sensitive terrestrial and marine species, habitats and ecosystems, protect cultural sites, activities and species, and protect public safety and enjoyment of the coast; and adopted a neutral position on the exemptions category. By email dated 23 November 2021, they withdrew their submission to the Bylaw.

<sup>2</sup> This may not be fully comprehensive of all engagement processes or communications between Council and one or more of the Iwi Authorities.

<sup>3</sup> There is reference to a hui with Te Rūnanga o Kaikōura / Ngāti Kuri hapū, on 5 August 2019.



engagement on those Options, and any other options, before formal recommendations and decisions were made to support the proposed Bylaw.

- 8 In retrospect, Council might have considered commencing engagement with all Iwi and Hapū earlier, given that a tikanga-based process takes time, and to ensure that all relevant information was available to Council in formulating options. Indeed, Council officers acknowledged, (Agenda Report, dated 30 April 2019), that a significant information gap in the first iteration of the Technical Report (dated 22 March 2019) related to the Iwi perspective on the values in the East Coast environment.<sup>4</sup> There is of course more than one Iwi perspective on the relevant values and relationships.
- 9 That said, we note that Council sought to engage and elicit relevant information from the above-named Iwi and Hapū, over a period of at least 18 months.

### **Te Rūnanga o Rangitāne o Wairau**

- 10 Te Rūnanga o Rangitāne o Wairau appears to have made first contact with Council in late November 2019 in relation to the proposed bylaw process, as a result of media information.<sup>5</sup> We agree that it is regrettable and wrong that Rangitāne had to make first contact with Council to seek information, rather than the other way round. It appears that Council attempted to provide all relevant information to Rangitāne, from that point onwards.
- 11 On 2 December 2019, Rangitāne o Wairau (having reviewed the draft Technical Report and Issues and Options Paper) indicated to Council that the greater east coast area held significance to

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<sup>4</sup> MDC Agenda Report (Environment) dated 30 April 2019

"[7] It was acknowledged at the workshop [held in July 2018] that one of the significant gaps was Iwi's perspective on the values that exist in the East Coast environment. A hui is was held [sic] on the 17 April 2019. This was an opportunity to discuss the impacts of the earthquake."

<sup>5</sup> Email dated 29 November 2019

Rangitāne, including pā sites, and other areas of occupation. Team Taiao Rangitāne identified by email dated 2 Dec 2019 that:

“Mussel Point and Cape Campbell are important customary fisheries for gathering kaimoana and access to this area is of high importance to our members. It is unlikely that we would support the proposed blanket closure of the coast to vehicles, but would like to look at a few other options that may be feasible and would mitigate the effects of the vehicles on the beach..”

- 12 Rangitāne o Wairau sent (*inter alia*) formal letters on 5 December 2019, and 09 January 2020, identifying their concerns with the Technical Report dated Nov 2019, and objecting to the proposed closure to vehicles “..in its entirety, until a consultation process has taken place..”
- 13 In terms of the merits of the proposed Bylaw, Rangitāne o Wairau appears to have been relatively consistent in their position from that point onwards.
- 14 Rangitāne’s written submission (dated 8 Sept 2021) identified two essential points concerning the proposed Bylaw:

“The first is a concern about a serious procedural misstep in the process of developing the Bylaw and the second relates to matters of substance..”
- 15 The procedural “misstep” related to Council’s alleged identification of a position on Ngāti Kurī, as hapū of Ngāi Tahu, having mana whenua and mana moana status in the area covered by the draft Bylaw, in contrast to identification of Rangitāne and other Iwi as having “long standing connections with the area..”
- 16 Rangitāne o Wairau’s submission noted their areas of interest were identified by the Waitangi Tribunal in WAI 785 “..and other legal processes..”<sup>6</sup> They only received 3 days notice of the proposed

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<sup>6</sup> Reference was made (*inter alia*) to Chapter 14.5 of the Tribunal Report, Te Tau Ihu o Te Waka a Maui at p1368-69

terms of the Bylaw (on 21 June 2021). According to Rangitāne o Wairau, their objection resulted in Council deleting parts of the Bylaw. However, this remedy was insufficient, and Council should have “restarted” consultation processes.

- 17 Rangitāne o Wairau relied upon their settlement legislation, the *Ngāti Apa ki te Rā Tō, Ngāti Kuia, and Rangitāne o Wairau Claims Settlement Act 2014*, which identifies the historical account for Rangitāne o Wairau, and their statutory area of interest (which includes the area of the proposed Bylaw). We note that the Settlement Act identifies that Rangitāne o Wairau have “..resided in the northern South Island for many generations..” and identifies their relationship with their ancestral lands, waters, wāhi tapu and taonga.
- 18 Their written submission provided further detail on Rangitāne o Wairau’s takiwā, and noted their contention that they have “..overlapping interests within the statutory takiwā of Ngāi Tahu; and their assertion that “..these interests have been the subject of various disputes and Court proceedings, which confirm that the interests of Rangitāne o Wairau and other Te Taihiti iwi are not affected by the Te Rūnanga o Ngāi Tahu Settlement Act..” Rangitāne o Wairau therefore asserted mana whenua and mana moana in relation to the area of the proposed Bylaw. Further details were provided of relevant kainga and occupation within the coastal areas that are the subject of the proposed Bylaw.
- 19 Turning to substantive effects of the proposed Bylaw, Rangitāne asserted that:

“The proposed bylaw will directly impact Rangitāne by preventing vehicular access to the coastal areas of Kāpara-te-hau, Mussel Point, Te Karaka, Oruamoa, Waiharakeke and further south to the Waima River. The sites situated along the coast from Marfells Beach to Ward Beach and further south to the Waima river are landlocked and as such access to the area for cultural or customary fishery purposes would be entirely at the discretion of the adjoining landowners.”

- 20 The proposed Bylaw would exclude effective and practical access to an important and long-standing cultural harvest area along the East Coast. Council *“..cannot, by Bylaw, remove customary rights which are enshrined in law and which have been exercised by the Rangitāne people for centuries.”* Rangitāne o Wairau sought an exemption for tangata whenua (in common with other Agencies), and proposed physical barriers preventing vehicles larger than a quad bike to access the area, *“..essentially returning the available access to pre-earthquake status..”* or *“..enabling vehicles smaller than 4x4 utilities and cars to access the area..”* Further restrictions to daylight hours and/or blanket closures during bird nesting periods could also be imposed but needed to be formally proposed by Council.
- 21 Te Rūnanga o Rangitāne o Wairau appeared before Commissioners in our hearings in November 2021, and May 2022, and were represented by Ms Radich (Counsel), and Mr Corey Hebbard (Kaiwhakahaere Matua, General Manager). We have already noted the relevant memoranda filed by Counsel for Te Rūnanga o Rangitāne o Wairau. Without being comprehensive, these memoranda relevantly identified that:
- (a) The final iteration of the Technical Report (v5, July 2021), identified at Section 2, paragraph [2.1] to [2.3], the asserted position of Te Rūnanga o Kaikōura, that Ngāti Kurī are the tangata whenua who have mana whenua and mana moana in the area covered by the East Coast Beach Vehicle Bylaw, referencing statutory acknowledgements in the 1996 Act. This was supported by correspondence from Te Rūnanga o Ngāi Tahu and Te Rūnanga o Kaikōura dated 21 October 2021.
  - (b) Rangitāne o Wairau opposed this assertion of mana whenua, mana moana, and relied on the RPS (which identifies a number of Iwi Authorities as tangata whenua within the Marlborough District).

- (c) Rangitāne o Wairau considered that the Technical Report represented “determinations” made by Council in the Technical Report, that were binding on Commissioners. Sites of significance to Iwi are only those which are significant to the Ngāi Tahu parties and no input has been sought from Rangitāne o Wairau as to their sites of significance, historical association, and ongoing connections with the Bylaw area. Consultation was undertaken on the basis that the Ngāi Tahu parties alone have mana whenua, mana moana, in the Bylaw area. This was a “..very low moment” in the relationship with MDC.
- (d) Rangitāne o Wairau asserted, but did not provide detailed supporting expert evidence or information (despite having opportunity to do so during the hearings process), that they also have “..mana whenua, mana moana and tangata whenua status in the Subject Area, as well as, and not instead of Ngāi Tahu, is a matter of established fact, law and tikanga..”
- (e) Counsel noted (and we accept) as relevant, ss82(1)(a) and 82(4) LGA, requires Council, in undertaking consultation, to identify affected persons or those with an interest in the decision, and consider the likely impact on affected persons of the decision in determining the nature and extent of consultation required. Failure to consult under these statutory provisions may result in material error, if the interests and their effects are not understood in their proper context. We have considered impacts of the proposed Bylaw on Rangitāne o Wairau’s ability to exercise customary practices, including fishing and harvesting, in the proposed Bylaw area, including our recommended 9km ATV/UTV access area, the Yellow Zone.
- (f) Challenge made to Commissioner Clayton’s independence, which we addressed in Minutes 3 & 7.<sup>7</sup>

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<sup>7</sup> Commissioner Clayton undertook her own assessment of independence, in light of the allegations made.

- 22 We do not agree with Counsel's assertion in (c) above, of a "pre-determined" or fatally flawed outcome, for reasons identified in our Minutes 3 & 7 . In particular:
- (a) It is demonstrably wrong to say that Commissioners were "bound" by "determinations" made in the Technical Report. This Report was prepared by Council officers, in context of recommendations in July 2021 to Council, to notify the proposed Bylaw as the most appropriate option. The Council was not bound by officer advice in the Technical Report, neither are we. For example, we have not accepted the advice in the Technical Report (and the Statement of Proposal) that all vehicle access should be banned in the Te Karaka / Cape Campbell area (our recommended Yellow Zone). We have relied on (*inter alia*) the evidence and submissions of Rangitāne o Wairau and Ngāti Kuia to recommend the Yellow Zone area, which enables ATV/UTV access to fishing and harvesting areas.
  - (b) We invited Rangitāne o Wairau to "cure" any information gap by submitting a Cultural Values Assessment (or similar) to identify their sites of significance, historical associations, and ongoing connections with the Bylaw area. Rangitāne o Wairau ultimately decided not to take up this opportunity. They did however constructively provide us with submissions on the merits of the Bylaw (albeit without prejudice to their process and related concerns).
- 23 Having carefully considered the submissions of Counsel for Rangitāne o Wairau, and the correspondence and information provided by Te Rūnanga o Ngāi Tahu and Te Rūnanga o Kaikōura, we now reiterate, essentially for the same or similar reasons stated in a preliminary way in our Minutes, that it is not necessary or appropriate to our role to undertake an assessment of competing strength of relationship of Iwi and Hapū, with the Bylaw area.

- 24 The Technical Report (v5, July 2021) correctly identifies that the statement of Cultural Values was based on information provided by Te Rūnanga o Kaikōura, rather than an independently researched “finding” or determination” on tikanga and mana whenua status, of the type referred to by Palmer J in the *Ngāti Whātua Ōrākei* (cross-claims) litigation.<sup>8</sup> We did not receive any specific expert evidence or information from any of the Iwi Authorities in relation to tikanga, that would enable the detailed factual enquiry anticipated. Moreover, it is not relevant to our limited recommendatory function. Our reasoning is provided in greater detail in our Minutes 1, 3, 7, 8.<sup>9</sup>
- 25 As to the substantive proposals, we have noted our Yellow Zone responds to some of Rangitāne o Wairau’s concerns about limiting access to fishing, gathering, and customary practices. We do not agree that it would be appropriate to include a wholesale exemption of “tangata whenua” within the entire Bylaw area, as submitted by Rangitāne o Wairau and Ngāti Kūia. We have attempted to apply a consistent Bylaws framework, to address the competing values of national importance that exist in the East Coast environment, as identified in our Report.
- 26 At this juncture, we leave the final word to Ms Radich. In relation to the vexed question of mana whenua, mana moana, Ms Radich confirmed that:

“..[3] Rangitāne o Wairau is not seeking for any such decisions to be made in the substantive decision making process. It is simply seeking to be able to preserve its ability to access its customary fisheries and its sites of significance (in common with and not to the exclusion of other iwi).” (Memorandum of Counsel, dated 16 May 2022)

**Te Rūnanga o Ngāi Tahu / Te Rūnanga o Kaikōura / Ngāti Kuri hapū**

- 27 We were assisted in our enquiries by information provided by Te Rūnanga o Ngāi Tahu / Te Rūnanga o Kaikōura / Ngāti Kuri hapū.

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<sup>8</sup> [2022] NZHC 843, 28 April 2022 (decision subject to appeal)

<sup>9</sup> As identified in those Minutes, these were preliminary views, pending responses from the Iwi Authorities (and any other submitter that wished to comment, several general submitters did make comments).

This includes their assertion of mana whenua, mana moana, which is recorded in Section 2 of the Technical Report (v5, July 2021), discussed above. We accept that Te Rūnanga o Kaikōura is the modern assemblage and representative of the hapū, Ngāti Kurī, one of 18 Papatipu Rūnanga of Ngāitahu who are statutorily acknowledged under the Te Rūnanga o Ngāi Tahu Act 1996.

28 In correspondence dated 12 October 2021, 3 December 2021, and 2 May 2022, Te Rūnanga o Ngāi Tahu (supported by Te Rūnanga o Kaikōura) responded to relevant assertions made by Rangitāne o Wairau, and we note their position as follows:

- (a) Reliance on the generic identification of Iwi Authorities in the Regional Policy Statement was not appropriate and did not reflect the relevant statutory provisions in s5 of Te Rūnanga o Ngāi Tahu Act 1996 (where the Ngāi Tahu Takiwā was clearly defined).
- (b) The Ngāi Tahu Claims Settlement Act 1998 explicitly states at s6 that Ngāi Tahu are recognised as “the tangata whenua of, and as holding rangatiratanga within, the Takiwā of Ngāi Tahu Whānui..”
- (c) Consistent with that recognition of Ngāi Tahu rangatiratanga and tangata whenua status, neither the Crown nor Parliament has provided redress to other iwi within the Ngāi Tahu Takiwā, despite the more expansive “areas of interest”.
- (d) “Areas of interest” are not co-extensive with, nor equivalent to, the legal status of statutory acknowledgements provided in the Ngāi Tahu legislation.
- (e) Supported the recognition in MDC’s Technical Report (v5, 2021) that the area of the proposed Bylaw was within the statutorily recognized Ngāi Tahu Takiwā, and the consultation process followed by MDC with Ngāti Kurī. “Accordingly , Te



Rūnanga o Ngāi Tahu and Te Rūnanga o Kaikōura did not submit on the proposed Bylaw.”

- (f) Disputing Rangitāne’s interpretation of the judgment of the Court of Appeal in *Ngāti Apa Ki Te Waipounamu Trust v R* [2000] 2 NZLR 659, and referencing subsequent Court decisions, such as *Te Rūnanga o Ngāi Tahu v Attorney-General* [2010] 1 NZLR 511 at [84].
- (g) If MDC were to adopt a definition of “tangata whenua” into the proposed Bylaw (which would include Iwi Authorities generically identified in the Regional Policy Statement), this would constitute a “serious breach” of the aforementioned Ngāi Tahu legislation.
- (h) Identifying that whakapapa (of Commissioner Clayton) did not create a conflict of interest. Commissioner Clayton’s culture and descent is no more relevant than any Pākehā Commissioner.
- (i) Rangatiratanga is a very serious matter for Ngāi Tahu, and accordingly, they reserved their position (and “all rights”) on these issues.

29 We acknowledge that our proposed Yellow Zone does not fully align with the position of support stated by Te Rūnanga o Ngāi Tahu / Te Rūnanga o Kaikōura (which endorsed the as-notified Bylaw). Our recommended version is, of course, different in the several respects identified by us, perhaps most materially, we have included the Yellow Zone as part of a Staged approach (and the possibility of an extended buffer area at the Waima (Ure) River.<sup>10</sup> We have had the fortunate opportunity to consider relevant information and evidence from the participants in this Bylaw process, that have led to our recommending a different approach to the as-notified Bylaw. We have given reasons to explain this difference.

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<sup>10</sup> We understand that the Nohoanga is known as Waimatuku.

30 As with Rangitāne o Wairau, we are not in a position to determine any competing assertion made for mana whenua, mana moana. We have decided that it is not relevant to our function. We note Justice Palmer’s cautionary note (in a different statutory and legal context) that a decision-maker must recognize tikanga on the basis of the expert evidence before it (at [372]) and that:

“[369] Just because a Court can do something does not mean it should..The need for caution remains..”

[377] ..A Court’s caution in approaching tikanga must be heightened when the content of tikanga is disputed within an iwi or hapū or between iwi or hapū..” [2022] NZHC 843

### **Te Rūnanga o Ngāti Kuia**

31 The written submission from Te Rūnanga o Ngāti Kuia supported in part, opposed in part, the as-notified Bylaw. They acknowledged the need to protect EQ affected habitat and ecosystems, and supported the overall objective of the Bylaw. Ngāti Kuia accepted there had been limited engagement. Relief sought included both the need for regulation of activities, and including Iwi within the exemption list, to enable customary access by vehicle.

32 During the hearing in May 2021, we received a presentation from Te Rūnanga o Ngāti Kuia. Mr Raymond Smith gave us a direct, and informative, statement of the Ngāti Kuia position. It aligns fairly closely with Rangitāne o Wairau’s view that motorized access is essential to access fishing grounds, and undertake customary practices, within the entire area of the proposed Bylaw. Mr Smith essentially opposed any limits being placed on motorized access for Iwi and Hapū requiring access (especially Quad Bike access). As noted, our recommended Yellow Zone responds in part to the Ngāti Kuia position, by enabling ATV/UTV access for the first 9kms of coastline south from the Marfells Beach Reserve, which are popular areas for fishing, craypotting (and other activities). Our further reasons are set out in our Report.

## **Appendix 3: Biodiversity**

### **Manaaki whenua, manaaki tangata, haere tatou whakamua Care for the land, care for the people, as we go forward**

- 1 We received extensive information and evidence on the biodiversity values of the East Coast, with much of this evidence coming from submitters that presented to us during the hearings in November 2021 and May 2022. This included submitter groups that provided baseline data from many volunteer hours spent observing nature, mapping habitats, and observing the effects of vehicle use on the entire beach environment, including dunes, intertidal zone, reef structures, and the wider habitat of rare and threatened indigenous flora and fauna species. The quality of that evidence and information was high, making it both “harder and easier”, to make our recommendations on the proposed Yellow Zone, to enable limited ATV/UTV access to the Cape Campbell area, but with biodiversity bottom lines (in which no vehicle access is permitted, the “Red Zone” areas).
- 2 Much of the submitter evidence noted below, pointed at the risk, or reality, of shifting baselines caused by the 2016 earthquake, in tandem with the increased scope for vehicle (and human) access to (previously) remote parts of the East Coast. These vectors have caused, and may continue to cause, harm to rare and threatened flora and fauna; and adversely impact the high to very high (including outstanding) natural character values. Enabling vehicle access should not destroy that which draws people in to the area.

### **Natural character values (and Landscape)**

- 3 Setting the scene for us, James Bentley’s Report (dated 13 December 2021) identified the relevant landscape and natural character values that informed his assessment. Mr Bentley

relevantly noted (in relation to the coastal marine area, below mean high water springs)<sup>1</sup> that:

**“..Greatest coastal biodiversity occurs at and in the lee of Cape Campbell..The intertidal platforms/reefs are habitat to an array of species representative of moderate-high wave swept conditions, including various limpets, chitons, topshells, mussels and barnacles.**

**South of Cape Campbell, the coast is very exposed to southerly and easterly storms. Large waves from onshore winds and oceanic swells are common..The coast is dominated by sand/gravel beaches of variable size intermingled with rocky headlands, platforms, outcrops and reefs, onshore and offshore. Intertidal platform/reef communities are typical of very exposed wave-swept conditions. Moderate numbers and diversity of plants and animals occur with greatest diversity within channels, pools, and partially sheltered areas.”**

**“..The coastal environment extending from the Awatere River south to the Waima (Ure) River retains exceptional landscape values and a high, very high, and outstanding natural character.”**

**“..Whilst the Kaikoura earthquake has made the east coast beaches more accessible for vehicles, it is the presence and footprint of the vehicles that will erode these unique landscape and natural character values and qualities.**

**This memorandum therefore supports Council’s attempt to limit vehicle use on these beaches.”**

- 4 We have considered, but (for the purposes of this Report), have not found it necessary (or useful) to reference below all of the relevant evidence on Biodiversity values identified by submitters, whether in formal written submissions, during the Hearings, or submitted as part of post-Hearing information.

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<sup>1</sup> Mr Bentley also commented on the terrestrial values, above MHWS, and noted that it was difficult (in landscape terms) to draw a “bright-line” for the MHWS, given the changes post-EQ.

5 However, we note for reference, information provided by submitters that presented material to us during the Hearings. Much of this evidence was cogent and compelling, relating to risks posed to protected wildlife and vegetation from any form of vehicle use, whether above or below MHWS, with seasonal periods during the year when particular indicator species (such as Banded Dotterel) are most at risk from vehicles. We note in particular the following:

**East Coast Protection Group (ECPG):**

6 The ECPG provided extensive information to us, reflecting their dedication to protection of the East Coast biodiversity within the Bylaw area. Without being comprehensive, this included:

**6.1 Biodiversity restoration plan**, which identified as a key priority, limiting vehicle access and preventing vehicle and visitor damage, including to areas of particular fauna habitat (e.g. the strand zone with driftwood habitat for lizards and invertebrates), as well as rare flora and fauna.

**6.2 Ecological surveys** conducted by ECPG / Sonya Roxburgh, in Sept/Oct 2021, and Nov 2021 to Jan 2022. Ms Roxburgh provided impressive and objective detail of a range of species affected by vehicle use, including sea birds and shore birds.

**6.3** The 3km stretch from the main Cape Campbell reef to the south end of the Cape Campbell Airstrip is a key roost and feeding area for northern hemisphere migratory birds during summer. At low tide, birds make use of both the main Cape Campbell reef, and the rock reefs for 3km or more southwards that become exposed. At high tide, native and migratory birds roost in the vicinity of the airstrip and sandy beach extending 400m northward.

**6.4** We have relied on ECPG and Ms Roxburgh's detailed (and impressive) observations, as well as those of other submitters, to recommend that all ATV/UTV access is banned from reef structures, within the Yellow Zone, given the importance of this area as intertidal habitat, which should remain free of vehicle use

at all times. This recommendation is reflected in the Mapping Legend, and proposed amendments to the Bylaw (in our Appendix 1).

- 6.5** Ms Roxburgh (and ECPG) provided detailed Banded Dotterel hot-spot areas, where habitat is suitable for nesting. It is clear from these mapped areas, and evidence from Ms Roxburgh, (as well as the Banded Dotterel Group, and RFB), that Banded Dotterel and vehicles do not mix well together, with Banded Dotterel being highly vulnerable to Quad Bike (and all other vehicle) movements.
- 6.6** Variable Oystercatcher nesting within the surveyed area remained small, and highlighted a need for greater monitoring of this species. Other bird species are identified in the ECPG material, which identified other anthropogenic causes (in addition to vehicles) that are likely to adversely affect bird and other fauna populations.
- 6.7** ECPG also drew our attention to the importance of habitat, and indigenous vegetation, to maintaining the entire ecosystem. This included areas of old-growth spinifex and pingao dunes, at risk from vehicle use. They produced a paper by Dr Orchard (2021) on this issue, which noted:

“Both are key habitat-formers associated with nationally threatened dune ecosystems..and pīngao is an important weaving resource and Ngāi Tahu taonga species. The primary goal is to protect existing seed sources that are vital for natural regeneration following major disturbances such as the earthquake event..”

- 6.8** We acknowledge the importance of dune protection zones, as recommended by Dr Orchard, and we have recommended changes to the draft Bylaw, to expressly require that any ATV/UTV access in the proposed Yellow Zone does not venture into dune areas, given their importance as protected habitat.<sup>2</sup>

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<sup>2</sup> ECPG in their response dated 21 Feb 2022, noted their support in principle for exercise of customary access, but sought that no vehicles were used to undertake access, to protect the identified biodiversity values, citing Dr Orchard’s paper on Managing Beach Access (Feb 2022).

**6.9** ECPG also produced a research report into the habitat and mapped extent of the small flightless moth, *Kiwaia* “Cloudy Bay”. The *Kiwaia* is at high risk of extinction; and is now locally extinct at Cloudy Bay. It may be a largely unnoticed tragedy that the Cloudy Bay moth no longer exists at Cloudy Bay. There are 4 known locations between Te Karaka / Cape Campbell and the Waima river mouth, including Cape Campbell, Canterbury Gully, Needles Point, and Lulworth, in an area that may total 5ha of habitat.

**6.10** The primary host plant, *Raoulia australis*, is vital to continued survival. As with the *Pimelea* looper (moth), a primary threat to survival is damage to host plants from vehicles driving off formed tracks. Without the host plant, the species will die.

**6.11** We placed substantial weight on the importance of protecting this species from potential extinction, as supporting our recommendation to ban all vehicle access from the “Red zones”, as provided in the as-notified Bylaw, and to limit areas and types of vehicle access, in our recommended Yellow Zone. As noted, the Cape Campbell habitat is crucial to the species continuance.

### **Royal Forest & Bird Protection Society (RFB) & Marlborough Forest & Bird**

7 We appreciate that the RFB, and the Marlborough Branch, are different submitters and entities. We have however addressed their presentations in the same section (collectively referred to as **RFB**). RFB noted that the SNA/PNA/RAP map presented by MDC (following Hearing 1) was the first time that this information was made publicly available to demonstrate existing identified important natural areas. It is evident from these maps that the coastline is a particularly important zone for ecological values; and support protection of the Bylaw area from vehicle use.

**7.1** RFB noted the Fur Seal breeding season (mid-Nov to mid-Jan), threat status of plants, bird nesting areas, and the NZ geopreservation inventory (which includes at least 7 sites of interest

in the proposed Bylaw area, including their importance and vulnerability to human damage. Chancet Rocks are assessed as being of international significance, with Lake Grassmere and Bar, and Needles Point being of national significance). These rankings have influenced our recommendation to avoid all vehicles anywhere near Chancet Rocks and Needles Point.

**7.2** The Marlborough Branch produced Banded Dotterel counts and hot spots, which were mapped throughout the proposed Bylaw area (from Marfells Beach to Waima/Ure).

**7.3** Also relevant to our recommendations (as part of "Stage-2"), the RFB written submission noted that "...there are important values south of the Waimā (Ure) River that are worthy of protection.." and that "...the area south of the Waimā River mouth and hapua holds important biodiversity values.." RFB asked in preferential order that:

- a) Access is not granted south of the Waimā River mouth; or
- b) That access is prohibited for 500m south of the river mouth and hapua; vehicle access is prohibited at the Waimā River mouth (to help restore the dune ecosystems there); with a single access point at Wharanui.."

7.4 RFB also proposed a speed limit of 20/km/hr with vehicles to be warranted and drivers licensed. If a northern access point was to be granted from the existing shingle quarry/works area, then (in their words), "Iwi" should be consulted around any important features of that site.

### **Banded Dotterel Group**

8 Ms Ailsa McGilvary-Howard and Mr Ted Howard<sup>3</sup> provided us with detailed baseline information on location and vulnerability of Banded Dotterels, including chick survival rates. Following our first Hearing

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<sup>3</sup> We acknowledge that Mr Howard's preference was not for total vehicle bans, but instead awareness and responsibility. This was in contrast to Ms McGilvary-Howard's support for bans. We appreciated the nuance involved between these two positions, clearly expressed to us.



in November 2021, the Group looked more closely at the issue of terrain, and how this might affect chick survival rates. From a small sample, it was possible to deduct that chicks often hunkered down till around 3 weeks of age, and preferentially selected quad tracks. Banded Dotterel's "...need space to breed – that is undisturbed space..", with foraging often taking place over a wide area. We have had regard to the evidence and data provided by this Group, which (together with the other submitters noted herein), we found influential in relation to our recommendations to support the "no-vehicle" areas that were identified by the as-notified Bylaw.

### **Eve & Mark Anderson**

- 9 Eve and Mark provided detailed information on their project to map katipō habitat within the proposed Bylaw area. Katipō were found mostly in spinifex, but also marram, which dominates the newly uplifted dune areas, with small numbers in other habitats. Marfells Beach appears to have the highest concentrations of katipō, reinforcing the importance of avoiding vehicle interaction with dunes in this area. There is a large spinifex area 400m south of the saltwater intake, described as the densest population of katipō in Marlborough. Their distribution continues down the east coast, as least as far south as Needles Point). Katipō are obviously vulnerable to vehicles damaging their habitat, in dune areas.

### **Nelson Marlborough Conservation Board**

- 10 The Board did not support vehicles having limited access below MHWS, noting the importance of the intertidal area (which includes numerous seaweeds and animals vulnerable to crushing by vehicles, including shellfish of vital importance to bird species). Crushing of intertidal species is detrimental to the intertidal community, and detrimental to species that feed on those populations. The Board supported (inter alia) the intent of Policy 20 of the NZCPS to prevent damage, harm and disturbance to this high value coastal area.

## **Tangata whenua**

- 11 We have addressed the submissions (and information/evidence) provided by the Iwi Authorities to this process (both in our Report, and our Appendix 2). We have already acknowledged their competing views on mana whenua, mana moana. It is appropriate to note that all Iwi Authorities generally identified the importance of protecting taonga species located within the area of the proposed Bylaw. This included (for example), Ngāti Kuri's support of the as-notified Bylaw, on the basis that it afforded greater protection to these values and species.<sup>4</sup>

## **Department of Conservation**

- 12 DOC has a direct role to play in maintaining and enhancing the habitat of the conservation estate, and has a duty to enforce (*inter alia*) the Marine Mammals Regulations, which control human-marine mammal interactions. Commissioners were therefore keen to hear from DOC, and requested that they attend our second Hearing in May 2022, in order to answer questions. We were grateful to DOC for attending the hearing, and for providing supplementary information relating to the critically endangered Kiwaia "Cloudy Bay" moth, and the endangered *Notoreas peronata*, "Cape Campbell" moth.
- 13 If Council approves our recommendations, and the proposed Bylaw becomes operative, then the challenge will sit with DOC to "do more" to protect this special area. Commissioners encourage DOC to undertake greater education and enforcement of Marine Mammal controls and Regulations; and apply urgent resourcing to monitoring, habitat recovery, pest control, and fencing off areas of critical habitat, as part of the earthquake restoration process. Recovery and restoration of the biodiversity of the East Coast deserves DOC's, and the community's, full attention.

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<sup>4</sup> Letter dated 12 October 2021, from Te Rūnanga o Ngāi Tahu and Te Rūnanga o Kaikōura; contra view stated in letter dated 3 Feb 2022 from Radich Law.

## Appendix 4: Existing Business Activities

- 1 We received submissions, and further information, from three existing businesses that require continued vehicle access within defined corridors at Marfells Beach and Ward Beach. These businesses are:
  - Dominion Salt Ltd (**Dominion Salt**)
  - Burkhart Fisheries Ltd (**Burkhart Fisheries**)
  - Lanfar Holdings (No.4) Ltd <sup>1</sup> (**Lanfar Holdings**)(and includes any future successors, nominees or assignees of these business operations).
  
- 2 Dominion Salt was included as an exempt “agency” in the as-notified draft bylaw. Burkhart Fisheries / Lanfar Holdings were (in general terms) included in the proposed vehicle access point at Ward Beach (for purposes of boat access). However, no specific or bespoke exemption at Ward Beach was included for Burkhart Fisheries / Lanfar Holdings, despite these companies holding relevant resource consents for their commercial fishing operations, both at Ward Beach and the Saltworks jetty at Clifford Bay.

### Ward Beach

- 3 Burkhart Fisheries holds resource consents to excavate 3,500 cubic metres of seabed material (basically, beach gravels) from the northeast corner of Ward Beach, including formation of a temporary causeway, to maintain a channel to facilitate launching and retrieval of vessels used for commercial fishing.
  
- 4 Counsel for this submitter provided copies of the relevant resource consents (U191050.01, U191050.02). These include consent conditions that maintain public access (including a duty not to leave/park vehicles/ machinery on the beach when not being used to launch and retrieve vehicles or undertake excavations, bird

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<sup>1</sup> Lanfar Holdings Ltd did not appear (on the information submitted) to be a named resource consent holder, but was a joint submitter, represented by Counsel (Quentin Davies). We have relied on his legal submissions which included Lanfar as a relevant business interest that requires vehicle access in the terms sought.

monitoring (including shore birds, such as Banded Dotterel), notification to Te Rūnanga o Kaikōura of dredging events and other matters (to enable exercise of kaitiakitaka), and a duty not to damage exposed beach rocks (conditions 3, 4, 6, 13, 17, 18, 19). These consents were most recently granted in 2021 (expiry 2026).

- 5 The spatial area sought by Burkhart Fisheries / Lanfar Holdings as an exemption to the bylaw was the same area identified in resource consent U191050. An incremental additional area was sought. It was described as an ability to deviate from a 20m wide strip for launching of boats. We have not adopted that wording in the recommended bylaw, as we consider (in the case of Ward Beach) that the area identified by the resource consent (and any updated resource consent) is sufficient; and (in the case of the Salt Works jetty), we have recommended a 110-metre vehicle corridor proximate to the jetty.

#### **Marfells Beach / Lake Grassmere Salt Ponds / Salt Works jetty**

- 6 Burkhart Fisheries holds resource consents for a brine shrimp farm trial and discharge to seawater (land use and coastal permits, U990121) with an expiry date of 35 years from date of grant of permit.<sup>2</sup> We accept this requires practical vehicle access in the general vicinity of the saltworks jetty. Counsel advised that the saltworks jetty consent was associated with a water take and discharge permit that have been surrendered.<sup>3</sup>
- 7 The relevant area for which exemption is sought for vehicle access is identified in the submission dated 31 August 2021 at paragraph [4]. This is an aerial photo, which does not provide exact dimensions of the area sought. Counsel for the submitter confirmed that the

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<sup>2</sup> Issue date 6 May 1999, duration 35 years (noting a possible typographical error in consent condition 2, which states an expiry date in May 2002).

<sup>3</sup> Counsel advised that: “[6] ..in the new year Burkhart/Lanfar will investigate whether its operation is covered by a permitted activity rule or whether a consent is required.” If required, the merits of that will need to be assessed under the relevant RMA processes. Refer generally submissions of Counsel at hearings 1 and 2, written submissions dated 10 December 2021, Memorandum of Counsel dated 24 May 2022, and additional material provided by those submitters in response to Commissioner questions.

relevant area for which vehicle access was required was in fact smaller than that shown in the aerial photo, as follows:

“[2] The relevant area is depicted in our submission of 31 August 2021 below paragraph 4. While in practical terms the area necessary to be used will be a lot smaller it might be prudent to allow works to occur between the pier and the intake point marked with a star and an equal distance to the south.”

- 8 In light of this pragmatic concession, and bearing in mind the importance of restricting vehicle access to Clifford Bay (where not relevantly required), we agree that the size of the vehicle access area should be in the general terms expressed by Counsel above. Absent greater clarity, we recommend that the corridor might be of the order of say 110 m width (50m each side of the jetty, with a 10m allowance for the jetty itself).

#### **Dominion Salt**

- 9 Dominion Salt did not participate in our hearings, possibly because the as-notified draft bylaw exempted them as an “Agency” operation.
- 10 In response to our request for information, and invitation to provide further material, by email dated 30 November 2021, Dominion Salt noted their reliance on the sea water intake maintenance corridor (**the corridor**) for purposes of vehicle access, as set out in Appendix 21 to the Marlborough Environment Plan (**Appendix 21**). We were advised that this corridor is used to maintain the intake; and that tracked machinery up to 22 tonne is used by the saltworks to lift equipment at the end of the seawater intake to access the pipe for inspection, cleaning and maintenance. Appendix 21 includes dimensions for the width of the corridor, which extends to approximately 69.5 metres north and 140 metres south of the datum line for the intake pipeline extension corridor. We have adopted that same width for our recommended exemption area.
- 11 Some submitters confirmed the importance of continued access for this well-known local business. Some raised issues outside scope (for

example, remedial planting of the jetty access area). Several submitters queried the scope of the exemption which (as drafted) enabled the saltworks to obtain access to the entire bylaw beach area, not just the jetty access point.<sup>4</sup> On our reading, this was an unintended loophole. We have addressed this with recommended changes to wording.

### **General**

- 12 All three businesses hold relevant coastal (and other) resource consents, meaning that their activities within the coastal marine area are authorized under the RMA 1991. The proposed bylaw could adversely affect their continued business operations, if it did not provide a reasonable corridor to exempt vehicle use associated with these operations.
  
- 13 We do not consider that the continued vehicle use (within confined vehicle corridors) will adversely affect the existing biodiversity, cultural and coastal values to any greater extent than presently occurs. They reflect existing business activity. It is not necessary or proportionate for the proposed bylaw to limit legitimate business activity, operating under lawfully obtained resource consents, and within confined beach access areas. Our recommendations to retain access should have no bearing on the merits of any future RMA-related process (such as future resource consent applications).
  
- 14 The draft bylaw exempted Dominion Salt Ltd as an “agency”, but not Burkhart Fisheries / Lanfar Holdings. In their written submissions, Burkhart Fisheries / Lanfar Holdings originally sought the same outcome (recognition under the “agency” exemption), but during the hearing they appropriately confirmed the spatial areas of interest were much more confined, as relevant to their business operations.

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<sup>4</sup> For example, at least 64 submitters (most of whom supported Dominion Salt, in whole or part). A non-exhaustive list of examples include: Kerry-Ann Harrison (opposed, but in possibly ironic terms as she also suggested banning walking on beaches as a *reductio ad absurdum* of the bylaw), Michael North (supported existing business access for Salt-works, but confined to the area of coast that adjoins the jetty), Thomas Peter (limited access, requested native plantings (but this is outside our scope), Angela Levick (support), Leigh Potton (support), Nelson Tasman RFB (support), Geertruida Meinsma (retain as notified), Linda Skelton (support), John (Joe) Harrison (oppose) unless general public access enabled, RAWA (support), Herb Thomson (support), Helen Braithwaite (support).

- 15 As noted, the “agency” exemption was problematic for these businesses, because it applies to the entire Bylaw area. We have therefore recommended that the relevant exemption areas are mapped in the Schedule to the bylaw.
  
- 16 Our recommendations are reflected in proposed amendments to the proposed bylaw in Appendix 1. Council staff will need to reflect these recommendations by GPS coordinates or similar on the proposed maps. When mapping the relevant areas, Council staff may wish to allow +/- 20 metres or so, for the Marfells Beach access.

## **Appendix 5: Ward Beach boat access**

- 1 In their written submission,<sup>1</sup> and during presentations to our Hearings, Burkhart Fisheries and Lanfar Holdings raised several issues relating to boat access:
  - (a) Vehicle access for commercial boat launching at Ward Beach;
  - (b) Access to seawater intake at Saltwater jetty (Marfells Beach);
  - (c) Safety of recreational fishers that use the proposed boat launching location at Ward Beach;
  - (d) Whether additional boat launching areas should be identified at Canterbury Gully, including at Needles Bay, and at Chancet Rocks, with these launching points to be between 20m and 50m wide, enabling access from private land.
- 2 Issues (a) and (b) above, are separately addressed in our Appendix 4. We have recommended exemptions for business-use at Ward Beach and the Saltworks jetty at Marfells Beach.
- 3 We discuss issues (c) and (d) below.

### **Safety of recreational fishers at Ward Beach**

- 4 In short, we agree with Burkhart Fisheries that the proposed public vehicle access point at Ward Beach appears to be unsuitable, in light of the challenging sea and tide conditions that apply to this location. Similar comments on safety were made by other submitters, for example:
  - (a) Larnce Wichman, noted the importance of continued access for land-based fishing, stating that “..fishers need experience navigating the dangerous, unpredictable water of Cape Campbell, especially after the 2016 earthquake..”; and noting that Council had not assessed the risk of taking local

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<sup>1</sup> Dated 31 August 2021



recreational fishers off their quad bikes and into boats.<sup>2</sup> Mr Wichman noted that Ward Beach poses a significant safety issue for commercial fishers; for recreational fishers, and others, it was “..not safe to launch in.”

- (b) Other submitters also commented adversely on the proposal for boat access in lieu of vehicle access: Brett Molloy noted it was “..*fraught with danger as inexperienced people will access the Cape and beyond.*” and put themselves in danger; to similar effect, Mark Wills (who supported full quad bike access, below high tide mark and with speed limits), noted that boat launching at these areas may end in fatalities; Ted Howard (who supported a ban on intertidal driving, but otherwise supported responsible vehicle use to minimize impacts) noted that “..*launching boats is part of Kiwi culture.*” and supported boat access subject to the principle of doing least damage to habitats.
- (c) From the other end of the submitter spectrum, examples include Craig Potton and Anthony Millen (who supported banning all vehicle access, but supported the as-notified boat launch sites); Kristen and Stephen Dempster, supported the notified Bylaw, and boat launching at Marfells and Ward Beach in clearly defined areas; Nelson Tasman RFB supported designated boat launch sites, not ad hoc launching; Nelson Marlborough Conservation Board, supported access for boat launching where practicable; Sally Peter supported continued use (as in the past recreational fishers have launched boats at these spots, they are already modified and public areas); Ailsa McGilvary-Howard (Banded Dotterel of South Bay project) supported access to the area by water, leaving land-based ecosystems time for EQ recovery.

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<sup>2</sup> Mr Wickman supported no constraints on vehicle access for local fishers, particularly quad bikes; he also supported alternative boat launch points.

- (d) While not intended to be comprehensive, the submitter views quoted above reflected the spectrum of opinions on vehicle access, more generally. A key issue appeared to be the concern that boat access should not be seen as a legitimate substitute for quad bike access (or, what we refer to as ATV/UTV access). We agree, and have reflected this in our recommended Yellow Zone, to ensure equitable access by ATV/UTVs from Marfells Recreation Reserve to Te Karaka / Cape Campbell.
- 5 Safety concerns for smaller (recreational) boats were confirmed by evidence given during the hearing by Trevor Burkhart, a director of Burkhart Fisheries, with substantial marine experience, including many years of launching (and retrieving) fishing boats at Ward Beach.
- 6 Following that presentation, we requested a report from the Harbour Master into the objective safety risks posed by enabling vehicle (and larger boat) access for recreational use at Ward Beach. The Harbour Master's opinion was that it is the duty of all mariners to undertake their own risk assessment, but that the objective risks associated with the Ward Beach launching point were (essentially) high, as with much of the East Coast. Ultimately, the risk would be carried by the families that choose to use this boat access point. We infer that the risk would be higher for boat users that are not locals, who may "google" the boat launching point, without being fully aware (or without adequately informing themselves) of the potential dangers of this entry point.
- 7 Having considered the information and evidence provided, we have recommended that Council remove the public vehicle access at Ward Beach. However, we were advised by submitters that informal vehicle access at Ward Beach (for boats) has likely been happening for many years. Moreover, people can and do make informed choices around their safety (and the safety of their families) at sea. Further debate may be merited, before any decision is made, around

objective risk. It is therefore appropriate that Council undertake a further consultation process, before any decision is made to remove this vehicle access point. Any decision by Council to remove the public vehicle access point will not preclude smaller boats (such as dinghies) from access to the water, such as in fair weather conditions. It will have no impact on our recommended vehicle access for Burkhart Fisheries / Lanfar Holdings, identified in our Appendix 4.

### **Additional boat launching areas**

- 8 We were not persuaded that it was appropriate for additional boat launching areas to be identified at and around Canterbury Gully, Needles Bay (which can be accessed over private land), or at Chancet Rocks. Essentially, this would compromise the other values present at these locations, in particular, the biodiversity values that we have identified in our Report and our Appendix 3.
  
- 9 We do not consider that additional boat launching areas accessible by vehicle, for purposes of commercial fishing or public access, are warranted in new areas not identified in the as-notified Bylaw. Canterbury Gully, Needles Bay, and Chancet Rocks all have high values for protected flora and fauna, as well as being habitat for marine mammals. Accordingly, we have not recommended this outcome, and rely on our Report (and our Appendix 3) for additional reasons relating to the biodiversity and natural character values at stake.

## Appendix 6

### Proposed East Coast Beach Vehicle Bylaw - List of Submitters who attended the hearing on 23, 24 and 25 November 2021 and 3 and 4 May 2022

The following speakers had indicated they would speak to their submissions but either withdrew prior to the Hearing date or did not appear at their allotted time.

- 5360 185 Ian Lindsey Baldick
- 4660 47 Anthony (Ash) Millen
- 5163 89 Susan Hall
- 5353 179 Kevin Wilson
- 5291 119 Clair Clemett
- 3674 5 Jimmy Peter
- 5301 129 Jennifer Hills
- 5279 107 Rebecca Davies (New Zealand Defence Force)
- 4251 34 Ken Marfell
- 45 4462 Craig Potton
- 5311 139 Jo Marfell
- 5337 163 Bill Matthews (RaWE)
- 4880 74 Kristen and Stephen Dempster

#### Hearing Tuesday 23 November 2021

Submitter ID	Name	Organisation
5339	Corey Heberd Miriam Radich	Te Rūnanga a Rangitāne o Wairau Radich Law
5368	Raymond Smith/Lewis Smith	Te Rūnanga o Ngāti Kuia
5367	Larne Wichman	
5168	Dylan O'Connor/Quentin Davis from	Gascoigne Wicks representing Burkhart Fisheries Ltd and Lanfar Holdings (No 4) Ltd
5329	David Pacey	
3673	Brett Molloy	
4685	Trevor Jamie	Marlborough 4WD Club
5270	Roger Hambleton	RaWE
5351	David Pacey	Recreation Access With Education (RAWE)
5349	Michael Stoneley	
5369	John Harrison	
5364	Ronald Heberd	

#### Hearing Wednesday 24 November 2021

Submitter Id	Name	Organisation
4739	Mark Wills	
5346	Craig Marfell	
5300	Murray Hills	
5328	Ted Howard	
5268	Andrew John	Forest and Bird Marlborough Branch

<b>Submitter Id</b>	<b>Name</b>	<b>Organisation</b>
5282	Rick Stolwerk	East Coast Protection Group (ECPG)
5089	Sally Peter	
5285	Robert Peter	
	Mark Anderson	
5305	Sally Neal	Nelson Marlborough Conservation Board
	Nick Eade	Nelson Marlborough Conservation Board
5345	Herb Thomson	
	Philippa (Pip) Thomson	
5057	Gillian Pollock	Nelson Tasman branch of Forest and Bird
5309	Ailsa McGilvary-Howard (Chairperson)	Forest and Bird (Kaikoura Branch)
5330	Ailsa McGilvary-Howard	The Banded Dotterel of South Bay Project

**Hearing Thursday 25 November 2021**

<b>Submitter Id</b>	<b>Name</b>	<b>Organisation</b>
5302	David Barker	
5284	Penny Wardle	The Marlborough Environment Centre
5333	Tim Newsham	
5334	Debs Martin	Royal Forest & Bird Protection Society of NZ (Inc)
5290	Adam Currie	
5340	Don Miller	
5356	Peter Buttle	
5357	Hazel Monk	
5359	Janet Dobson Roxburgh	

The following speakers had indicated they would speak to their submission but either withdrew prior to the Hearing date or did not appear at their allotted time.

- 5356 Peter Buttle
- 5346 Craig Marfell

**Hearing Tuesday 3 May 2022**

<b>Submitter Id</b>	<b>Name</b>	<b>Organisation</b>
5168	Quentin Davies/Emma Deason	Gascoigne Wicks for Burkhart Fisheries and Lanfar Holdings (No 4) Limited -
5339	Corey Heberd Miriam Radich	Te Rūnanga a Rangitāne o Wairau Radich Law
	James Bentley	Boffa Miskell
5330	Ailsa Howard	

**Hearing Wednesday 4 May 2022**

<b>Submitter Id</b>	<b>Name</b>	<b>Organisation</b>
5282	Rick Stolwerk and Sonya Roxburgh	East Coast Protection Group (ECPG) Zoom and
5089/5285	Rob and Sally Peter	
5345	Herb and Pip Thomson	
	Anthony Little	MPI
	Jody Weir	DOC NB: The following people were in attendance to answer questions not around the Marine ecology. <ul style="list-style-type: none"> <li>• Phil Bradfield, Operations Manager</li> <li>• Patrick Crowe, Senior Bio Ranger</li> <li>• Rowan Rhindmarsh, Bio Supervisor</li> </ul>

## **Appendix 7: Summary of recommended outcomes on submissions**

We have set out below a summary of submissions, in relation to the Questions that were put forward for public consultation in relation to the as-notified Bylaw. The Table was prepared by Council at our request.

Question 2 (Exemption 1) related to the proposed exemption for boat launching facilities at Marfells Beach and Ward Beach.

Question 3 (Exemption 2) related to the proposed exemption for statutory and authorised agencies.

Question 4 related to the as-notified Bylaw, which "allowed" vehicles in the area between the Waima (Ure) River and the District Boundary with a 30km/hr speed limit.

It will be evident from our Report and Appendices that we recommend prohibited vehicle access in what we refer to as the "Red Zones"; this largely mirrors the as-notified Bylaw, except that we have recommended a new "Yellow Zone" for ATVs/UTVs, which is described in our Report, and the amended Bylaw and associated maps. Accordingly, our recommended outcomes on Question 1 support in part, oppose in part, submitters that supported or opposed prohibitions on motor vehicle access.

Our recommendations on "exemptions" support the continuation of boat launching facilities at Marfells Beach and Ward Beach, but subject to a recommendation to consider removal of public vehicle access for boat launching at Ward Beach, as part of what we refer to as the Stage-2 process (which, if adopted by Council, requires further public consultation). Accordingly our recommended outcomes on Question 2, support in part, oppose in part, submitters that supported or opposed these boat launching facilities.

As to Question 3, we recommended that the public and statutory agencies identified in the as-notified Bylaw should be exempt from the Bylaw. We did not recommend additions to these identified "Agencies". Accordingly, our recommended outcomes on Question 3 aligned with submitters that "support" this exemption.

As to Question 4, our recommended outcome (Stage-1) adopted the as-notified exemption for motor vehicles between the Waima (Ure) River and the District Boundary, with a 30km/hr speed limit, pending (Stage-2) further public consultation to investigate an increased no-vehicle buffer area at Waima (Ure) rivermouth, southwards. Accordingly, our recommended outcomes on Question 4 support in part, oppose in part, submitters that supported or opposed this access area.

The reader will need to review our Report and Appendices for answers to Question 5, and the associated recommended outcomes for submissions on this Question and topic.

### Summary per Question

Question Name	Answers (Y/N)	Total
Question1_MotorVehicleAccessProhibited	Neutral	5
	Oppose	77
	Support	111
	<b>Total</b>	<b>193</b>
Question2_Exemption1	Neutral	47
	Oppose	28
	Support	118
	<b>Total</b>	<b>193</b>
Question3_Exemption2	Neutral	66
	Oppose	23
	Support	104
	<b>Total</b>	<b>193</b>
Question4_MotorVehicleAccessAllowed	Neutral	40
	Oppose	72
	Support	81
	<b>Total</b>	<b>193</b>
Question5_GeneralCommentsAboutTheProposedBylaw	N/A	193
	<b>Total</b>	<b>193</b>

Grand Totals (for the filters applied)	
Submissions :	<b>193</b>
Speaking:	<b>50</b>
Hearing:	<b>0</b>