

# **Proposed Marlborough Environment Plan**

## **Hearing Notes**

12 April 2018

Block 4 – Topic 11

## **Use of the Coastal Environment**

Presentation from

**Kenepuru and Central Sounds Residents' Association  
and Clova Bay Residents' Association**

# Presentation to MEP Hearing Panel re Topic 11

## Introduction

1. On behalf of the Kenepuru and Central Sounds Residents' Association (KCSRA) and the Clova Bay Residents' Association (CBRA) (Associations) I would like to thank the hearing panel for the opportunity to talk to aspects of the Association's submissions on the Proposed Marlborough Environment Plan (MEP) and our subsequent Further Submissions as it concerns the above Topic.
2. My name is Andrew Caddie and I am the President of KCSRA. As I am currently living in Blenheim the Associations asked me to prepare and present on behalf of the Associations.
3. In terms of my professional background I hold 2 tertiary qualifications - a Bachelor of Forestry Science and a LLB, both from Canterbury University. I was a forester for a number of years with the then NZ Forest Service. Following a period of OE I obtained my LLB and practised law as a commercial solicitor for a number of years at various large National legal firms.
4. Today's session of hearings covers Topic 11 of Block 4 – **Use of the Coastal Environment**. I note the Chair's earlier assurances that panel members will have read the Associations original submissions and that filed for this hearing earlier this month. Two points:
5. From your reading you will recall that the Association's primary focus is the Coastal Marine Zone of the Marlborough Sounds and for the purposes of this topic the Coastal Marine Area figures largely. Secondly today we wish to focus on matters arising from the RMA Section 42A report the Council has had prepared. In this case the Section 42A report (and addendums) prepared by Ms Debbie Donaldson, Consultant Planner.

## Structure of this Submission

6. I have decided to firstly deal with what the S42A reporter refers to as Matters 4 and 5 (Fishing and Moorings). I then deal with other aspects of our submissions and the recommendations of the S42A reporter on a selective basis.
7. I wish to stress that whilst today there will be a focus on matters where the S42A reporter **did not** find favour with our submissions we wish to record that

overall the majority of our submissions points were accepted. But in the interests of time we will not dwell on these.

#### **Matter 4 - Fishing – Issue 13C and Objective 13.4**

1. The S42A reporter has recommended that this section of chapter 13 be deleted in its entirety. **We submit in opposition to this recommendation.**
2. This section contains an Objective – the sustainable management of fisheries in the Sounds and two associated policies. In essence the S42A reporter argues that however admirable the intention of this section it is not a matter that MDC can control. Control in the sense of to direct or command or regulate or govern.<sup>1</sup> Further it is seen as fatal that this objective is not something the Council can achieve on its own.
3. The Associations agree that, via Policy 13.4.1, the MDC is not seeking to **control** fishing activities it is merely expressing its intention, for a variety of sound reasons, of advocating and supporting for the sustainable management of the Sounds fisheries to the likes of the Minister of Fisheries. A non-regulatory policy approach to this issue.
4. We also note that one of the reasons put forward by the MEP and the Section 32 report as to the rationale for this Objective and associated policies is that it indirectly assists the MDC in carrying out one of its Section 30 functions namely seeking to maintain indigenous biodiversity<sup>2</sup>. As far as we can ascertain there is no discussion from the S42A reporter on this fact.
5. Accordingly with all due respect the Associations disagree with the conclusion of the S42A reporter at her paragraph 367. That the subject matter of this section cannot be an MEP matter as it falls outside the scope and functions of the Council under the RMA.
6. As the panel will be aware the interaction and dividing lines between the RMA and the Fisheries Act 1996 has been the subject of an appeal from an Environment Court decision to the High Court<sup>3</sup>.
7. In brief the trustees sought regional planning controls over fishing to maintain indigenous biodiversity and address certain other matters. The issue of if a regional council could control fishing matters was raised at the Environment Court. The Environment Court declared, in short, a regional council may impose controls on fishing techniques and methods provided the sole or dominant purpose of the control was a specified resource management

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1 Oxford English Dictionary

2 Section 30 (1) (ga) of the RMA

3 AG v Trustees of Motiti Rohe Moana Trust et al [2017] NZHC 1429

- purpose<sup>4</sup>. The Attorney General begged to differ and hence the litigation at the High Court.
8. Upon reflection I accept the HC case is not on point, as here the MDC is **not** seeking to impose controls over fishing activities. Rather MDC appears to accept that in the context of Objective 13.4 control lies with the likes the Minister of Fisheries. What MDC via the MEP is seeking to indirectly address is a statutory function through the soft (but not easy) path of advocacy and support. However the case is useful we submit in relation to its discussion on section 30(1)(ga) Biodiversity. In particular we draw the panels attention to Whata J's discussion in paragraphs 119 to 128 and conclusions.
  9. The S42A reporter also made some comments about the Section 32 report that in her view underlined the unsuitability of the approach of the notified MEP on this matter. Namely that as the s 32 reporter was of the view that "*the policies cannot be said to be efficient or effective in achieving the objective*"<sup>5</sup> this led to the result, so the S42A reporter opined, that the proposed objectives and policies cannot meet the test for inclusion.
  10. Again the Associations respectfully disagree.
  11. Section 32 contains a whole range of assessment criteria of which this is but one. We submit that when the section 32 assessments are considered in the round a different conclusion is arrived at. Namely the proposed objective and policies are suitable and desirable for inclusion in the MEP.
  12. We support the targeting of this section on the Marlborough Sounds. It is an iconic and special area and advocating and supporting the sustainable management of the various fisheries within its bounds seems most appropriate. In passing we note that many Sounds fish species are not migratory and have quite restricted freedom of movement (eg shell fish such as scallops) contrary to what the S42A reporter opines at paragraph 374.
  13. Finally under this section we would like to comment on the S42A reporter's views on policy 13.4.2. Namely that the MDC support community groups working towards a sustainable fishery for the Marlborough Sounds. She sees such support as inequitable - as favouring one group over others eg it ignores industry groups.
  14. In rebuttal we note the section 32 reporter makes the quite valid point that it is often community groups who provide the initial impetus for issue resolution. We suggest this is often due to their view not being clouded by industry (and personal) economic goals. The Associations are also keenly aware of the inequitable nature of having to contest environmental matters with well-funded

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4 Ibid at para 1.

5 Section 32 (1) (b) (ii)

- and resourced industry groups who favour the status quo as in their economic interests.
15. We submit this policy wisely recognises both the community interest in these matters and recognises the asymmetrical power and resource imbalances community groups face when wanting to engage on these matters.

## **Matter 5 – Anchoring and Moorings**

16. Whilst many private moorings are recreationally orientated much of the Sounds is without road access and therefore for some mooring owners boat access is a necessity not an option. Accordingly the community takes issues around the grant and renewal of moorings very seriously.
17. In the Associations submissions we generally supported the thrust of policies on mooring management (13.6.1), anchoring (13.7.1 and .2) and policies 13.9.1 to 13.9.8- moorings. However it is fair to say we were somewhat startled by the development by the S42A reporter of a new very directive policy (13.9.9) re Moorings with potentially quite serious impacts on mooring owners.
18. This recommendation was based on two submissions suggesting aspects of mooring design be considered but more importantly the S42A reporter relies heavily in advancing this new policy on a recent MDC commissioned Cawthron report.<sup>6</sup> This report among other things looks at the potential for adverse effects on the seabed from the use of the conventional and widely used block and chain mooring. Please bear in mind that this report was not available to submitters back in 2016.
19. The report states that there are some 3000 moorings in the Sounds and thus infers that the area cumulatively potentially impacted is significant – or is it?
20. Based on a swing radius of 20 m and a sweep of 140 square metres<sup>7</sup> we are looking at around 40 hectares. However, Cawthron suggest, based on NSW research, that this may be an underestimate. So using the NSW figures we get an area around 76 ha.
21. Either way a reasonable sized area. But as some of our members have been quick to point out when appraised of this proposed new policy a small cumulative area compared to the cumulative area of other uses with significant adverse impacts on the seabed.
22. Other members have pointed out that the MDC requires that moorings be lifted and inspected every 2 years and that this generates significant disturbance of

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<sup>6</sup> Cawthron 2018 – Report No 3098 Effects of moorings on different types of marine Habitat.

<sup>7</sup> See page 8 of the Cawthron report cited above.

- the seabed. A member also commented that an implicit assumption of the Cawthron study seemed to be that all moorings are used year round.
23. There also seems a disconnect between this proposed policy as developed by the S42A reporter and the usual method of MDC policy development for matters of significant community interest. **Detailed consultation.** The S42A reporter refers to the report being presented to the MDC Environment Committee. On reviewing the agenda for that meeting we note the recommendation *“That the information be referred to the Planning, Finance and Community Committee for inclusion in the ongoing development of the Marlborough Environment Plan”*.
  24. However it is clear from the recently released minute of that meeting there was some concern as to whether the process around this report had been dealt with in a transparent manner. Indeed it was recorded<sup>8</sup> that members suggested that a process be put in place identifying effective and transparent ways of dealing with the information and recommendations presented. MDC staff were to work on this.
  25. Further the recommendation actually approved by that Committee was *“That the information form part of the MDC database for policy development and decision making”*. A subtle but important change from the recommendation originally put forward by MDC management.
  26. In the minute and associated agenda papers there was also talk of the completion of a multi beam survey that would provide hard data (evidence) on, among other things, the relationship of 3 dimensional structures on the sea bed in the Queen Charlotte Sound. So, asked one member, why the unseemly and less than transparent rush if the evidence is still in the process of being collected? Further the Associations understanding is that as existing moorings come up for renewal they are effectively treated as a new mooring application.
  27. To sum up: from the Associations perspective on the face of it we have a new directive policy impacting on a large segment of the community that has bypassed the usual MDC consultation process. Given the circumstances we submit the new policy **should be deleted**, the hard data collected and analysed and following a round of more open and informed public debate and discussion a variant re-introduced by way of a plan variation.
  28. However the Associations are all too aware that we operate in a less than ideal world. So we decided to also turn our minds to consider how best to balance this policy directive should it find favour with the Panel.
  29. To be fair the Cawthron report makes a reasonable case that in some locations with significant ecological or conservation values the block and chain mooring

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<sup>8</sup> MDC Minutes of 1 February 2018 - Item - ENV - 0218-232 *Environmental Effects of Moorings on Different Types of marine Habitat – E325-002-003*

method would most likely have adverse environmental effects that, if we accept the Cawthron report, can be modified by the use of another design – admittedly one that is likely to be two or three times more expensive.

30. Accordingly in the alternative we submit, it would be appropriate to balance the quite reasonable concern of mooring owners at the way this policy has been thrust upon them against the no doubt well intentioned efforts of MDC staff and the S42A reporter to address what they see as a significant environmental issue.
31. The Associations submit that adjusting the proposed wording of the policy to better reflect what mischief the new policy was intended to do might go some way to do this.
32. The latest proposed wording by the section 42A reporter is contained in her Addendum 1. In the **attached** appendix we have submitted some alternative wording that more directly captures the intended mischief as evidenced by the Cawthron report – adverse impacts on seabed habitats that have significant ecological or conservation values sensitive to disturbance.
33. **Changes to Policy 13.9.1:** As a result of submissions from an iwi interests the section 42A reporter wishes to have the policy (the considerations to be factored in for a proposed mooring site) give direct consideration to multiple-owned Maori land<sup>9</sup>.
34. With all due respect and acknowledging the broad sweep of matters considered by the S42A reporter the development of the policy reasons behind this amended policy seem somewhat under cooked. We respectfully suggest that the Panel ascertain more clearly what the mischief the S42A reporter is trying to address and if the proposed wording and placement achieves that.
35. In the interim the Associations submit the current wording is confusing and unclear and thus should be deleted or tidied up.

### **Objective 13.3 – Recreation activities in the Coastal Environment**

36. The Associations submitted in support of the permissive approach to recreational activity and the general thrust of policies of 13.3.2 and 13.3.3. However in relation to policy 13.3.4 we saw it as unnecessarily restrictive nor reflective of modern day realities. The proposed wording is:

“Ensure recreational use has priority over commercial activities that require occupation of the coastal marine area in Queen Charlotte Sound, including Tory Channel. (This policy does not apply to areas zoned Port or Marina).

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<sup>9</sup> Paragraph 450 of the Section 42A report

37. In the Associations view time does not stand still and what was a good policy back in 2000 when the current plan (MSRMP) was introduced with a similar policy may still be one. However policy consideration can and should be given we submit to extending the policy to other areas with high recreational use. Thus for example over this period the importance of Havelock as a recreational gate way to the Pelorus and Kenepuru Sounds has grown exponentially. Recreational activity has thus increased significantly in the Pelorus and Kenepuru Sounds.
38. We submit the policy analysis in restricting this laudable policy to the Queen Charlotte is excessively narrow and somewhat circular in logic.
39. *In the past we have had this policy for the specified areas, recreational use has not abated in the specified areas and so we should maintain this policy but only for the specified areas to the exclusion of consideration of other areas. Why?- because originally the policy was only for the specified areas.*
40. This is as the section 42A reporter acknowledges other areas of the Sounds are increasing in importance for recreational use and with our increasing population and growing non-domestic tourist sector will only increase in popularity.
41. The Associations submit that the distinction afforded Queen Charlotte/Tory Channel in this regard seems arbitrary and cannot be sustained. We reiterate our submission that policy 13.3.4 should be extended to areas of the Pelorus and Kenepuru Sounds with high public use and amenity value.

Andrew Caddie

For and on behalf of KCSRA and CBRA

12 April 2108

## Appendix

### Proposed policy 13.3.9 – Use of the Coastal Environment

***Policy 13.9.9 – In determining an application for a new mooring in a site that contains seabed habitats with significant ecological or conservation values, an assessment of the effectiveness of the proposed mooring type and design in mitigating adverse impacts on these values should be carried out.***

*There is evidence to demonstrate that the conventional block and chain moorings can cause damage to the seabed as a result of heavy ground chain scoring within the 360 degree arc around the mooring block. The placement of such moorings can therefore have adverse effects on seabed habitats surrounding the mooring, in particular those areas with ecological or conservation values that are sensitive to seabed disturbance. By way of example and not limitation such areas include rocky reefs, macroalgal beds, rhodolith or sea grass beds, sponge gardens, tubeworm mounds, fish spawning areas and areas of shell hash. This policy requires that consideration be given to other mooring types and design that would reduce the seabed disturbance surrounding the mooring in these circumstances.*