Discussion Document

To Support Formation of Submissions

by the Marlborough Sounds Integrated Management Trust on

Government Proposals for a New Marine Protected Areas Act

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Purpose

This discussion document is an analysis by Peter Lawless, Coordinator of the Marlborough Marine Futures project of the consultation document released by Government on changes to the marine protected areas legislation[1]. It is intended to support discussion within the Marlborough community. This discussion document has been approved by the Marlborough Sound Integrated Management Trustees for general release, but does not purport to be the views of the Trust.

After discussion at a public Forum, and with interest groups that cannot be present at the Forum, the Trust will prepare its submission to Government and will encourage others to do the same.

Overall

Reform of the marine protected areas legislation is long overdue and the consultation document should be welcomed as a base for public discussion. Its proposals, however, are not well thought through, and fall far short of good practice in New Zealand or around the world.

The goal of Government, as presented in the consultation document, is to achieve a network of representative marine protected areas within the Territorial Sea. Reform of the Marine Reserves Act, 1971, is necessary to achieve this.

Worldwide good practice, as recommended by the IUCN, is that the primary purpose of every marine protected area should be nature conservation, and this is fundamental not stated in the consultation document.

In summary:

1. *Ad hoc* approaches proposed in the consultation document are outdated and inappropriate, marine protected areas development should be embedded in integrated coastal and marine management;

2. The role of the tangata whenua should be integrated, respected and embedded in the overall approach and the document does not set out how that might be achieved;

3. The question of compensation has been cast in ways that will distort and disable marine protection initiatives in the future and should be extended to all forms of marine protected area;

4. Recreational Fishing Parks as defined in the document are not *marine protected areas* within current usage of the term in New Zealand, or by the IUCN, and should be placed outside the proposal, or integrated into a wider concept of marine parks;

5. The ideas in the document about community consensus are under-developed and flawed, even though good practice examples are available in New Zealand;

6. Commercial activities in marine protected areas should not be allowed to distort their functions and the interests of the tangata whenua should be protected.

[1] With portions being taken from analysis provided by Nigel Scott of TRONT for Te Korowai o Te Tai o Marokura

7. The proposed fishing park in Marlborough should not include areas outside the Sounds. Restricting this instrument to the Sounds proper would achieve the objective of protecting/enhancing the value to recreational fishers *within* the Marlborough Sounds and also reduce its negative effects on commercial fishers holding ACE.

8. It is not clear how the approaches integrate with the Marlborough District Council's resource management and planning responsibilities under the RMA.

Elements of a solution could be to:

1. Defer, reduce or reform the idea of a recreational fishing park for the Marlborough Sounds.

2. Only include in the new Act instruments that have conservation as their primary purpose.

3. Provide for marine parks with zoning for other interests as is done in places like the Great Barrier Reef and use this in the Marlborough Sounds.

4. Carefully provide for the full range of interests of the tangata whenua.

5. Provide for integrated coastal management that incorporates best practice in spatial planning and fine scale management based on New Zealand experiences in whole of community collaborative processes.

The analysis below provides some thinking on how this might be done.

Ad hockery

Ad-hoc marine protected area applications are inappropriate and should not be provided for in the new legislation. Marine protection and utilisation planning should be conducted in a collaborative manner from the outset, focussing on actual or likely risks/threats to biodiversity.

Suitable planned, collaborative approaches should include the following elements:

a. The 'bottom-up', collaborative, consensus-building and tangata whenua-led approach championed by Te Korowai o Te Tai o Marokura. Te Korowai planning was integrated, focussing on protecting the full range of rights, interests and values of an area not just marine protection or biodiversity conservation alone and focussing on actual or likely risks/threats to these rights, interests and values.

b. The 'top-down', Government-facilitated approach such as the South East marine protected area Forum. All such entities should include sufficient Tangata Whenua representation as determined by the Tangata Whenua (this may include both commercial and non-commercial representation).

c. Integrated planning initiatives from communities and councils such as the Marlborough Marine Futures Project and the Sea Change project for the Hauraki Gulf.

Role of Tangata Whenua

The tangata whenua have a broad range of rights and interests that need to be well integrated into the formation of marine protected areas and protected in these processes.

Government led planning for marine protected areas

With regard to any marine protected area planning conducted by Government departments, tangata whenua must be given the opportunity for input and participation

into such planning before the measures are made public or are assessed by a Board of Inquiry. Any such Board should include sufficient tangata whenua representation.

Statutory safeguards

Statutory safeguards are needed including:

a. A Treaty clause ("to give effect to…"). In terms of tangata whenua interests the formation and management of marine protected areas should at least match those for terrestrial areas. Therefore, the Treaty recognition should match that in the Conservation Act section 4 - *This Act shall so be interpreted and administered as to give effect to the principles of the Treaty of Waitangi.*

b. A requirement for those exercising functions, duties or powers to act in a manner consistent with the provision of the 1992 fisheries settlement.

c. An undue adverse effects test for customary, commercial and non-commercial rights and interests (including but not limited to fishing).

d. Provision that Recreational Fishing Parks not derogate from the capacity of tangata whenua to form mataitai, taiapure and rahui even when those would conflict with the Park and its management.

Process

I think it is important to support the proposal to prevent Ministers from making amendments to recommended marine protected area resulting from collaborative processes or Boards of Inquiry. Applications should be referred back to the relevant entity for further work if Ministers are not willing to approve/decline in their current state as each proposal will have delicately balanced trade-offs.

The consultative document, however, reveals a very limited understanding of how community consensus can emerge and what that means.

Consensus decision making can only succeed when participants agree to forgo the right of veto. Dale Hunter writes "*Individuals take on a commitment to reach agreement by consensus and give up the right of veto.*"[2]

However, community consensus needs to include all affected interests and be able to meet their core needs. A process that is only about the formation of marine protected areas cannot do this. The needs of tangata whenua, commercial fishers, tourism operators and local communities need to be accommodated in a comprehensive set of solutions in which the formation of marine protected areas forms a vital, but not an isolated, component.

The community consensus will never be absolute. It has been recognised in such processes around New Zealand that there are vocal individuals whose role means that they can never agree. For example, in the process for the Port of Auckland politicians were expressly excluded from the Stakeholder Working Group. Similarly, participants in the Hauraki Gulf Sea Change process recognised that professional lobbyists could not effectively participate in a process that required every sector to give something up to reach agreement.

[2] The art of facilitation – Dale Hunter with Stephen Thorpe, Hamish Brown and Anne Bailey 2007

Conversely, the Te Korowai process adopted a model where the people with generational commitment to the place made the core trade-offs supported by wise advisors from the public agencies, science community and officers of the tribal authority TRONT. The nature of the consensus required for Ministers to implement the results of a collaborative process needs to be clearly articulated in the legislation and in the parameters for each process.

As proposed in the consultation document a range of Ministers need to be convinced that a proposal should proceed. The text in Appendix C refers to the role of officials in this. In our experience this has the potential to stymie most good proposals. In the process for Kaikoura some officials acted in a highly partisan manner defending the putative interests of industries well beyond the point the industry representatives themselves advocated.

In practice this means Cabinet agreement will be required for any proposal to advance past the first hurdle. Kaikoura achieved this but only after the expenditure of more than $250,000 of public funds and a thousand hours or more from each of the members of Te Korowai. Therefore, there needs to be a front end where processes can get enough momentum to have any chance of making it over that first formal hurdle.

‘Rebalancing’

It is wrong to equate, as the consultation document does, marine reserves and marine protected areas with sustainability measures under the Fisheries Act in an attempt to avoid compensation. ‘Protecting and preserving’ are not equivalent to ‘sustainable use’.

The displacement of fishing effort with the establishment of a marine reserve or marine protected area can:

a. Seriously undermine the sustainability of the remaining fishery in a QMA (especially for sedentary species such as pāua); and

b. Can thus seriously undermine the ‘currency’ of the 1992 fisheries settlement.

‘Rebalancing’ (e.g. retirement of quota with negotiated compensation and/or recreational bag limit cuts) will therefore be needed with the establishment of any type of marine protected area in the future.

This is a fair proposition considering oil and gas permit holders receive absolute protection. Currently, fisheries rights holders receive no protection at all.

Removing fishing displacement with marine protected area establishment will remove the need for monitoring of such effects (proper monitoring of such effects could prove to be expensive).

Concessions, tourism and research

The proposals as set out in the consultation document would produce some very onerous and probably unintended effects if a Recreational Fishing Park was legislated for the Marlborough Sounds. As proposed, a wide range of activities would come under a concessions regime, as operates on land-based reserves and in national parks.

This would capture tourism activities including water taxis, charter fishers, diving, marine transport, commercial filming, recreation events and research to name a few. Under current DOC processes each of these would need a license and would pay concession fees which might equate to 7% of gross revenue under current practice.

Other questions to consider are - should tangata whenua receive discounted rates or be exempt from concession for some activities? Should tangata whenua have to pay for access permits for research and monitoring in their own rohe moana?

Transitional provisions

Transitional provisions would be required to ensure that current operators would be deemed to hold concessions until due process was completed and others prevented from using the new laws to displace them.

Generational reviews

Generational, including an opportunity to dis-establish marine protected area if appropriate have not yet been discussed in Marlborough but this approach is known to be supported by tangata whenua.

Oil and gas

Areas for consideration as MPAs should not be constrained by the likes of potential oil, gas or mineral prospects.

EEZ

The EEZ is out of scope for the new marine protected area Act under the proposals in the consultation document. This will affect Marlborough most in the north where the Cook Strait canyon cuts across the boundary and where ecologically significant areas off D'Urville Island continue offshore.

Types of MPAs

Marine reserves

Could be supported as proposed as they are well accepted in New Zealand.

Species specific sanctuaries

Could be supported but suggest extending them to unique communities such as biogenic habitats. Note that under the discussion document the management of fishing within species specific for, say bryozoan beds, would remain under the Fisheries Act.

Seabed reserves

Support but extend to idea of stratum protection so a pelagic area could be protected.

Recreation fishing parks

Recreational Fishing Parks are not marine protected areas and should not be supported for inclusion in a new MPA Act in their proposed form. They should remain under the Fisheries Act. They are a tool which can distort biodiversity conservation rather than enhancing it.

The IUCN says that recreational fishing parks are not marine protected areas *per se* although marine protected areas may use fishing closures as a management tool.

Temporary or permanent fishing closures that are established primarily to help build up and maintain reserve stocks for fishing in the future, and have no wider conservation aims or achievements are not considered to be marine protected areas. For example, Norway, Iceland and the Faroe Islands close areas to fishing at short notice if the percentage of

juveniles or by-catch goes above a certain number. These areas do not qualify as marine protected areas.

IUCN's advice is that areas set aside purely to maintain fishing stocks, particularly on a temporary basis, should not be considered to be protected areas even though they may well reflect good fishery management. For such sites to meet IUCN's definition of a protected area, managers would need to address the overall health and diversity of the ecosystem and have a stated primary aim to this effect.[3]

The primary characteristic of a marine protected area for the IUCN is that *as stated throughout this document marine protected areas must first meet the definition of a protected area and thus be primarily managed for nature conservation*[4].

The proposal to establish such a mechanism should be referred to the fisheries review process that is currently underway.

However, should this tool remain in the new Marine Protected Areas Act, fisheries management safeguards need to implemented for each park including:

a. Banning recreational charter fishing inside the park.

b. Setting new, reduced recreational fishing limits including:

   i. Individual daily bag limits that reflect the intent of 'fishing for a feed'

   ii Vessel limits

   iii Accumulation limits.

c. Recreational fishers being required to report their catch.

The special case of Marlborough

The proposals as advanced for the Recreational Fishing Park would be difficult to support in Marlborough. An alternative of a Marine Park with a core conservation purpose and which excludes commercial fishing from a suitable area could be much better fit.

If the Recreational Fishing Park is to be established by the legislation it should only be done as the foundation for a more comprehensive solution for the Marlborough marine environment such as true Marine Park of the type established for the Great Barrier Reef and Monterey in California. As advanced in the consultation document the proposed Fishing Park pre-emptively blocks the formation of any further no-take marine reserves in the Marlborough Sounds.

Three options for Marlborough Marine Futures to consider are set out below:

Option A – Oppose the Fishing Park but support reform of the MPA laws

The Fishing Park proposal is supported by some sectors in Marlborough and strongly opposed by others.

Ministers have indicated that they see it as an election promise and intend to proceed with it.

[3] http://cmsdata.iucn.org/downloads/uicn_categoriesamp_eng.pdf
[4] Ibid

None of the rest of the scheme for improving marine protected areas formation in the consultation document rests on legislating in two marine parks. In fact, doing so cuts across the collaborative philosophy evident in the rest of the document.

However, if Government defers formation of the Marlborough Sounds Recreational Fishing Park to due process under the Act, that process as currently proposed would not lead to fully integrated solutions for the Marlborough marine environment.

There is also some risk that opposition to the marine park proposals might delay or derail the MPA reforms as a whole.

Opposing the Fishing park in total would certainly mean that the current Government would not support the Marlborough Marine Futures project.

Option B – Make the Fishing Park into something better for Marlborough

If Government is irrevocably committed to making the Recreational Fishing Park a possible approach might be to:

1. Pull the Recreational Fishing Park boundary back to the mouths of Queen Charlotte and Pelorus Sounds, this would reduce the effect on the ACE fishers considerably (see Map1);

2. Require in the Act a 3, 4 or 5-year review of the Park to create integrated management including marine reserve formation, taiapure and mataitai, integration with the RMA and marine farm considerations (note that in the Hauraki Gulf a 2-year process proved inadequate);

3. Appoint a governance board for the Fishing Park charged with conducting the review as well as interim management of the Park, the Board would need to encompass the full range of interests including land use and marine farming as well as environmental interests;

4. Support Marlborough Marine Futures to form a Stakeholder Working Group that could morph into the governance board and resource it to get the required work under way as the legislation is being prepared so any glitches can be sorted and momentum is maintained (noting that Minister's would at all stages be acknowledged has holding the discretion on final appointments to the governance board and performance in the collaborative environment of the Stakeholder Working Group would be material in the final decisions made by Ministers);

5. Explicitly bring iwi into to the core process rather than have a parallel process for their interests, this was a critical success factor in Kaikoura;

6. Set a wider boundary for the review than for the Fishing Park, the Marlborough District Boundary is the logical one;

7. Give the governance board a wide brief that includes land use effects, benthic ecosystem protection and working with iwi to sort out how their customary interests can be protected;

8. Have an MOU between central Government and the Marlborough District Council on how this process would interface with the RMA plan process;

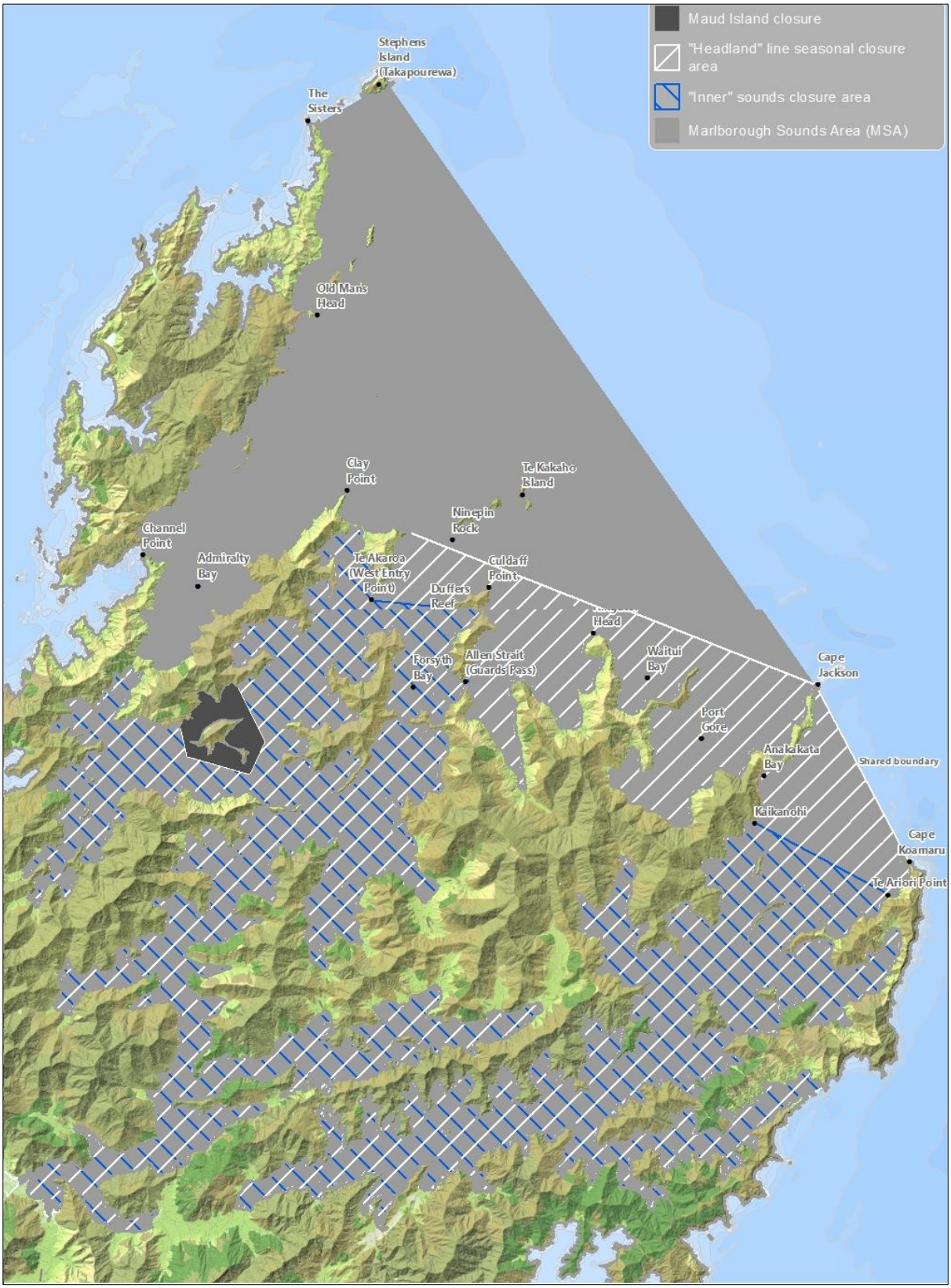
9. Establish and resource an Expert Advisory Group to assemble the required science (noting that much of the science will be sourced from the existing research programmes but their priorities might need to be influenced);

10. Require that the governance board also bring forward a recreational fishing regime that would ensure sustainability of the fisheries within the area closed to commercial fishing;

11. Give powers to the Ministers to enact the solutions advanced by the governance board where those solutions are within the ambit of the new Act and require others exercising powers and functions under other Acts to listen and respond to their recommendations on a package of solutions (this would include the RMA, Biosecurity Act, Maritime Transport legislation, Fisheries Act and perhaps other parts of the Conservation legislation).

Option C – Push for a comprehensive marine park for Marlborough

This option would involve persuading Government to add a Marine Park concept as a part of the legislation and then to adopt a two-step process for Marlborough. Step one would be to legislate in a Marine Park for the Marlborough Sounds limiting its initial application to excluding commercial fin fishing from the area shown on Map1. Step two would be then to do the investigations needed to establish every else about the Marine Park. This option is much the same as Option B, but is clearer in its objectives throughout and has the added benefit of providing the basis for other such Marine Parks to be established elsewhere in New Zealand. Rather than a "governance board" this approach would allow Government to appoint an "establishment board" engaged only in a collaborative strategic process free of the constraints imposed by being involved in day to day management.


Maud Island closure
"Headland" line seasonal closure area
"Inner" sounds closure area
Marlborough Sounds Area (MSA)
Stephens Island (Takapourewa)
The Sisters
Old Mans Head
Clay Point
Te Kakaho Island
Ninepin Rock
Channel Point
Admiralty Bay
Te Akaroa (West Entry Point)
Culdaff Point
Duffers Reef
Head
Waitui Bay
Cape Jackson
Forsyth Bay
Allen Strait (Guards Pass)
Port Gore
Anakakata Bay
Shared boundary
Kaikanohi
Cape Koamaru
Te Ariori Point

Map 1