

**BEFORE THE PROPOSED MARLBOROUGH ENVIRONMENT PLAN HEARINGS PANEL
AT BLENHEIM**

UNDER the Resource Management Act 1991
(the Act)

IN THE MATTER of a change to Marlborough's policy
statement and plans under the First
Schedule to the Act

**MEMORANDUM OF COUNSEL FOR THE MARINE FARMING ASSOCIATION INC AND
AQUACULTURE NEW ZEALAND LTD**
Dated this 23rd day of April 2018

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MAY IT PLEASE THE PANEL:

1. During the Hearing held on 11 April 2018, the Panel asked a series of questions of the Marine Farming Association Inc (MFA), Aquaculture New Zealand Limited (AQNZ) and associated industry submitters. This memorandum answers those questions.

What provisions distinguish between the National Transportation Route (NTR) as a route, and as an area susceptible to wave wash as a result of vessels using the route?

2. The provisions relating to the Route¹ itself (and associated safety and efficiency) are policy 13.15.1 and method of implementation 13.M.20. The explanatory text to policy 13.15.1 notes that the safety and efficiency of ships using this part of the coastal marine area “will be a major consideration in the assessment of activities and structures proposed to be located or carried out *at any point along the route*” [*emphasis added*].
3. By contrast, the provisions which relate to the effects of wave energy caused by ships operating on the NTR are policy 13.16.1 and methods of implementation 13.M.20 and 13.M.22.
4. In terms of the rules, the use of surface water by a ship in the NTR and Queen Charlotte Sound is a permitted activity pursuant to rule 16.1.1, subject to the standards in 16.3.1. If those standards are not met, the controlled activity standards (16.4.1 or 16.4.2) refer to the NTR.
5. In the definitions at Volume 2 Chapter 25, “National Transportation Route” is defined as “mapped on the *National Transportation Route Map*.” The definition of “Wave record” means “any record of the ship – generated vertical displacement of the seawater surface as a function of time derived at any location within the [NTR] that meets the requirements of Clause 3 of Appendix 12.”
6. Volume 3, Appendix 12 (Determination of wave energy) also refers to the NTR and identifies approved measurement sites for the calculation of wave

¹ The main channel, as defined by the transit lines between prominent headlands which approximates the vessel track as defined in the relevant passage plan.

energy. The assumption inherent in Appendix 12 is that the vessels are travelling on their tracks as defined in the relevant passage plan.

7. On this basis, the industry maintains its submission that it would add clarity if the MEP map differentiated between the NTR and areas affected by ferry wash caused by vessels travelling within NTR.² The NTR should be confined to the main channel, as defined by transit lines between the prominent headlands.

Additional standards for mussel reef restoration

8. The aquaculture industry had sought mussel bed restoration as a permitted activity. The industry proposed a standard that the activity must be carried out in accordance with a Mussel Bed Restoration Plan approved by the Marlborough District Council. The process to establish such a plan would need to be conducted in accordance with the Local Government Act 2002, and in particular Part 6.
9. I anticipate any such plan would have the following characteristics (which could be additional standards):
 - (a) It would relate to a defined geographic area;
 - (b) The plan would be for a defined term of 10 years or less;
 - (c) The Harbour Master confirms that the presence of the mussel bed (and associated activity) will not materially change the risks to navigation when assessed in accordance with the New Zealand Port and Harbour Marine Safety Code;
 - (d) The site is not within an Ecologically Significant Marine Site;
 - (e) The site is located over an area characterised by sand, shell and/or mud; and
 - (f) The Plan must define objectives, and include a monitoring programme and provide for the public release of the results of that monitoring programme.

² Legal Submissions for Hearing Block 4 (4 April 2018) at [114].

10. Both AQNZ's submission and the submission of the MFA sought alternative relief and further consequential amendments.
11. An alternative to what is proposed might be to add some explanatory text. For example, in Volume 1, Chapter 6 Method of Implementation 6.M.4 the following text could be added: "In the Hauraki Gulf, mussel bed restoration has attempted to restore natural character. Similar approaches may be appropriate in the Marlborough context."

The definition of enhancement in s 30(2) of the Act

12. In relation to the mussel bed restoration project there was a suggestion that such a project would be an enhancement of a fisheries resource and consequently contrary to s 30(2) of the Resource Management Act 1991 (the Act).
13. Enhancement is not defined in the Act. It is likely to mean an activity designed to increase stocks of fish. "Fisheries resources" has the same meaning as in s 2(1) of the Fisheries Act 1996.³ It means "any 1 or more stocks or species of fish, aquatic life or seaweed." "Fish" is, in turn, defined as including all species of finfish and shellfish, at any stage of their life history, whether living or dead."⁴
14. This is a circumstance where there is likely to be mixed purpose for undertaking the activity, including the following:
 - (a) Restoration of natural character pursuant to policy 14 of the New Zealand Coastal Policy Statement 2010 (NZCPS);
 - (b) Restoration of habitats of indigenous species;
 - (c) To enhance scientific understanding;
 - (d) To provide recreational amenity for snorkelers and divers;
 - (e) To improve water quality;
 - (f) To reduce ocean acidification in a local area;
 - (g) To provide a location for the disposal of excess mussel shells;

³ Section 2(1) Resource Management Act 1991.

⁴ Section 2(1) Fisheries Act 1996.

- (h) To provide a new source of mussel spat; and
 - (i) To provide a new source of kaimoana.
15. Not all of these objectives might be present in any one project.
16. This is similar to the situation faced by the High Court in *Attorney General v Trustees of Motiti Rohe Moana Trust* [2017] NZHC 1886 (10 August 2017): In that decision the Court held at [6]⁵: “Notwithstanding s 30(2), a regional council may perform its function at s 30(1)(ga) to maintain indigenous biodiversity within the [Coastal Marine Area], but only to the extent strictly necessary to perform that function.” The same would apply in respect of other regional council functions.
17. Based on that decision, one could fashion an argument that the Fisheries Act 1996 and not the Resource Management Act 1991 regulates the construction of mussel reefs where the activity went beyond that strictly necessary to perform Regional Council functions. That seems to be a curious outcome.
18. That case is under appeal. The Panel might call for supplementary submissions once the appeal is decided.

Oyster Bay

19. The mapping provided in Appendix C of the industry’s legal submissions on Oyster Bay did not include Oyster Bay Road as a road. It is zoned Open Space 3 in the notified MEP. To avoid any doubt that the use of commercial vehicles on that road is a permitted activity, the area should be zoned Port or Port Landing Area Zone as per the submissions of the aquaculture industry. An updated version of the Oyster Bay zoning map provided at Appendix C to the industry’s legal submissions is included as an Appendix to this Memorandum, showing the extent of the proposed extension.


Marine Pollution Regulations

20. An issue before the Panel is the interpretation of regulation 11 of the Resource Management (Marine Pollution) Regulations 1998. The

⁵ Citing *Attorney-General v Trustees of the Motiti Rohe Moana Trust* [2017] NZHC 1429 at [134]

aquaculture industry's argument is that regulation 11(2) does not expressly authorise the discharge of sewerage into the coastal marine area.

21. Commissioner Crosby raised the question of what the role of regulation 11(3) was if that submission as correct. Prior to 1 July 2000, regulation 11(3) prevented rules in regional plans from regulating discharges which regulation 11(1) expressly permitted.
22. After 1 July 2000, regulation 11(3) merely applies for the avoidance of doubt.



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APPENDIX

