Proposed Marlborough Environment Plan

Topic 6: Indigenous Biodiversity

Hearing dates:	12 – 15 February 2018
S42A Report Writer:	Andrew Maclennan, Peter Hamill and Steve Urlich
Conflicts of Interest:	None
Interim decision:	None

(Note: A list of conflicts of interest which arose during the process are available to view on the Marlborough District Council Website)

List of Abbreviations

CMA	Coastal Marine Area
MDC	Marlborough District Council
NZCPS	New Zealand Coastal Policy Statement 2010
PMEP	Proposed Marlborough Environment Plan
RMA	Resource Management Act 1991
RPS	Regional Policy Statement
SNA	Significant Natural Area
TEO	Threatened Environments Overlay

Submitter abbreviations

AQNZ	Aquaculture New Zealand
CBRA	Clova Bay Residents Association Inc
DOC	Department of Conservation
EDS	Environmental Defence Society Incorporated
Forest & Bird	Royal Forest and Bird Protection Society NZ
FNHTB	Friends of Nelson Haven and Tasman Bay Incorporated
KCSRA	Kenepuru and Central Sounds Residents' Association
MFA	Marine Farming Association Incorporated
MFIA	Marlborough Forest Industry Association Incorporated
NZTA	New Zealand Transport Agency
PMNZ	

Issues arising:

- Statutory requirements
- Protection of Marlborough's indigenous biodiversity
- Identification and management of sites, areas and habitats with significant indigenous value
- Importance of clear criteria by which to identify the environments
- Biogeographic areas and modifications to criteria
- A Panel of Experts
- Significant Natural Areas (SNA)
- Ecologically Significant Marine Sites (ESMS)
- Overlay maps
- Threatened Environments Overlay (TEO)
- Cultural harvesting
- Rules

Structure of Decisions

1. It is important that the topic decision is read as a whole together with the tracked change version of the Plan. The decision on each topic contains the reasons for the Panel's decisions. These comprise either adoption of the reasoning and recommendations of the original Section 42A Report or the replies to evidence, or a specific reasoning by the Panel[1].

2. The tracked change version of the relevant PMEP provisions forms an integral part of the decision. The source of the change in terms of the topic that the subject matter was dealt with is clearly identified in the track changes version of the plan. This records all amendments (additions and deletions) to the notified PMEP provisions made by the Panel.

3. Where the PMEP provisions **remain as notified**, it is because:

   (a) The Panel has decided to retain the provision as notified for reasons set out in this decision; or

   (b) The Panel adopted the reasoning and recommendation of the Section 42A Report Writer to retain the provision as notified as recommended in the Reply to Evidence; or

   (c) The Panel adopted the reasoning and recommendation of the Section 42A Report to retain the provision as notified in the original Section 42A report.

4. Where there is a **change to a provision** within the plan it is because:

   (a) The Panel has amended a provision for reasons set out in this decision in response to a submission point which the Section 42A report writer(s) does not recommend in their reports; or

   (b) The Panel adopted the reasoning and recommendation of the Section 42A Report Writer to change the provision to that recommended in the Reply to Evidence; or

   (c) The Panel adopted the reasoning and recommendation of the Section 42A Report Writer to change the provision to that recommended in the original Section 42A report; or

   (d) A consequential change has been necessary following on from a decision in either a), b) or c).

[1] (The only exception to that approach relates to the Noise section of the Nuisance topic where the reasoning and recommendations in the responses to Minutes 54 and 59 may have been adopted, rather than the reasoning and recommendations in the Section 42A Report or the Reply to Evidence report. The reasons for that difference in that topic are dealt with in detail at the commencement of the Noise section of the Nuisance topic decision. In respect of that topic the approach to understanding of the individual submission point decisions addressed in paragraphs 13.3 to 13.5 below should be adjusted accordingly to apply references to the Section 42A Report and/or Reply to Evidence in those paragraphs as being references to the responses to Minutes 54 & 59 for that Nuisance topic.)

5. Where there is a **different recommendation** between the Section 42A Report and the Reply to Evidence (i.e., the recommendation by the Section 42A report writer(s) has changed as a result of hearing the evidence of submitters), unless the Panel decision specifically adopts the original report's reasoning and recommendations, the reasoning and recommendations in the (later) reply to evidence has been adopted and it must be taken to prevail.

6. There are limited circumstances where the Panel has taken the opportunity to give effect to national policy statements or implement national environmental standards. Where this occurs the relevant decision clearly sets out the nature of the change and the reason for the change.

7. Finally, there are limited circumstances where the Panel has decided that **alternative relief** is more appropriate than that requested by the submitters, but still within the scope of the relief sought. This is recorded in the Panel's decision.

Indigenous Biodiversity

Status of objectives and policies

8. Forest & Bird drew attention to the fact there is no coding of Chapter 8 provisions.[2]

Consideration

9. The Section 42A report writer and the Panel determined that in order to understand the hierarchy and spatial extent of objectives and policies, each of these requires a code. We understand this was a drafting oversight during plan production: these codes are inserted as follows:[3]

	Objectives	*Policies*	*Methods*
Regional Policy Statement Provisions	*8.1*	*8.1.1*	*8.M.3*
[RPS]	*8.2*	*8.1.2*	*8.M.4*
		8.1.3	*8.M.5*
		8.2.1	
		8.2.2	
		8.2.3	
		8.2.4	
		8.2.5	
		8.2.6	
		8.2.7	
		8.2.8	
Regional Plan Provisions	*8.1*	*8.2.3*	*8.M.1*
[R]	*8.2*	*8.2.4*	*8.M.6*
		8.2.5	*8.M.7*
		8.2.7	*8.M.8*
		8.2.9	*8.M.9*
		8.2.10	*8.M.10*

[2] Forest & Bird (715.172-.176, .185-.188).

[3] Section 42A Report, pages 2-3: pages 12-13.

		8.2.11 *8.2.12* *8.2.13* *8.3.1* *8.3.2* *8.3.3* *8.3.4* *8.3.5* *8.3.6* *8.3.8*	*8.M.11* *8.M.12*
Regional Coastal Plan Provisions *[C]*	*8.1* *8.2*	*8.2.3* *8.2.7* *8.2.9* *8.2.10* *8.2.12* *8.3.1* *8.3.5* *8.3.7* *8.3.8*	*8.M.1* *8.M.6* *8.M.7* *8.M.8* *8.M.9* *8.M.11*
District Plan Provisions *[D]*	*8.1* *8.2*	*8.2.6* *8.2.9* *8.3.1* *8.3.2* *8.3.3* *8.3.5* *8.3.8*	*8.M.2* *8.M.10* *8.M.11* *8.M.12*

Introduction, Issue 8A and Objective 8.1

Marlborough's remaining indigenous biodiversity in terrestrial, freshwater and coastal environments is protected

10. Some submitters generally support Objective 8.1. Others request: that the objective refers to 'areas of significant indigenous biodiversity' as opposed to 'all remaining indigenous biodiversity' as this amendment better reflects the intent of s 6(c) RMA;[4] that the significant areas in the plan may be affected by legitimate adjacent activities such as Significant Natural Areas (SNA), wetlands within plantation forestry;[5] that the objective be amended to make it clear that appropriate (not absolute) protection of significant biodiversity is to be achieved as some activities may not be able to avoid adversely affecting significant indigenous biodiversity;[6] that the objective and Policy 8.1 be amended to include reference to 'wetland and marine environments;[7] others seek a range of amendments;[8] another seeks that the explanation is amended to remove reference to maintaining or improving areas and the condition of indigenous biodiversity 'where opportunities arise' as those words weaken the objective and make its meaning unclear.[9]

Section 42A Report

11. After reviewing the various provisions of the RMA that relate to indigenous biodiversity,[10] the report writer identifies:

- the specific direction given in the wording of indigenous biodiversity and habitats in s 6(c) RMA is that it should be 'significant' and of national importance;
- the intent of Objective 8.1, however, seeks a much broader range of protection for indigenous biodiversity within Marlborough's specific region;
- the serious loss of indigenous biodiversity in this area requires that remaining indigenous biodiversity is protected in its broadest sense along with fencing, pest control, regulation and improved land practices;

[4] AQNZ (401.88), Port Marlborough (433.35), MFA (426.92), Trustpower (1201.77), Federated Farmers (425.121).

[5] MFIA (426.92).

[6] NZ Forest Products (995.14).

[7] EDS (698.61, .62).

[8] Forest & Bird (715.171).

[9] FNHTB (716.92).

[10] Section 42A Report, pages 13-15; RMA s 32(1)(a) (Appropriateness of the objective), s 5 (2)(b), s 6(c), s 30(1)(ga); NZCPS Objectives 1, 6, 7, Policy 11(a) and (b) (lengthy analysis).

- it is not the Council's intention to protect indigenous biodiversity in an absolutist sense, otherwise it would not provide for clearances;
- the values, integrity and resilience of indigenous biodiversity require high level management in such a manner that these qualities are protected, not diminished, and the objective in relation to significant areas foreshadows that these will require more stringent protection methods;
- enabling people and communities to provide for their social, economic and cultural wellbeing and their health and safety is an essential part of the overall objective.[11]

12. The report writer concludes that the objective should not be watered down by including exclusions for various activities; that reference to freshwater and coastal environments are already included in the objective. He also agrees that the explanation to the objective should better reference the terms of the RMA and provide an explanation of the link between indigenous biodiversity provisions and those of natural character. Further, the (limiting) phrase 'where opportunities arise' should be deleted.

13. The report writer recommended that the objective should be amended to include 'biodiversity values[12] … are protected'.[13] He also amended the text of the explanation to account for the concerns of FNHTB and Forest & Bird by deleting the phrase 'where opportunities arise' with its negative connotations.

Consideration

14. We concluded at the outset that the phrase 'intrinsic values' should be introduced into the Introduction to Chapter 8 Indigenous Biodiversity.[14] Section 7(d) RMA 'Intrinsic Values' is a matter to which all those exercising functions under this legislation are required to have regard. The relevant sentence relating to an amendment reads: 'However, biodiversity values are also important components of amenity, kaitiakitanga, the quality of the environment and also the intrinsic values of ecosystems'. The Introduction to the chapter should be placing all of these issues in their context.

15. The Panel is therefore concerned also to provide added emphasis to the importance of Objective 8.1. The inclusion of the word 'values' has gone some way to emphasising this, but the definition of 'intrinsic values' in s 2 RMA identifies its wider implications:

[11] NZCPS Policy 6.

[12] Trustpower (1201.77).

[13] Consequential amendment.

[14] Volume One, Chapter 8 Introduction, page 8-1, third paragraph.

… those aspects of ecosystems and their constituent parts which have value in their own right, including –

(a) their biological and genetic diversity; and

(b) the essential characteristics that determine an ecosystem's integrity, form, functioning and resilience.

Issue 8A – A reduction and the extent and condition of indigenous biodiversity in the Marlborough region.

16. The Section 42A Report addresses Issue 8A but suggests no change.

17. We note that the second subheading in Issue 8A is 'Marine environments' not 'Coastal environments' – a matter which the Panel noted for it was part of FNHTB's submission to Objective 8.1. The implications of a 'marine' environment as opposed to 'coastal' is addressed later in the evidence of Peter Hamill, Section 42A report writer.[15] Objective 8.1 should therefore substitute 'marine' for 'coastal' environment.

18. The Panel also considers that it is important to include specific reference to NZCPS Policy 11 early in the explanation to Objective 8.1 for it is the NZCPS particular reference to 'indigenous' biological biodiversity as a specific reference which is preceded by the various relevant NZCPS objectives mentioned by the report writer. The Panel also agrees with the report writer's analysis in paragraph 4 above as to the in intent Of Objective 8.1.

Decision

19. The following amendment is made to the third paragraph of the Introduction to Chapter 8 Indigenous Biodiversity:

… However, biodiversity values are also important components of amenity, kaitiakitanga, quality of the environment and <u>the intrinsic values of</u> ecosystems ~~values~~, matters to which regard shall be had in terms of Section 7 of the RMA. …

20. Objective 8.1 is amended as follows:

<u>[RPS, R, C, D]</u>

Objective 8.1 – <u>The intrinsic values</u> of Marlborough's remaining indigenous biodiversity in terrestrial, freshwater and ~~coastal~~ <u>marine</u> environments ~~is~~ <u>are</u> protected.

As there has been considerable loss of indigenous biodiversity in Marlborough, it is important that remaining areas are protected and that their condition is maintained and improved where opportunities arise. <u>This will ensure that the intrinsic values of the District's ecosystems, some of which are unique to Marlborough, are safeguarded. Intrinsic values in this context are</u>

[15] Section 42A Report, Recommendation (Hamill), page 10. This is seen by Mr Hamill as a drafting error.

defined in Section 2 of the RMA as "…those aspects of ecosystems and their constituent parts which have value in their own right, including-

(a) their biological and genetic diversity; and

(b) the essential characteristics that determine an ecosystem's integrity, form, functioning, and resilience."

Protection ~~in this context~~ should be considered in a broad sense and may include legal protection as well as fencing, active pest control, regulation and improved land management practices.

The inclusion of this objective ~~helps to achieve~~ gives effect to the National Policy Statement for Freshwater Management 2014 (NPSFM), where for both water quantity and quality reasons the protection of the significant values of wetlands is required. This objective also ~~helps to achieve~~ gives effect to Policy 11 of the New Zealand Coastal Policy Statement 2010 (NZCPS) where there is specific direction to protect biological diversity in the coastal environment.

This objective also ~~helps~~ sets out the intent to protect indigenous biodiversity as an important component of Marlborough's natural heritage and gives recognition to central government's 'statement of national priorities' for protecting rare and threatened indigenous biodiversity on private land (June 2007). These priorities are:

National Priority 1:

To protect indigenous vegetation associated with land environments that have 20 percent or less remaining in indigenous cover.

National Priority 2:

To protect indigenous vegetation associated with sand dunes and wetlands; ecosystem types that have become uncommon due to human activity.

National Priority 3:

To protect indigenous vegetation associated with 'originally rare' terrestrial ecosystem types not already covered by priorities 1 and 2.

National Priority 4:

To protect habitats of threatened and declining indigenous species.

~~Matters of national importance in Section 6(a) and 6(c) of the RMA require the Council to recognise and provide for the preservation of the natural character of the coastal environment,~~

~~*wetlands, lakes, rivers and their margins, and the protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna. These matters help to protect biodiversity as important components of Marlborough's natural heritage.*~~

There is a relationship between this objective and Objective 6.2 in Chapter 6 in terms of the preservation of natural character under Section 6(a) of the RMA and Policies 13 and 14 of the NZCPS within the coastal environment. This is because indigenous biodiversity is also a component of natural character. For this reason, policies in this chapter that provide for the protection of indigenous biodiversity in the coastal environment, wetlands, rivers, lakes and their margins gives effect to both Section 6(a) and (c) of the RMA and achieves the direction set out in Policies 13 and 14 of the NZCPS.

Policy 8.1.1 and Appendix 3 Identification of sites, areas and habitats with significant indigenous value[16]

21. The Introduction to Appendix 3 states as follows:

22. The following provides explanations or guidelines for the application of ecological significance criteria in the assessment of sites.

23. Rankings within each criterion are: H = High; M = Medium; L = Low. They collectively contribute to an overall ranking, indicating the degree of significance. For a site to be considered significant, one of the first four criteria (representativeness, rarity, diversity and pattern or distinctiveness) must rank M or H.

24. The DOC submission sought that the numbering used in the criteria was removed as it causes confusion[17]. Both Mr Hamill and Dr Urlich were in agreement. The Panel also agrees.

Decision

25. The numbering in the criteria in Appendix 3 is to be removed.

Policy 8.1.1

When assessing whether wetlands, marine or terrestrial ecosystems, habitats and areas have significant indigenous biodiversity value, the following criteria will be used: …

26. For a site to be considered significant, one of the first four criteria (representativeness, rarity, diversity and pattern, distinctiveness) must rank medium or high.

[16] Section 42A Report (Maclennan), page 21. 'The submission points and recommendations associated with Policy 8.1.1, Appendix 3 - Ecological Significance Criteria for terrestrial, wetland and coastal environments, and the mapping of ecologically significant marine sites has been assessed within the "Criteria for significant biodiversity" and "Mapping of ecologically significant marine sites" reports.'

[17] DOC (479.71 and .270)

Distinction between identification and management criteria

27. Forest & Bird sought better distinction between the identification of significance and the management criteria in Policy 8.1.1.[18] Ms Martin considers management criteria should be removed or separated from the 'significance' criteria to provide for clarity. She considers too that connectivity/ecological context should be added to the criteria for determining significance. 'Management' is important to retain because it gives context.

28. Criteria (a)–(d) in Policy 8.1.1 are those used for determining significance and can be referred to as the 'identification' criteria. The remainder of the criteria (e)–(h) are referred to as having the 'management' function. These criteria are used to assist with the distinction of a site being high, medium or low distinction in Appendix 3 along with, for example, prioritising sites for further enhancement or restoration. Appendix 3 to the notified PMEP sets out these issues in table form. Reference was made to an Environment Court case which found the management criteria cannot be included in determining identification of significance and therefore the two distinctions should be split into different policies.[19]

29. If the criteria are split into identification and management, it is the report writer's opinion that it is important to retain the management criteria and a strong link between the policies would be required to ensure the management criteria could still be used to inform the significance criteria. For example, under the representativeness criteria how is it possible to effectively determine what the best example of a habitat is, without taking into account its size, its ecological context and sustainability?[20]

30. The elevation of the connectivity/ecological context would mean some sites currently assessed as not significant may become so if they were reassessed.

Consideration

31. In the report writer's opinion it is important to retain the linking mechanisms between identification of sites of significant indigenous biodiversity (wetlands, freshwater, marine and terrestrial systems) and the management necessary to determine what category to place them within (High, Medium, Low - Appendix 3).

32. The most appropriate way to address this issue, given the structure of the PMEP, is, in the Panel's opinion by using subheadings 'Identification Criteria' and 'Management Criteria' in

[18] Forest & Bird, Deborah Martin, Evidence, paragraphs 30-32.

[19] Royal Forest and Bird Protection Society of New Zealand Incorporated v New Plymouth District Council [2015] NZEnvC 219.

[20] Section 42A Report (Hamill), Reply to Evidence, page 7; Policy 8.1.1, Volume 4 Appendix 3: Ecological Significance Criteria, page 8.

Appendix 3 (as well as to Policy 8.1.1) to differentiate between the criteria as amended and to include the wording 'freshwater' and 'marine' identified in Policy 8.1.1 (a)–(d) and (e)–(h).

Environments to which criteria apply should be comprehensive and clear

33. Eight submitters support the other provisions in Policy 8.1.1. Others seek: the criteria should also apply to freshwater and coastal environments;[21] in what instances would Council require an assessment under this policy;[22] while the criteria provide support in part, it would be useful to have some prioritisation of sites for partnership programmes between Council and landowners, that for a site to be considered significant, one of the first four criteria must rank as high and/or two or more must rank as medium.[23]

Section 42A Report

34. EDS signals the environments to which the criteria should also apply to freshwater and coastal environments and the criteria should be comprehensive and clear.

35. In Mr Hamill's view, the addition of 'freshwater' to Policy 8.1.1 would ensure that all environments are treated equally. Dr Urlich advises that the phrase 'coastal environments' is included in the 2011 Ecologically Significant Marine Sites publication.[24] This is because most of Marlborough's estuaries are assessed as ecologically significant marine sites. The extent of the coastal environment is also mapped in the Zoning Maps Volume 4. He recommends no change is required for coastal environments as they are already included.[25]

Consideration

36. In Mr Hamill's opinion, the addition of 'coastal marine' to Policy 8.1.1 and Appendix 3 is not required. Issue 8A also sets the frameworks for the environment and divides it into sections relating to terrestrial and freshwater, wetlands and marine. And as notified, Policy 8.1.1 includes wetlands, marine and terrestrial ecosystems. Appendix 3 as notified replaces the word 'marine' with 'coastal'. This is seen by Mr Hamill as a drafting error with which the Panel would agree. In his view, the coastal ecosystem is simply a subset of the terrestrial environment, just as alpine and mountain environments. The marine environment, on the other hand, clearly distinguishes it from other environments in that it covers all habitats that are located below mean high water springs.

[21] EDS (698.62).

[22] NZTA (1002.34).

[23] Federated Farmers (425.123).

[24] Davidson R J; Duffy C A J; Gaze P; Baxter, A; du Fresne S; Courtney S; Hamill P 2011. *Ecologically significant marine sites in Marlborough, New Zealand*. Co-ordinated by Davidson Environmental Limited for Marlborough District Council and Department of Conservation. Published by Marlborough District Council.

[25] Section 42A Report (Hamill and Urlich), page 10.

37. The addition of 'coastal marine' in Policy 8.1.1 would therefore create confusion while Appendix 3 would create further confusion if coastal marine significance criteria could be split from terrestrial, wetland and freshwater environments. The coastal marine criteria would then apply to areas as defined in the coastal environment. Having different assessments between coastal marine and the terrestrial environments could lead to the situation where part of a continuous habitat was determined to be significant and the other part not, based on an arbitrary line drawn on a map.

38. The recommendation is to insert 'freshwater' into Policy 8.1.1 and the title of Appendix 3, and replace 'coastal' in the title of Appendix 3 with 'marine' as set out in the Section 42A Report and the Recommendation Report.[26]

Decision

39. For the reasons given and the recommendations made by Mr Hamill, the Panel finds that Policy 8.1.1 and the Appendix 3 heading are to be reworded as follows:

Policy 8.1.1 – When assessing whether terrestrial, wetlands, freshwater or marine ~~or terrestrial~~ ecosystems, habitats and areas have significant indigenous biodiversity value, the following criteria will be used: …

Appendix 3

Ecological Significance Criteria for terrestrial, wetland, freshwater and ~~coastal~~ marine environments …

40. Policy matters within Policy 8.1.1 are amended as follows:

Identification criteria

(a) representativeness;

(b) rarity;

(c) diversity and pattern;

(d) distinctiveness;

Management criteria

(e) size and shape;

(f) connectivity/ecological context;

(g) sustainability; and

[26] Section 42A Report (Hamill), paragraph 57; Recommendation, page 9.

(h) adjacent catchment modifications.

Ecologically significant marine sites

Policy 8.1.2 – Sites in the coastal marine area and natural wetlands assessed as having significant indigenous biodiversity value will be specifically identified in the Marlborough Environment Plan.

Policy 8.3.1 – Manage the effects of subdivision, use or development in the coastal environment by:

(a) avoiding adverse effects where the areas, habitats or ecosystems are those set out in Policy 11(a) of the New Zealand Coastal Policy Statement 2010;

(b) avoiding adverse effects where the areas, habitats or ecosystems are mapped as significant wetlands or ecologically significant marine sites in the Marlborough Environment Plan; or

(c) avoiding significant adverse effects and avoiding, remedying or mitigating other adverse effects where the areas, habitats or ecosystems are those set out in Policy 11(b) of the New Zealand Coastal Policy Statement 2010 or are not identified as significant in terms of Policy 8.1.1 of the Marlborough Environment Plan.

8.M.4 Identification of areas with significant biodiversity value

Identification of the values of various waterbodies within Marlborough is included in Appendix 5.

The natural and human use values include ecological, habitat, recreational and natural character values. The Council has also identified in the resource management plan significant wetlands and ecologically significant marine sites.

41. The consequence of the decision to adopt buffers to protect ESMS's is that some policy recognition both of their purpose and method of identification needs to be provided in the Plan.

42. The issue of identification can be readily provided for by way of an additional paragraph to the explanation for Policy 8.1.2 which is the policy providing for sites of significant indigenous biodiversity to be specifically identified. The additional paragraph will emphasise that for category A and B ecologically significant marine sites a buffer will be identified as a precautionary approach around those sites. In addition Method 8.M.4 can be amended to include the identification of those buffer areas in a new appendix.

43. As to the purpose of the buffers, the appropriate policy provision will be in Policy 8.3.1 which addresses the management of the effects of use or development in the coastal environment. That new subclause to Policy 8.3.1 will make it plain that it is necessary to manage the effects of activities within the buffer so as to ensure adverse effects are avoided on the adjacent ecologically significant marine site.

Decision

44. Insert a new appendix in Volume 3 as Appendix 27 to define buffer areas around ESMSs Category A and Category B sites that are vulnerable to seabed disturbance as follows:

Category A - Ecologically Significant Marine Sites		
Site ID	**Site name**	**Buffer distance**
1.5	Coppermine Bay	100
2.13	Catherine Cove Rhodoliths	50
2.24	Allen Strait	100
2.6	Rangitoto Roadstead	200
3.7	Picnic Bay	100
4.11	Bob's Bay	50
4.16	Perano Shoal	100
4.25	Onauku Bay (Northern Coastline)	100
4.9	Wedge Point (subtidal rocky shores)	100
6.1	The Knobbys	100
6.2	Whataroa Bay	100

Category B - Ecologically Significant Marine Sites		
Site ID	**Site name**	**Buffer distance**
1.2	Motuanauru Island Boulder Bank	200
1.7	Inner Greville Harbour/Whararikiki	N/A
1.8	Greville Harbour/Whararikiki Channel	100
2.1	North West D'Urville Island Coast	100
2.10	Trio Bank	200
2.12	Penguin Island Coastline	100
2.15	Clay Point	100
2.16	Te Aumiti/French Pass	100
2.18	Paparoa Point	100
2.20	Chetwode Islands	100
2.22	Goat Point	100
2.23	Culdaff Point	100
2.27	Titi Island	100
2.28	McManaway Rocks	100

Category B - Ecologically Significant Marine Sites		
Site ID	**Site name**	**Buffer distance**
2.29	Witt Rocks Offshore Reef	100
2.31	Te Anamāhanga/ Port Gore	200
2.33	Te Anamāhanga/ Port Gore	100
2.34	Gannet Point	100
2.5	Rangitoto Islands	100
2.9	Jag Rocks	100
3.1	Harris Bay	100
3.11	Tapapa, Kauauroa & Tawera Current Communities	100
3.12	Piripaua Reef	100
3.14	Clova Bay	100[27]
3.15	Grant Reef	100
3.16	Crail Bay	100
3.18	Little Nikau	100
3.2	Oke Rock	100
3.6	Tawhitinui Reach	100
3.8	Fitzroy Bay / Hallam Cove	100
4.13	Lochmara Bay	100
4.14	Pihaka Point	100
4.15	Kumutoto Bay	100
4.18	Patten Passage	100
4.2	The Grove	100
4.21	Te Aroha Bay	100
4.22	Puriri Bay	100
4.23	Matiere Point	100
4.24	Onauku Bay	100
4.3	Bottle and Umungata Bays	100
4.4	Houhou Point	100
4.6	Ngakuta Point	100
4.7	Iwirua Point	100
4.8	Wedge Point (subtidal soft shores)	100

[27] See commentary on Clova Bay site later in decision

Category B - Ecologically Significant Marine Sites		
Site ID	**Site name**	**Buffer distance**
5.1	Diffenbach Point	100
5.2	Tikimaeroero Point	50
5.3	Takatea Point, Hitaua Bay entrance	100
5.4	Tory Channel/Kura Te Au subsites: Site 5.4A Raumoko, site 5.4B Wiriwaka Point, Site 5.4C Tokokaroro Point, Site 5.4D Te- Uira-Karapa Point	50
5.6	Tio Point	50
5.7	Deep Bay	100
5.8	Tory Channel/Kura Te Au	100
5.9	Tory Channel/Kura Te Au Entrance	100
6.3	Cutters Bay	100
7.1	Cape Jackson	100
7.4	Motuara subtidal	100
7.10	Cook Rock Reef	100
7.11	Brothers Island Reef	100
7.13	Awash Rock	100
7.2	Cape Jackson Bryozoan Community	100
7.8	White Rocks Current Community	100
9.1	Cape Campbell / Ward Reef	100

45. Amend the overlay maps to include the buffers as shown in the appendix.

46. Amend the explanation to Policy 8.1.2 by adding a new third paragraph as follows:

A buffer is also identified around all Category A and B Ecologically Significant Marine Sites. A buffer recognises that habitats on the sea bed are vulnerable to disturbance from activities conducted in the coastal marine area. Those activities cannot necessarily be undertaken in a precise manner to avoid the adverse effects of seabed disturbance, particularly given the physical separation between the sea surface and seabed. In these circumstances, a buffer represents a precautionary approach to the protection of the Ecologically Significant Marine Sites.

47. Amend Policy 8.3.1 by adding a new subclause (d) as follows:

(d) creating a buffer to manage activities in proximity to an Ecologically Significant Marine Site in order to avoid adverse effects on the Ecologically Significant Marine Site.

48. Amend Method 8.M.4 by adding the following:

8.M.4 Identification of areas with significant biodiversity value

Identification of the values of various waterbodies within Marlborough is included in Appendix 5. The natural and human use values include ecological, habitat, recreational and natural character values.

The Council has also identified in the resource management plan significant wetlands and ecologically significant marine sites. In the case of ecologically significant marine sites, buffer areas are also identified for all Category A and B sites. The extent of the buffer area is determined by the vulnerability of the site to sea bed disturbance and is 50, 100 or 200 metres. The extent of the buffer area is identified in Appendix X.

Appendix 3

Explanation of the scale of spatial classification for each environmental type

49. EDS requests an explanation of the scale of spatial classification used for each environmental type, and requests it to be consistently referred to in each criterion. It seeks that the appendix be amended to 'freshwater and marine environments' in the heading, and it should be reworded to 'Ecological Significance Criteria to terrestrial …' EDS also identifies that no classification scale has been identified for the freshwater environment. This point is supported by Federated Farmers.

50. The changes requested by EDS are that the following is added to the introduction paragraph to Appendix 3:[28]

The scale at which significance is to be determined depends on the type of environment.

a. Terrestrial environment: the scale of assessment is at the ecological district level. [MDC: Insert an explanation of ecological district].

b. Marine environment: the scale of assessment is at the coastal biographic region level. This a region that is defined and classified according to visible ecological patterns and the physical characteristics or a geographic or hydrographic area. New Zealand's coastal biographic regions have been identified and mapped by the Ministry for the Environment. Marlborough falls within the South Cook Strait Region.

[28] EDS (698.109).

c. Freshwater environment: [MDC: Insert assessment classification scale].[29]

51. Mr Hamill agrees that the 'ecological districts' should be defined. He suggests the following wording: 'An Ecological District is defined as a local part of New Zealand where the topographical, geological, climatic, soils and biological features produce a characteristic landscape and range of biological communities (identified in Map 1 attached).' He recommends that this definition of what is added to the ecological significance criteria for wetland, marine, terrestrial and freshwater environments, and a map be included in the mapping book.

(b) Marine environment: the scale of assessment is at the coastal biogeographical level.

52. This is a region that is defined and classified according to visible ecological patterns and the physical characteristics of a geographic area or by hydrographic area. New Zealand's coastal biogeographic regions have been identified and mapped by the Ministry for the Environment. Marlborough falls within the South Cook Strait region. The report writers recommend that map of biogeographic areas should be included.[30]

53. Dr Urlich observes that the definition sought by EDS and provided for the coastal biogeographic region is not consistent with the definition that has been used in the assessment of significance in the identification of significant marine sites in the PMEP. The 2011 Ecologically Significant Marine Sites document (identified by the Ecologically Significant Marine Sites Expert Panel in 2011) divides the Marlborough coastal marine area into nine marine biogeographic areas (identified in Map 2 attached). The South Cook Strait biogeographic region includes Tasman Bay, Golden Bay and Kahurangi Point. Dr Urlich recommends that the EDS relief sought is declined.[31]

(c) Freshwater environment

54. EDS suggest that a classification scale for freshwater environments be used from the New Zealand Rivers Classification Scale (REC) for rivers and lakes. But it does not provide a suggested definition so this is put to one side.

[29] Section 42A Report (Urlich and Hamill), Criteria for identifying ecological significance of biodiversity and mapping of ecologically significant marine sites, page 20.

[30] Section 42A Report (Hamill and Urlich), page 21.

[31] Section 42A Report (Hamill and Urlich), page 21.

Consideration

55. The phrase 'ecological district' is repetitively used through the criteria in Appendix 3 and submissions sought a definition of that phrase. The Panel agrees one is necessary and adopts Mr Hamills wording.

56. The Panel notes that the map included in the Section 42A Report as Map 1 is notated 'Example of map of ecological districts that would be included in the PMEP Maps'. This map illustrates all the Ecological Districts and Conservation/pastoral lease land, and includes the Marlborough District boundary and includes some of the relevant marine sites. On the adjacent page, Map 2 'Biogeographic areas identified by the Ecologically Significant Marine Sites Expert Panel in 2011' illustrates Tasman Bay, Golden Bay and Kahurangi Point as set out by Dr Urlich. Thus Map 1 ranges more widely than Map 2 as it includes detailed terrestrial environments as well as the marine environments.[32]

57. The Section 42A Report identifies that the criteria applied are at a sub-regional or bio-geographic scale. This is because the Marlborough coastal marine area has distinctive differences in hydrodynamics and wave exposure which in turn influence the biology. Tory Channel as an example is comprised of cooler, well mixed and more nutrient rich waters than Queen Charlotte Sound, and these areas differ in turn from the waters around D'Urville Island. These differences inform the nine geographic areas.

Decision

58. The introduction to Appendix 3 is to be amended by inserting the following:

The following provide~~s~~ explanations or guidelines for the application of ecological significance criteria in the assessment of sites. <u>The scale at which significance is to be determined depends on the type of environment.</u> …

59. Insert a definition in Glossary to Appendix 3 of Ecological District as follows:

<u>*Ecological District: An Ecological District is defined as a local part of New Zealand where the topographical, geological, climatic, soils and biological features produce a characteristic landscape and range of biological communities (see map).*</u>

60. A map of the 'ecological districts' is included in Appendix 3.

Biogeographic areas and modifications to criteria

61. In addressing ecological significance criteria in Marlborough, the witness for the Minister of Conservation acknowledges that the first criteria descriptions first applied in Davidson et al

[32] Section 42A Report (Hamill and Urlich), pages 20-22.

(2011) were subsequently refined in Davidson et al (2015-2016), with minor changes in the latter, which provided clarity, context and improvements around how the Expert Panel made its assessments, for example, … specifying 'biogeographic area' for comparative assessments.[33]

62. The Minister of Conservation seeks to include 'biogeographic area' into the distinctiveness H criterion to cover marine environments to clarify that biogenic habitats are included. As a consequential change, Mr Hamill agrees that 'biogeographic area' is also included to the rarity criterion. Mr Hamill recommends as a consequential change that 'biogeographic area' also be added to the size and shape criteria to provide further consistency.

63. In terms of further clarification, Mr Hamill agrees the addition of the word 'cohesive' to the 9H definition would provide consistency with the definitions of M and L, and provide more clarity. Currently it is missing. He therefore supports, in part, this change to Appendix 3. Dr Urlich notes that the Expert Panel has not seen cohesive as relevant to the coastal environment but the Hearing Panel supports Mr Hamill's amendment from 'coastal' environment to 'marine'. On our analysis, no submitter to Policy 8.1.1 sought that the word 'marine' be removed and substituted with 'coastal environment'.

64. Dr Urlich does not support this approach as the Expert Panel has been using different wording in its size criterion. He says the Expert Panel compares size relative to other similar habitats and does not use the 'cohesive' term.[34] Habitat types differ in the area at which they may become significant, for example, rhodolith beds at 10 ha would be large but a 10 ha horse mussel bed would be small. EDS submit that it is not clear why a 'compact' shape should determine significance. A significant area may be large because it extends in a thin ribbon over an extensive area, such as a gully system. In the absence of a robust scientific reason, EDS request that this should be deleted.[35]

65. Mr Hamill concludes that sites may be significant but are not compact in shape and it is recommended that the word 'compact' (which is not a relevant criterion) should be deleted and the wording for the shape and size criterion be changed accordingly with the addition of the word 'cohesive' which is originally identified as being relevant: Appendix 3. Mr Hamill notes that the Size and Shape criterion is not one of the four determining 'significance'.

[33] Minister of Conservation, Andrew Baxter Evidence, paragraph 89.

[34] MDC, Section 42A Report (Hamill and Urlich), Errata and additions, paragraphs 75.3-75.4.

[35] EDS (698.109).

Consideration

66. The term 'Biogeographic Area' is included in the definition of the distinctiveness 8H criterion to cover marine covenants. A consequential change is to add 'Biogeographic Area' into both the rarity, and size and shape criteria.

Decision

67. Definition for 'Ecological District' and 'Biogeographic Area' are inserted after the 'Adjacent catchment medication in respect of significant sites within the coastal marine area' section in Appendix 3 as follows:

Ecological District: An Ecological District is defined as a local part of New Zealand where the topographical, geological, climatic, soils and biological features produce a characteristic landscape and range of biological communities (Identified in Map 1)

Biogeographic Area: A geographical area of similar ecology and habitats where the community structure and grouping of species is distinct (see map).

68. A map of the ecological districts and biogeographic areas are included in Appendix 3 as Map 1 and Map 2.

69. The criteria for 8H under Distinctiveness is amended as follows:

H: The site contains any ecological feature that is unique nationally, in the region or in the ecological district or biogeographic area; or it contains several such features that are outstanding regionally or in the ecological district or biogeographic area

70. The criteria for Rarity is amended as follows:

Rarity

4. Indigenous vegetation or habitat of indigenous fauna that has been reduced to less than 20% of its former extent in Marlborough, ~~or relevant land environment~~, ecological district, biogeographic area or freshwater environment.

5. Indigenous vegetation or habitat of indigenous fauna that supports an indigenous species that is threatened, at risk, or uncommon, nationally or within the relevant ecological district or biogeographic area for sites within the coastal marine area.

6. The site contains indigenous vegetation or an indigenous species that is endemic to Marlborough or that are at distributional limits within Marlborough.

71. The criteria for Size and Shape is amended as follows:

Size and Shape

9. The site is significant if it is moderate to large in size and is physically ~~compact or~~ cohesive.

***H:** The site is large in size for the region or ecological district or biogeographic area and is cohesive ~~compact in shape~~.*

***M:** The site is moderate in size for the region or ecological district or biogeographic area and is cohesive ~~compact in shape~~; or the site is relatively large but not very ~~compact or~~ cohesive .*

***L:** The site is small in size for the region or ecological district or biogeographic area. or the site is moderate in size but not at all ~~compact or~~ cohesive .*

A Panel of Experts?

72. AQNZ and MFA request that significant sites to be incorporated into the ESMS should be assessed by a panel of experts/ecologists.[36] This is recommended as appropriate in its context, given that the High Court confines the Council to maintain indigenous biodiversity in the CMA only 'to the extent strictly necessary'. Mr Hamill and Dr Ulrich are in agreement with the relief requested in that the identification of significant sites is a specialised skill undertaken by experts. They provide a note to the explanation of Appendix 3 to achieve this result.[37]

73. In his Reply to Evidence, Dr Ulrich refers to several submissions on which he accepts scientific information in total or in part but where he recommends that the Hearings Panel refer the matters referred to the Significant Sites Expert Panel for further information by a given date. Some of these matters were able to be resolved by the evidence produced at the hearing (such as the migratory route of whales) but others require further expert evaluation outside the limitations of this plan process.[38]

Decision

74. The following is added to the explanation of the evidence in Appendix 3:

The ecological criteria are to be applied by suitably qualified and experienced ecologists in this field of expertise.

Significant Natural Areas (SNAs)

A non-regulatory approach to the protection of indigenous biodiversity

75. A number of proposed policies included within the PMEP seek to encourage the continued voluntary protection of indigenous terrestrial biodiversity. These policies are implemented

[36] AQNZ (401.090), MFA (426.094).

[37] Section 42A Report (Hamill and Ulrich) page 14. (The RPS for Northland endorses this approach).

[38] Section 42A Report, Reply to Evidence, Policy 8.1.1. Appendix 3 and Volume 4: Ecological significant marine site criteria and mapping.

through a range of non-regulatory methods such as undertaking voluntary ecological assessments on private property; supporting the QEII Trust; and community restoration projects.[39]

Objective 8.2

An increase in area/extent of Marlborough's indigenous biodiversity and restoration or improvement in the condition of areas that have been degraded.

Policy 8.2.2

Use a voluntary partnership approach with landowners as the primary means for achieving the protection of areas of significant indigenous biodiversity on private land, except for areas that are wetlands.

76. The policy supporting Objective 8.2 is in turn supported by Method of Implementation 8.M.3 which relates to implementing Marlborough's 'Significant National Areas' (SNA) programme which seeks to increase the knowledge regarding Marlborough's indigenous biodiversity. (A 'Significant National Area' is an area of vegetation or habitat of indigenous vegetation that meets the threshold of 'significance' through the application of the assessment criteria in Volume 3, Appendix 3 Ecological Significance Criteria for terrestrial, wetland and coastal environments.)

77. A number of submissions support the voluntary partnership approach set out within Policy 8.2.2 and Method of Implementation 8.M.3, and acknowledge that the Council has put significant resources into the programme over the last 16 years. That is said to be highly regarded within the community and they seek that the policy, and the voluntary partnership approach be retained as notified.[40] Other submitters assert that if SNA areas are included in the PMEP, this would be a serious breach of the previous agreements made between the landowners and MDC, which would jeopardise the goodwill and co-operation existing under the present programme.[41]

78. One submitter seeks an amendment to Policy 8.2.2 which clarifies that protection of significant biodiversity is a matter of national importance and an environmental bottom line that must be recognised and provided for;[42] other submitters consider (inter alia) that what is proposed does not identify rules that are necessary to protect biodiversity and the significant

[39] Section 42A Report, pages 17-20.

[40] E Beech (42.5 and .27); C Bowron (88.1); I Mitchell (364.23); M and K Gerard (424.33 and .34); Federated Farmers (425.128); QCSRA (504.33); J and J Hellstrom (688.78); E Beech (693.6 and .28); KCSRA (868.29); MEC (1193.132); Forest & Bird (715.199); FNHTB (716.120).

[41] Forest & Bird, Deborah Martin Evidence, paragraph 20.

[42] EDS (698.65).

habitats of indigenous fauna as recognised by s 6(c) RMA and the policy should be deleted;[43] others suggest the policy be amended to include, encourage and promote the protection, restoration and re-establishment of areas of indigenous biodiversity, and then Policies 8.2.10, 8.2.11 and 8.2.12 can be deleted.[44]

79. Forest & Bird considers voluntary protection of significant biodiversity sites is not sufficient to keep them from being eroded or wiped out. It is concerned that the non-regulatory approach is seen as a way to get around the requirements of the RMA. It disagrees that prioritisation of voluntary over regulatory methods for remaining biodiversity on private land is necessary and seeks amendments to include policy direction and methods ensuring the significant indigenous areas can be identified in schedules or maps. It seeks rules to protect indigenous cover of low stature vegetation, grass, herblands and shrublands that it asserts are inadequately provided for in the Threatened Environments Overlay (TEO) sites. Its witness Deborah Martin seeks an additional method to be incorporated into the PMEP to identify the SNA areas through aerial maps and then ground truthed.[45]

80. The witness for the Minister of Conservation provided a clear, positive but also concerning analysis of Marlborough's SNA programme and what it provides but it is one that also raised concern. His concern is that the remaining natural areas (of indigenous biodiversity) in depleted parts of Marlborough are typically small, fragmented, degraded or in mosaics with introduced semi-natural and exotic vegetation. Most are at risk of decline without management.[46] Mr Moore's evidence encompasses a whole spectrum of issues facing Marlborough.

81. The other relevant issues supported by Mr Moore encompass the 'excellent' volunteer landowners' programme (88 protection projects between landowners and the Council, and 38 QEII Trust covenants) but he suggests that programme needs to go hand in hand with a robust regulatory backstop to effectively protect SNAs from active clearance.

Section 42A Report

82. The Section 42A Report identifies the Council has a duty to future generations to protect important indigenous biodiversity, particularly in the very extensive South Marlborough area. Several submitters suggested that various provisions be adapted from other plans in the country. But these provisions are not founded on the prioritisation of voluntary over

[43] Fish and Game (509.125).

[44] AQNZ (401.94) and MFA (426.98).

[45] Forest & Bird (715.177).

[46] Minister of Conservation, Simon Moore Evidence, paragraph 3.1.2.

regulatory methods which landowners in Marlborough have supported for the last 16 years. Depending on the funding package that is set up, the landowner can contribute between 20% and 50% of the costs.[47]

83. The type of remnant vegetation in South Marlborough in the Awatere high country, and its protection, necessarily requires a great deal of cooperation from landowners. That area is especially problematic as much of the vegetation is scattered scrub that looks all the same in the aerial photography. Generally, landowner trust and cooperation are key to ensuring that identification and protection of significant indigenous vegetation is achieved.

84. Seven hundred and eight sites have been identified as potential SNAs, and a smaller group has active protection, with a combined area of 45,016 ha at present, and six further ecological districts are still to be surveyed (these are all high country ecological districts). Of these sites, only 88 protection projects have been instigated through the programme, including a mix of fencing, re-vegetation, weed control and wetland restoration, requiring a major effort by Council and landowners to increase protection management. The present system, though, has 75% landowner interest in the ecological districts surveyed so far, and Council has recently committed resources to address the other ecological districts and to strengthen and enhance the protection available through the SNA programme.[48]

85. The Panel sought answers to two questions:

- Is a voluntary system coupled with some clearance standards sufficient to protect Marlborough's indigenous biodiversity?
- If not, then is a transition time warranted to introduce a mix of regulatory/voluntary controls?

Consideration

86. The Panel concluded from the evidence that the remaining indigenous biodiversity is at such low levels in South Marlborough that, while absolute protection is unrealistic, what is important is strong PMEP emphasis on protection at all levels of remaining biodiversity. This is coupled with an additional emphasis on the importance of restoration initiatives through such mechanisms as the SNA programme. Those imperatives are based on s 30(1)(ga) RMA and Policies 11(b) and 14 NZCPS.

[47] Section 42A Report, page 18 citing Summary Report on the Results of the Significant Natural Areas Project 2015 – 2016. Marlborough District Council.

[48] Section 42A Report, page 18, Errata paragraph 1. Minister of Conservation, Simon Moore Evidence, paragraph 8.3.2.

87. The Panel accepts the evidence of submitters who advance the proposition that the voluntary system, with increased commitment from both Council and landowners, is able to provide proper protection for SNAs both in ecological districts already, and about to be, surveyed.

88. A transition period placing emphasis on increased landowner commitment and filling 'gaps' in landowner commitment at change of ownership is thus the preferred method of protection with strong support from 'back-up' vegetation clearance rules. Council as part of that 'transition' to a tighter regulatory level of protection has made its commitment to greater resource the SNA programme. Importantly, it now has a specific Policy 9.1.4 in the PMEP which states formally in a statutory document that landowner control of access to all their lands remains unaffected by the SNA system. That policy acknowledges that *public access to land held in private ownership can only be granted by the landowner.*

89. One of Forest & Bird's submissions was for Council to provide for the use of aerial photography and remote sensing technology to identify sites, followed by ground truthing. This would assist in a more advanced system of identification of SNAs, although it would not be able to identify some of the rarer small stature communities such as rock outcrops, scree slopes etc.[49] The reports identified by Ms Martin identified several vast areas of the district, especially in South Marlborough, have not yet been surveyed and are not included in the TEO.

90. Mr Hamill considers that 'to ensure coverage, the identification of sites would need to be precautionary'. He agrees the identification of relatively large areas would then need to be refined during site verification. But from his experience with the identification of wetlands, landowners respond much more favourably to the reduction of the area of land identified rather than increasing an area using aerial imagery.

91. Mr Hamill also identified that to achieve complete full coverage of Marlborough's indigenous biodiversity sites, through aerial identification and then ground truthing, would have resourcing and timing implications in order to make the plan operational.[50]

92. The Panel, however, considers that high resolution aerial photography and the new Council dedicated resources, coupled with landowner assistance, should enable survey of the remaining six ecological districts to proceed with a reasonable level of confidence in the protection of remaining significant indigenous biodiversity.

[49] Forest & Bird, Deborah Martin Evidence, page 4.

[50] Section 42A Report (Hamill), Reply to Evidence, page 5.

93. The challenge, though, has to be an equal adoption of the SNA system of protection on a tighter, more widespread basis by landowners. The decision is to set a framework which provides for the next ten year plan period to enable that greater commitment by landowners to a voluntary system of protection coupled with confidential mapping, and a reliable system of transfer of the commitment at change of ownership. If that can be achieved then recourse to regulatory compulsory public mapping may not be required. The next plan review can assess progress.

94. The Panel agrees the outcome sought is identification and protection of SNAs by combination of landowner and Council engagement through the SNA programme. To meet concerns in the Environment Court *New Plymouth* decision[51] the PMEP could be tightened by adopting an approach that the PMEP is able to fulfil a 10 year transition process to regulation if the AER assessment at the end of the PMEP 10 year term shows the voluntary system to be inadequate.

95. The amendments we propose relate to Policy 8.2.2, 8.M.3 Marlborough's Significant Areas programme, and 8.AER.2. Therefore, the amendments proposed by the Panel to Policy 8.2.2 and to 8.M.3 and 8.AER.2 are:

- Where Policy 8.2.2 often refers to 'the voluntary partnership approach with landowners' insert 'enabling a 10 year transition to both expand the SNA programme to other areas and to assess its effectiveness for achieving protection of significant biodiversity …'.
- In 8.M.3 add a fourth paragraph talking of the 10 year transition process:
- 'The Plan adopts a voluntary partnership approach with landowners enabling a 10 year transition to both expand the SNA programme to other areas and to assess its effectiveness for achieving protection of significant indigenous biodiversity.'
- And in 8.AER.2 under 'Monitoring of effectiveness' reword the first paragraph to read:

'Monitoring of sites identified through the Significant Natural Areas programme shows ~~an improvement in the values of those sites~~ <u>there is increased protection of the indigenous</u>

[51] *Royal Forest & Bird Protection Society of New Zealand Incorporated v New Plymouth District Council* [2015] NZEnvC 219 ([98]). Forest & Bird sought declarations that the district plan failed to recognise and provide for areas of SNAs in accordance with its statutory obligations. The Council was found in contravention of its duty by failing to include in Appendix 21.2 of the district plan SNAs which were identified by applying the criteria contained in Appendix 21.1.

biodiversity values.' Other changes were recommended to 8.AER.2 which the Panel agrees with. They are amendments that achieve more specific anticipated environmental results.

- And retain Policy 8.2.8 and Method 8.M.5 as to monitoring.

96. We note MDC seeks that 8.AER.5 is amended as it considers the existing wording of 8.AER.2 does not capture the intent of the indicator which is 'monitoring', and this needs to be considered now.

97. Originally the Section 42A Report recommended that Policy 8.2.8 (monitoring of ecosystems, habitats and areas with significant biodiversity showing loss or deterioration) should be deleted because it provides no guidance as to how the monitoring of significant biodiversity would be undertaken nor the time frames in which this might occur.[52] Both Federated Farmers and AQNZ and MFA sought the policy should be deleted as it states the obvious while the Council has a statutory duty to review the PMEP. They considered the policy does not add value.[53]

98. But both MDC and DOC have committed to an ongoing monitoring programme to update and improve information on the sites and to monitor site conditions. The MDC and DOC had contracted an expert panel to coordinate an inventory of ecologically significant marine sites which resulted in the 2011 'Ecologically Significant Marine Sites in Marlborough' publication.

99. The first survey was undertaken in 2014/2015 and the results eventually incorporated into the notified PMEP overlay. Subsequently, the 2015/2016 survey report 'Significant Marine Site Survey and Monitoring Programme: Summary report 2015-2016' was published but not completed prior to the notification of the PMEP. Any changes to the relevant sites have been included in MDC's submissions and the Section 42A Report prepared by Peter Hamill and Dr Stephen Urlich.

100. MDC seeks the following amendment to 8.AER.5 as it considers that terrestrial, river and wetlands areas should be separated from ESMS as they are distinctly different environments and therefore monitoring and resources will be distinct.[54] The Council therefore seeks the following indicator Monitoring effectiveness is added to 8.AER.5:

… The number of private properties over which ecological assessments to determine if there are ecosystems, habitats or areas present with significant indigenous biodiversity value,

[52] Section 42A Report, page 27.

[53] Federated Farmers (425.134), AQNZ (401.100) and MFA (426.107).

[54] MDC (91.203).

continues to increase. ~~s (albeit at a low level) as the active SNA survey has been completed. Any increase in properties surveyed is most likely to arise through resource consent processes.~~

101. As recommended, a 10 year transition to expand the SNA programme provides the reason to retain Policy 8.2.8 and Method 8.M.5 Monitoring in order to monitor the effectiveness of Policy 8.2.2.

Decision

102. Policy 8.2.8 Monitoring is retained as notified.

103. Amend Policy 8.2.2 as follows:

Use a voluntary partnership approach with landowners, enabling a 10 year transition to both expand the SNA programme to other areas and to assess its effectiveness for achieving protection of significant indigenous biodiversity, as the primary means for achieving the protection of areas of significant indigenous biodiversity on private land, except for areas that are wetlands.

104. Amend the explanatory statement to Policy 8.2.2 as follows:

… The programme is funded by the Council~~, central government's biodiversity fund~~ and landowners.

105. Insert a new paragraph at the end of the explanatory statement to Policy 8.2.2 as follows:

However, not all landowners have chosen to participate in the SNA programme and other areas are yet to be surveyed as part of the programme. This policy provides for a 10 year transition to expand the SNA programme to areas yet to be surveyed, but also provides the opportunity for the Council and the community to assess the effectiveness of the voluntary partnership in achieving Objective 8.1. In this regard, Policy 8.2.8 and Method 8.M.5 will be particularly relevant.

106. Amend Method 8.M.1 Regional rules as follows:

… ~~Fishing activities using techniques or methods that disturb the seabed~~ Dredging, bottom trawling, deposition, reclamation and anchoring within the areas identified as ~~an~~ a vulnerable ecologically significant marine site will be prohibited. Resource consent is required for most uses or activities within the coastal marine area and an assessment of the effects of the activity on indigenous biodiversity will be undertaken, including whether there are any significant biodiversity values.

107. Amend Method 8.M.2 District rules as follows:

Resource consent will be required for land disturbance or vegetation clearance activities where certain species or habitats with indigenous biodiversity value are to be modified. This includes clearance of indigenous vegetation in areas that have 20% or less of remaining indigenous cover, as identified in the Threatened Environments Overlay Maps.

108. Amend Method 8.M.3 Marlborough's Significant Natural Areas Programme by adding a fourth paragraph, as follows:

The Plan adopts a voluntary partnership approach with landowners enabling a 10 year transition to both expand the SNA programme to other areas and to assess its effectiveness for achieving protection of significant indigenous biodiversity.

109. Amend Method 8.M.4 Identification of areas with significant biodiversity value as follows:

Identification of the values of various waterbodies within Marlborough is included in Appendix 5. The natural and human use values include ecological, habitat, recreational and natural character values.

The Council has ~~also~~ identified ~~in the resource management plan~~ significant wetlands and ecologically significant marine sites on maps in Volume 4..

Whale migratory routes and dolphin distribution in Marlborough's coastal marine area are depicted on maps in Volume 4.

110. The following bullet point is deleted from Method 8.M.6:

- ~~*from funding made available by central government for the protection of areas of significant indigenous vegetation and habitats of indigenous fauna;*~~

111. Amend Method 8.M.11 Partnership/Liaison as follows:

The Council works closely with the Queen Elizabeth II National Trust, an independent organisation that assists landowners to formally protect their land through a covenant on the property title. The Council also works closely with the Department of Conservation in providing information for landowners, resource users, community groups and Marlborough's tangata whenua iwi and the public in general and in on-the-ground work to assist in enhancing biodiversity in Marlborough.

…

This will extend to supporting community initiatives and advocating to government departments to set up protected marine areas and working with industry groups to promote sustainable use of marine resources.

Marlborough's tangata whenua iwi have a particularly strong interest as kaitiaki in the protection, maintenance and enhancement of indigenous biodiversity. The Council will seek to partner with iwi in its efforts to protect the remaining indigenous biodiversity in Marlborough's terrestrial, freshwater and coastal environments.

112. As a consequence of the above change, also add reference to Marlborough's tangata whenua iwi to Policy 8.2.12 and Method 8.M.6.

113. mend the 'Monitoring effectiveness' column in 8.AER.2 as follows:

Monitoring of sites identified through the Significant Natural Areas programme shows ~~an improvement in the values of those sites~~ there is increased protection of the indigenous biodiversity values.

Baseline monitoring programmes established ~~in 2010~~ for a representative sample of terrestrial, river and wetland sites ~~and in 2014/15 for ecologically significant marine site~~ show~~s~~ no loss of ~~those~~ indigenous biodiversity values over the life of the MEP.

Measured against baseline monitoring programmes established for ecologically significant marine sites in 2015/16, there is no loss of indigenous biodiversity values over the life of the MEP.

There is no increase in the extent or distribution of known aquatic pest species identified as declared pests in the Regional Pest Management Plan for Marlborough.

114. The following indicator is deleted from 8.AER.4:

~~*A voluntary partnership approach with landowners continues to be the primary means of protecting terrestrial areas of significant indigenous biodiversity.*~~

115. Amend the 'Monitoring effectiveness' column in 8.AER.5 as follows:

… The number of private properties over which ecological assessments to determine if there are ecosystems, habitats or areas present with significant indigenous biodiversity value, continues to increase~~s (albeit at a low level) as the active SNA survey has been completed. Any increase in properties surveyed is most likely to arise through resource consent processes.~~ …

Community involvement in the protection and enhancement of indigenous Biodiversity

116. In the context of submissions supporting Policy 8.2.1 and the methods that implement it, some submitters requested that, in addition to landowners, the role of others in the community in protecting and enhancing indigenous biodiversity should be recognised. For example, AQNZ and MFA seek to recognise the role of resource users (presumably because their members do not utilise land). Ngati Toa sought to recognise the role of Marlborough's tangata whenua iwi (especially in the context of Method 8.M.11).

Consideration

117. The policy specifically identifies the support and liaison of landowners as a means of protecting and enhancing indigenous biodiversity. This method is essential as many significant natural areas occur on private land. A partnership built through support and liaison will be a vital element to successfully protecting and enhancing these privately owned areas.

118. Notwithstanding the importance of working with landowners, the Panel believes that the submitters above make a valid point about the involvement of others in the community. Marlborough's tangata whenua iwi perform a kaitiaki role and will also act as guardians for taonga species. That role should be recognised in the policy and the relevant methods. AQNZ's and MFA's submissions reminded the Panel that the coastal marine area is public domain and there are no landowners. However, there are resource users active in the coastal marine area that can perform an equivalent role to landowners in this context. In summary, the Panel believes that the submissions made by AQNZ, MFA and Ngati Toa should be accepted.

119. During the hearing on Topic 6 the Panel heard from many submitters detailing the past, present and future involvement of the community in restoration efforts. In accepting the relief requested by the above submitters, the Panel believes that the role of community groups should also be recognised in the same provisions. Not to do so would flagrantly ignore the considerable efforts currently being made by the community to arrest the decline of indigenous biodiversity.

120. In the context of considering submissions to Policy 8.2.2 (see above), the Panel had cause to consider the voluntary partnership approach in the context of the complete package of regulatory and non-regulatory methods to be applied to achieve Objective 8.1 and 8.2. Helpfully, these methods are set out in full in Policy 8.2.1. However, the statement of the suite of methods in the policy itself did make the policy rather clumsy in the Panel's opinion. As notified, the methods of implementing the policy are included in the statement of the policy, when they would normally be included in the Methods of Implementation section. There is a relatively simple resolution and that is to list the methods in the policy within the explanatory

text for the policy. The Panel considers that this change can be made via Clause 16 of the RMA as it does not change the intent or effect of the policy. The methods are still described (albeit in the explanation) and then specifically identified in the Methods of Implementation section. The outcome is a simplified statement of the policy.

Decision

121. In conjunction with a subsequent decision to amend Policy 8.2.1, amend the explanation to Policy 8.2.1, as follows:

Policy 8.2.1 – A variety of means will be used to assist in the protection, maintenance and enhancement of areas and habitats with indigenous biodiversity value~~,~~. ~~including partnerships, support and liaison with landowners, regulation, pest management, legal protection, education and the provision of information and guidelines.~~

A variety of methods are necessary to achieve the protection and enhancement of areas and habitats with indigenous biodiversity value. These methods include partnerships; support for and liaison with landowners, resource users, community groups and Marlborough's tangata whenua iwi; pest management; legal protection; education; and the provision of information and guidelines.

Sometimes, simply fencing an area is the most effective means of protection and in this case, it is the Council's role to support landowners (including financially)…

Amend Policy 8.2.12 to read:

Encourage and support private landowners, Marlborough's tangata whenua iwi, community and industry groups, central government agencies and others in their efforts to protect, restore or re-establish areas of indigenous biodiversity.

Amend the last bullet point of Method 8.M.6 to read:

Through supporting initiatives developed by community, resource users, Marlborough's tangata whenua iwi and industry groups to promote protection and restoration of indigenous biodiversity.

Amend the first paragraph of Method 8.M.11 to read:

The Council works closely with the Queen Elizabeth II National Trust, an independent organisation that assists landowners to formally protect their land through a covenant on the property title. The Council also works closely with the Department of Conservation in providing information for landowners, Marlborough's tangata whenua iwi and the public in general and in on-the-ground work to assist in enhancing biodiversity in Marlborough.

Insert a new paragraph into Method 8.M.11, as follows:

Marlborough's tangata whenua iwi have a particularly strong interest as kaitiaki in the protection, maintenance and enhancement of indigenous biodiversity. The Council will seek to partner with iwi in its efforts to protect the remaining indigenous biodiversity in Marlborough's terrestrial, freshwater and coastal environments.

Policy 8.2.9

Maintain, enhance or restore ecosystems, habitats and areas of indigenous biodiversity even where these are not identified as significant in terms of the criteria in Policy 8.1.1, but are important for:

(a) the continued functioning of ecological processes;

(b) providing connections within or corridors between habitats of indigenous flora and fauna;

(c) cultural purposes;

(d) providing buffers or filters between land uses and wetlands, lakes or rivers and the coastal marine area;

(e) botanical, wildlife, fishery and amenity values;

(f) biological and genetic diversity; and

(g) water quality, levels and flows.

122. The Section 42A Report originally recommended that this policy be deleted. Mr Caddie, however, considers that without Policy 8.2.9 the deletion is contrary to Policy 14(a), (b), (c), NZCPS Restoration of natural character.[55]

123. The report writer considers after hearing evidence that the direction within Policy 14 NZCPS is much less than the direction within Policy 8.2.9[56]. But he also identifies that the policy provides direction within Policy 8.3.8 that the intent of Policy 8.2.9 is amended to better reflect the language in Policy 14 NZCPS.

124. Ms Stevens for Ngāi Tahu seeks to add an addition to the explanation as a new paragraph to follow after the description after the s 7 RMA matters that foreshadows her further submission for a new policy that relates to cultural harvests. The Panel considers that the additional wording to the explanation recommended by the report writer in the Reply to Evidence gives further recognition to (c) of the policy and therefore should be included.

Decision

125. Amend Policy 8.2.9 as follows:

Policy 8.2.9 - Promote the maintenance, enhancement, or restoration of ~~Maintain, enhance or restore~~ ecosystems, habitats and areas of indigenous biodiversity even where these are not identified as significant in terms of the criteria in Policy 8.1.1, but are important for: …

[55] KCSRA and CBRA, A Caddie Evidence, paragraph 26.

[56] Section 42A Report, Reply to Evidence, pages 8-9.

126. And that the following is added to the end of the explanation to Policy 8.2.9:

The importance of areas of indigenous biodiversity for cultural purposes could include a range of associations and uses of indigenous biodiversity, including taonga species, māhinga kai, underlying cultural values of a place, presence of resources used for rongoā, weaving, food sources, or ceremonial uses.

New Policy 8.X.X

Customary harvest

127. Following the policy direction in Policy 8.2.9(c) cultural purposes, submissions and evidence were put forward by the representatives of Ngāi Tahu seeking to provide for harvesting of cultural materials with a new policy and explanation.[57]

128. Counsel submits that customary harvesting is a sustainable practice managed by tikanga. It is an important component of iwi exercising kaitiakitanga as recognised by Part 2 RMA (particularly s 6(e)) providing for the relationship between Ngāi Tahu and the environment, while s 7 RMA requires all those exercising powers and functions under the Act to give particular regard to kaitiakitanga.[58]

129. The witness explains that in the context of kaitiakitanga, this means maintaining and enhancing the integrity of life-sustaining resources that all communities depend upon to survive. It is linked to māhinga kai – the customary gathering of food and natural materials and places where these resources are gathered. Māhinga kai and customary harvesting is expressly linked to Ngāi Tahu's culture as well as those of other iwi.

Consideration

130. The witness suggested a new Policy 8.X.X be identified which would protect and enhance indigenous biodiversity, and also enable customary harvesting including within areas identified with outstanding landscape value, Threatened Environment – Indigenous Vegetation Sites, Ecologically Significant Marine Sites or sites, areas and habitats with significant indigenous biodiversity value.

131. The evidence provided identified that in the context of biodiversity, customary harvesting is essential in enabling Ngāi Tahu to exercise kaitiakitanga and to provide for their relationship with their culture, lands, water and other taonga. Cultural harvest may be for different reasons, including but not limited to, medicinal uses, ceremonial, uses, weaving or for

[57] Ngāi Tahu, Tanya Stevens Evidence, paragraph 17, 30-33; Legal Submissions, paragraph 17.

[58] Section 6(e) RMA: 'The relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga.'

consumption. Ms Stevens emphasised that where particular resources are only available on private land, access agreements or case by case permissions from the landowner are essential before entry onto the property is allowed.

132. Ngāi Tahu included a suggested policy and explanation, methods and a rule. The rule suggested for chapters 3, 4, 19 and 22 and read as follows:

> *Customary harvest of indigenous biodiversity with the activity-specific standard of Customary harvest and in accordance with tikanga.*[59]

133. The Section 42A report writer indicated that the issue of customary harvesting had been raised in Chapter 3. The option of including an additional permitted activity rule relating to customary harvesting was discussed by that report writer and found wanting in a number of areas.[60]

134. The report writer for this report identifies that monitoring of permitted condition standards becomes very difficult with the activity-specific standards in respect of activities that are non-specific and/or measurable. It was suggested that a limit be placed on the area of vegetation that could be cleared as part of cultural harvest. He considers 'Without a limit it would be very easy for someone to clear a large area of vegetation and then argue it was being done in accordance with tikanga'. This, he notes, would be very difficult to prove otherwise.

135. Cultural harvest of plants for weaving or medicinal purposes, however, does not necessarily include the removal of the entire plant, and while limiting the area to a small area, for example 20m^2, would not impact of this collection, it would allow the removal of individual trees (such as for the creation of pouwhenua).[61]

136. The Section 42A report writer recommends that the issue could be resolved by adding it to the plan as a policy enabling customary harvest instead of a rule. In relation to the suggested wording, this could be simplified from the original submission to encompass tikanga.

137. By agreement, Ms Stevens' original wording for Policy 8.X.X was simplified and recommended by both the Council and report writer to include the reference to 'tikanga' in an amended Policy 8.3.X.[62]

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[59] Ngāi Tahu, Tanya Stevens, Evidence, para 32

[60] Section 42A Report (Maclennan), Reply to Evidence, pages 55-57.

[61] Section 42A Report (Mr Hamill), Reply to Evidence, page 3.

[62] Section 42A Report, Reply to Evidence, page 56. 'Tikanga' means 'Māori practices and values' s 2 RMA. See also Memorandum of Counsel for Ngāi Tahu, 7 March 2018.

Decision

138. A new policy is inserted as follows:

Policy 8.3.X - Enable customary harvesting in accordance with tikanga.[63]

Customary harvesting is essential in enabling Marlborough's tangata whenua iwi to exercise kaitiakitanga and to provide for their relationship with their culture, lands, water and other taonga. Cultural harvest may be for different reasons, including but not limited to medicinal uses, ceremonial uses, weaving or for consumption. Where particular resources are only available on private land, access agreements or case by case permissions from the landowner are essential before entry onto the property is allowed.

Protection of Ecologically Significant Marine Sites (ESMS) from disturbance

A regulatory approach

139. ESMSs involve a more regulatory control where Policy 8.1.1 and Appendix 3 of the PMEP set out criteria to be used to assess whether marine and terrestrial ecosystems, habitats and areas have significant indigenous value. These areas (and wetlands) have been mapped as overlays within the PMEP and there are specific policies and rules intended to manage the protection of these areas.[64]

Seabed disturbance in ecologically significant marine sites

140. The PMEP identifies 129 ESMS within the coastal marine area (CMA). Within these sites, Policy 8.3.7 applies: Within an identified ecologically significant marine site fishing activities using techniques that disturb the seabed must be avoided.

141. This is echoed in prohibited activity Rule 16.7.5 - Fishing activity that uses a technique that disturbs the seabed within any Ecologically Significant Marine Sites, except Croiselles Harbour Entrance – No. 1.2 and Tennyson Inlet – No. 3.9.

142. The policy together with the rule seek to give effect to the requirements of Section 6(c) of the RMA and Policy 11 of the NZCPS.

The anticipated environmental result

143. 8.AER.1 seeks: 'An increase in the number and extent of ecosystems, habitats and areas with indigenous biodiversity value that are formally protected or covenanted (where practicable).'

144. There are a number of submitters who support Policy 8.3.7, Rule 16.7.5, and 8.AER.1 seeking that they be retained as notified. Others seek: a large-scale 'Marine Protected Area' be

[63] Ngāi Tahu, Joshua Leckie, Legal Submissions, paragraph 19; Tanya Stevens, Evidence, paragraph 22.

[64] Section 42A Report, page 8.

incorporated into the PMEP;[65] deletion of controls within Policy 8.3.7 and Rule 16.7.5 because they fall outside the Council's jurisdiction under the RMA and that the more specific fisheries legislation has precedence.[66]

Policy 8.3.7

Within an identified ecologically significant marine site fishing activities using techniques that disturb the seabed must be avoided.

Rule 16.7.5

Fishing activity that uses a technique that disturbs the seabed within any Ecologically Significant Marine Sites, except Croiselles Harbour Entrance – No 1.2 and Tennyson Inlet – No 3.9.

145. The evidence produced by MDC, Forest & Bird, Minister of Conservation and many others sharply defined the paucity of indigenous biodiversity in Marlborough's aquatic environment. As a result, every effort is being made by the Council and experts to sustain and grow what species remain in the marine environment, and that need ongoing protection from further disturbance.

146. The technical reporting assessed by an Expert Panel has identified selected sites that contain significant biodiversity values that warrant protection from seabed disturbance.

147. The question arises in the marine environment whether the Council has the jurisdiction to protect ESMSs from intrusion, given that fisheries under the Fisheries Act 1996 have so many fisheries-only-related functions in the marine environment.

148. That the Council does have jurisdiction is established in *Attorney-General v The Trustees of the Motiti Rohe Moana Trust*[67] in the context of the powers and duties afforded the regional council under the RMA juxtaposed with those powers exercised in relation to fisheries resources or the effects of fishing on the biological sustainability of fisheries and the aquatic environment as a resource for fishing needs which are controlled under the Fisheries Act. The High Court held that:

- a regional council must not exercise the functions at s 30(1)(d)(i), (ii) or (vii) RMA to manage the utilisation of fishing resources or the effects of fishing on the biological sustainability of the aquatic environment as a resource for fishing needs;

[65] Sea Shepherd New Zealand (1146.49), the Pinder Family Trust (578.49), Guardians of the Sounds (752.49).

[66] Fishing Industry (710.16), Legacy Fishing Limited (906.1), Burkhart Fisheries Limited and Lanfar Holdings Limited (610.1), PauaMAC 7 (1038.1).

[67] [2017] NZHC 1429 per Whata J at [131], [134].

- a regional council may perform its function at s 30(1)(ga) RMA 'to maintain indigenous biodiversity within the CMA but only to the extent strictly necessary to perform that function'.[68]

149. Recently the Court of Appeal in the Motiti case addressed the respective roles and powers of the fishing industry and regional councils, and decided the Fisheries Act 1999 and the Resource Management Act 1991 overlap in terms of their various functions and in pursuit of different objectives. Since the decision was issued the Fishing Industry submitters' counsel has lodged further submissions seeking to persuade the Panel that the decision supports its arguments.

150. The Panel addresses the Court of Appeal's decision here for the clarity it brings to an understanding of the distinctions that exist.

The RMA indigenous biodiversity/Fisheries Act legislation

151. The Court of Appeal in Motiti identified, as did Whata J in the High Court, that the fisheries legislation creates an elaborate and comprehensive scheme for the sustainable utilisation of fisheries resources for regulating commercial, customary and recreational fishing through regulations (such as setting a total allowable catch for each quota management stock). The Court held the industry's activities have two dimensions – monitoring the potential of fisheries resources to meet the needs of future generations, and avoiding, remedying or mitigating adverse effects on the aquatic environment.

152. The Court then set out the Minister of Fisheries' further obligations to achieve sustainability utilisation. In this narrative, the Court identified that the fishing industry carries out the objectives set out in the legislation, and although it recognises that biological diversity should be maintained in its own legislation, it allows that principle to be weighed against other considerations, notably that of setting total allowable catches at levels that could produce maximum sustainable yield.

Questions of law

153. The first three questions of law answered by the Court of Appeal are relevant to MDC's relationship with the fishing industry under the Fisheries Act 1996. The fourth question of law relating to the declaration is not relevant here.

154. Question One: Does s 30(2) of the RMA only prevent a regional council from controlling activity in the coastal marine area if the purpose of those controls is either to manage the

[68] Section 42A Report, pages 63-64.

utilisation of fisheries resources or to maintain the sustainability of the aquatic environment as a fishing resource?

155. The Court ultimately concluded the two statutes (the RMA and the Fisheries Act) pursue different objectives which overlap. Section 30(1)(ga) RMA is concerned with protecting indigenous biodiversity. The Fisheries Act is concerned with sustainable utilisation of fisheries resources, but only to the extent appropriate to secure future stocks does it require decision makers to protect the aquatic environment. Plainly these legislative objectives overlap. Equally plainly, the RMA objective of protecting indigenous biodiversity is much broader than that of sustaining yields of quota management species in the following ways:

(a) It is broader in scope in that the Fisheries Act protects fish, aquatic life and seaweed, while s 30(1)(ga) protects all forms of indigenous organisms and their ecosystems.

(b) It protects indigenous biodiversity not just as a resource but for its intrinsic value and for its 'ecological, genetic, social, economic, scientific, educational, cultural, recreational and aesthetic values'.

(c) Its remedial or protective purpose is not limited to the effects of fishing. (Ms Gepp for Royal Forest & Bird noted that the Fisheries Act does not deal with the effects of fishing on areas of outstanding natural character.)

(d) It permits a regional council to set what may be a different baseline for permissible effects on indigenous biodiversity in any given area.

156. In answer to Question One, the answer given by the Court is a qualified 'yes'. The effect of s 30(2) RMA is that a regional council may control fishing and fisheries resources in the exercise of its s 30 functions, including the listed s 30(1)(d) functions, provided it does not do so to manage those resources for Fisheries Act purposes.

157. Question Two: Can a regional council exercise all of its functions under the RMA concerning the protection of Māori values and interests in the coastal marine area provided that they are not inconsistent with the special provision made for Māori interests under the Fisheries Act?

158. The control of fisheries under the Fisheries Act extends to provision for taiapure - local and customary fishing, and a regional council may be required to bear that in mind when determining in a particular setting whether s 30(2) precludes the exercise of its functions under subs 30(1)(d)(i), (ii) or (viii). It is otherwise not necessary to answer the question further in Motiti.

159. Question Three: To what extent, if any, does s 30(2) of the RMA prevent a regional council from performing its function to maintain indigenous biodiversity under s 30(1)(ga)? In answering this question, is it correct to say that it is only appropriate for a regional council to exercise this function if it is strictly necessary to achieve that purpose?

160. The Court held the RMA does not specify that the function of maintaining indigenous biodiversity in s 30(1)(ga) is subject to s 30(2). The Court held it is not the case that a regional council may exercise this function only when strictly necessary when dealing with fisheries resources controlled under the Fisheries Act. But any controls imposed under subs 30(1)(d)(i), (ii) or (vii) are subject to s 30(2). Section 30(1)(ga) policies can be subject to s 30(2); but only where specified s 30(1)(d) functions are also invoked.

Conclusion

161. The Court of Appeal decision clarifies the role of regional councils in the sustainable management of Indigenous Biodiversity. The Panel believes the approach taken in the PMEP which is for the purpose of protecting Indigenous Biodiversity is consistent with the Court of Appeals decision.

162. On the factual evidence heard by the Panel as to the risks to Indigenous Biodiversity from seabed disturbance, sedimentation effects, and water quality effects, the Panel is satisfied that there is a demonstrated need to protect Indigenous Biodiversity in the Sounds which is under threat from those aspects. The Panel received evidence of the very comprehensive process the Council and its technical advisory panel have put in place to identify the location of indigenous marine habitat/species which are under threat, if not protected from fishing and other forms of physical disturbance. That has resulted in the PMEP identification of precisely defined ESMS sites with accompanying rules to protect them, i.e. the purpose of all those interrelated provisions is solely to protect indigenous biodiversity within those sites.

163. There was no evidence received of the fishing sector, whether in the form of governmental agencies or private entities, carrying out any such detailed assessment of risk threats to indigenous biodiversity at that detailed scale level. The Panel considers that level of detailed protection is necessary because of the concerning level of reduction in indigenous biodiversity that has occurred as a result of the effects of a combination of diverse threats in the past. No evidence of the identification of the location of those threatened habitats or the species they contain by the fishing sector was provided sufficient to satisfy the Panel that that sector was protecting indigenous biodiversity at the detailed scale which was warranted, and which is provided by the PMEP provisions.

164. The PMEP provisions have the sole purpose of protecting indigenous biodiversity from identified threat sources, and in the Panel's view those provisions are appropriate.

Policy 8.3.7

165. Section 30(1)(ga) RMA gives the MDC the authority to protect its marine indigenous biodiversity. Policy 8.3.7 is thus the springboard for Rule 16.7.5 to prohibit all nominated threat activities known to adversely affect identified ESMS species.

166. A first question to be resolved was whether prohibited activity status should apply in Rule 16.7.5, or discretionary or non-complying status. Our conclusion is that there is such a paucity of marine indigenous biodiversity sites that the most effective status is that it should remain prohibited. The rule should prohibit all nominated threat activities that are known without question to adversely affect ESMS species in a significant manner.

167. The Section 42A report writer considers that the policy and the rule package aim to sustainably mange the marine indigenous biodiversity sites remaining and are not an attempt to restrict fishing activities other than for that purpose. We are satisfied that there is considerable evidence provided by the experts before the hearing and by Professor Thrush in what is essentially a peer review of the numerous technical reports on ESMSs from the Expert Panel to address the indigenous biodiversity species identified. And that there is considerable Council justification to address PMEP provisions that are intended to manage effects on these particular sites.

Vulnerability

168. In terms of the vulnerability of the ESMS to seabed disturbance activities, this is outlined by the report writer citing a 2014-2015 Reassessment of Significant Marine Sites.[69] Of the 129 sites originally identified, 81 were considered potentially vulnerable to bed disturbance activities. The other 42 ESMSs related to bird nesting, dolphin and whale habitats, to be addressed differently from the application of Rule 16.7.5. Other sites to be removed from the protection Category List C are No 1.2 Croiselles Harbour Entrance and No 3.9 Tennyson Inlet. The one site listed in Category D (Long Island Marine Reserve) is already protected under the Marine Reserves Act 1971. And in terms of Category E, these sites do not contain values that are significant in terms of Policy 8.1.1 and Appendix 3.

169. Of the 71 remaining sites, the report writer advises these amendments create a much more targeted approach while ensuring that the PMEP does not include unnecessary regulation.

[69] Section 42A Report, pages 71-72. Reassessment of selected significant marine sites (2014-2015) and evaluation of protection requirements for significant sites with benthic values.

Given its prohibited status, the more targeted approach has a very high management threshold.[70] The provisions in the PMEP should be retained.

Bottom trawling and dredging

170. Professor Thrush gave extensive evidence on the effects of bottom trawling and dredging, leaving little doubt as to their adverse effects on seafloor biodiversity.[71] He also provided examples of Category A and B sites. He identified that Category A site status should be extended to a much wider range of species as being sensitive to anchoring than are currently listed in the Expert Panel reports. In his experience as a marine scientist, horse mussels, hydroids, sponges and bryozoans, foliose red algae are also highly sensitive to disturbance; he recommends that they receive Category A protection. He also made a strong argument that Category B sites be elevated to Category A, and that the much wider range of species he suggests be moved into Category A as knowledge progresses over time.[72]

171. After hearing EDS's oral submissions and evidence from Professor Thrush on ESMSs, the Panel requested further information on definitions from Professor Thrush on two points – the first on bottom trawling, and the second on dredging, which are identified threats to the marine species. This request is in the context of whether Policy 8.3.4 be amended to define better how to protect ESMSs and whether it be effects or activities based. The Panel's conclusion was that it should be activities based and resulted from the witness's answers to the definitions of bottom trawling and dredging.

172. 'Bottom trawling', as proposed by the report writer, means 'the action or practice of fishing by dragging a net or associated device on the seabed'.[73]

173. In response to the questions regarding the adequacy of this definition, Professor Thrush recommended the following amendments in order to capture the entire trawling structure:

> *Bottom trawling means the action or practice of fishing by dragging a net or associated device on the seabed including associated mechanical or other supporting operational devices over or just above the seabed.*

174. Specifically, Professor Thrust outlined that trawl nets are held open by mechanical arms commonly called 'doors' and that often it is the 'doors' not the net which comes into contact with the sea floor.

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[70] Section 42A Report, page 72.

[71] EDS and Forest & Bird, Professor Simon Thrush, Evidence, paragraphs 6.1-6.9.

[72] EDS and Forest & Bird, Professor Simon Thrush, Response to Minute from the Panel.

[73] Section 42A Report (Maclennan), page 76.

175. Professor Thrush recommended that the current definition of 'dredging' in the PMEP be amended to capture dredging for fishing purposes as follows:

> *Dredging means the use of mechanical devices that as defined by their very purpose come into contact (or 10m above it) with the seafloor and are moved across the seabed including (but not limited to) for:*
>
> - *~~any activity involving the dredging of the seabed to provide~~ providing an adequate water depth for any purpose; ~~and includes~~*
> - *~~any dredging activity necessary to~~ maintaining water depth levels; and*
> - *fishing.*

176. The Section 42A report writer's definition of dredging in the context of the PMEP Rule 16.7.5, however, is as reflected in the existing definition: 'Dredging in the context of Rule 16.7.5 means: *Any activity of involving the towing of a device on the seabed primarily for the collection of shellfish.* This is the Panel's preferred option too as it avoids the more generic one provided by Professor Thrush that includes fishing and consequently avoids any confusion as to the purpose of the definition in the context of the rule.

177. We also concluded from the evidence of Professor Thrush that activities other than dredging and trawling (the most significant of adverse activities due to their impact on the seabed) could result in disturbance to the seabed with the same or similar adverse effect to ESMSs as that caused by fishing techniques. These activities relate to anchoring, reclamation, and deposition of dredged materials.

178. The Panel questioned whether Rule 16.7.5 should differentiate between suggested Categories A and B and/or Category C, which are suggested levels of protection as to the activities covered.

179. The practical conclusion reached was to have one rule prohibiting dredging, bottom trawling, mining and depositing of dredged materials for all ESMSs in Categories A and B sites. And as a separate rule, identify anchoring as a prohibited activity in respect of a schedule of ESMSs which are Category A sites only.

180. Reclamations are not included as prohibited because of the potential need to take actions to climate change-induced sea level rise in the manner described in Chapter 13 Policies 13.10.24 and 13.10.27 which reflect the principle of reclamation to be the last resort.

Decision

181. Policy 8.3.7 is amended as follows:

Within ~~an~~ ~~identified~~ vulnerable ecologically significant marine sites, activities ~~using techniques~~ that disturb the seabed must be avoided.

182. The explanatory paragraph to 8.3.7 is amended as follows:

Some ~~fishing~~ activities use techniques or practices that result in disturbance of the seabed. Depending where this occurs, there is the potential for adverse effects on marine biodiversity. The policy seeks to specifically avoid ~~the use of these techniques~~ activities that disturb the seabed to ensure areas identified as having significant biodiversity value in the coastal marine area, and which are identified as being vulnerable to such disturbance, are protected. This will help to give effect to Policy 11 of the NZCPS. Ecologically Significant Marine Sites evaluated to be vulnerable to seabed disturbance are identified as Category A and Category B sites in Appendix 27.

183. Rule 16.7.5 is replaced with the following:

16.7.5 Dredging, bottom trawling, anchoring, deposition and reclamation within any Category A Ecologically Significant Marine Site listed within Appendix 27.

16.7.6 Dredging, bottom trawling, deposition and reclamation within any Category B Ecologically Significant Marine Site listed within Appendix 27.

184. Include a new Appendix 27 as identified earlier in this decision.

185. A definition of bottom trawling is included in Volume 2, Chapter 25 as follows:

Bottom trawling means the action or practice of fishing by dragging a net, including other associated mechanical or supporting devices, where the net or devices come into contact with the seabed and/or the ecology of the seabed.

Biodiversity Offsets

Policy 8.3.8

With the exception of areas with significant indigenous biodiversity value, where indigenous biodiversity values will be adversely affected through land use or other activities, a biodiversity offset can be considered to mitigate residual adverse effects. Where a biodiversity offset is proposed, the following criteria will apply:

(a) the offset will only compensate for residual adverse effects that cannot otherwise be avoided, remedied or mitigated;

(b) the residual adverse effects on biodiversity are capable of being offset and will be fully compensated by the offset to ensure no net loss of biodiversity;

(c) where the area to be offset is identified as a national priority for protection under Objective 8.1, the offset must deliver a net gain for biodiversity;

(d) there is a strong likelihood that the offsets will be achieved in perpetuity;

(e) where the offset involves the ongoing protection of a separate site, it will deliver no net loss and preferably a net gain for indigenous biodiversity protection; and

(f) offsets should re-establish or protect the same type of ecosystem or habitat that is adversely affected, unless an alternative ecosystem or habitat will provide a net gain for indigenous biodiversity.

186. A wide range of submissions were made on this policy ranging from those who sought its deletion to a number in support with a further range seeking various amendments. Those seeking deletion essentially argued that the exclusion of offsetting in areas of significant biodiversity value would mean adverse effects in those areas always have to be avoided even if offsetting was capable of providing different but still significant biodiversity value.

187. The range of amendments sought included amongst other relief sought - deletion of the opening words excluding areas of significant biodiversity; amendments to clarify the 'mitigation' hierarchy proposed; others seeking that it is made clearer that off-setting is not mitigation; exclusion of offsetting in the marine environment; restriction to types of biodiversity by reference to Appendix 3, or application of offsetting only to significant biodiversity, or exclusion of culturally significant biodiversity.

Section 42A Report

188. The original report took considerable guidance from the NZ Government Guidance on Good Practice Biodiversity Offsetting in New Zealand, New Zealand Government et al, August 2014 – a document on which many submitters also relied. That document contains 10 principles which the report writer traversed in considering the submissions made and the recommendations made.

189. The detailed discussion in the original report was probably best summarised by the following views expressed at pages 84-85:

> *Given the direction set out in the guidance note, I consider that it could be appropriate to limit the biodiversity offsetting policy to those areas that are not considered significant. However, in order to reach this position, the areas that are considered 'significant indigenous biodiversity' within the Marlborough District must be considered irreplaceable, or so vulnerable that they cannot be replicated. I consider that the assessment criteria listed in Policy 8.1.1 and Appendix 3 of the MEP will classify a large spectrum of indigenous biodiversity within Marlborough as 'significant'. Some of these areas that meet the significance criteria will have very high biodiversity values which would be considered irreplaceable. However, other areas will be able to be replicated through an offset and achieve an environmental gain. As such, I consider that limiting*

the policy to areas of non-significant biodiversity value may result in a loss of opportunity to undertake appropriate biodiversity offsets. Accordingly, I recommend that the policy is not limited to areas of non-significant indigenous biodiversity, and instead any indigenous biodiversity offset can be considered against the policy and assessed on its merits.

190. The recommended amendments reflected that approach with possibly the most significant being the deletion of the opening words and expansion of the criteria to reflect the Guidance approach more closely.

Consideration

191. The Panel agreed with that overall approach advanced by the report for the reasons provided in the original and reply reports but differed as to some of the wording. In particular the Panel preferred to emphasise that any net gain needed to be related to the like for like principle i.e. providing that gain in the context of the same area where the affected biodiversity was located. The Panel also accepted that it was impractical and unrealistic to impose concepts of perpetuity.

192. To achieve those ends some limited wording changes were made from the wording recommended.

Decision

193. Amend Policy 8.3.8 as follows:

~~With the exception of areas with significant indigenous biodiversity value, w~~Where indigenous biodiversity values will be adversely affected through land use or other activities, a biodiversity offset can be considered to ~~mitigate~~ offset significant residual adverse effects. Where a biodiversity offset is proposed, the following criteria will apply:

(a) Residual adverse effects: the offset will only compensate for significant residual adverse effects that cannot otherwise be avoided, remedied or mitigated;

(b) Limits to offsetting: offsetting should not be applied to justify impacts on vulnerable or irreplaceable biodiversity.

(~~b~~c) No net loss: the residual adverse effects on biodiversity are capable of being offset and will be fully compensated by the offset to ensure no net loss of biodiversity;

~~(c) where the area to be offset is identified as a national priority for protection under Objective 8.1, the offset must deliver a net gain for biodiversity;~~

~~(d) there is a strong likelihood that the offsets will be achieved in perpetuity;~~

~~*(e) where the offset involves the ongoing protection of a separate site, it will deliver no net loss and prefereably a net gain for indigenous biodiversity protection; and*~~

~~*(f)*~~*(d) Like for like: offsets should re-establish or protect the same type of ecosystem or habitat that is adversely affected, unless an alternative ecosystem or habitat will provide a net gain for indigenous biodiversity in the same area.*

(e) Proximity: the proposal should be located close to the application site, where this will achieve the best ecological outcomes.

(f) Timing: the delay between the loss of biodiversity through development and the gain or maturation of ecological outcomes is minimized.

(g) Any offsetting proposal will include biodiversity management plans prepared in accordance with good practice

Buffers

194. It is the evidence of Andrew Baxter for the Minister of Conservation that the ecologically significant benthic marine sites are mapped with boundaries matching the spatial extent of the values present (based on the best available information). Some are irregular in shape and do not include a buffer for protection against direct effects (accidental or intentional encroachment into the area by trawlers or dredges). But they are a useful management tool as they provide greater security in terms of long-term protection.

195. Mr Baxter cites with approval a Davidson et al (2015) report proposing three peripheral management areas or buffers around ecologically significant marine sites of 50 metres, 100 metres or 200 metres, as follows:

Significant site location	PMA size (m)
Offshore (most or all of site >1 km from shore)	200 m
Moderate distance (most of site located 200 m to 1 km from shore)	100 m
Site <4 ha in size and close to shore	50 m

196. The report writer believes that these buffers would provide important added protection for identified significant sites, and the variable distances proposed reflect the differences between offshore and onshore sites. Sites located close to shore with better frames of reference (headlands and shoreline generally) are less likely to be encroached upon compared with offshore sites well away from reference points.[74]

[74] Minister of Conservation, Andrew Baxter Evidence, paragraph 104

197. Professor Thrush for EDS considers that buffer zones around protected areas of the sea floor may be a practical and necessary solution to keeping SNAs (ESMS) safe from disturbance. He notes there are other biological reasons to consider buffer zones useful:

- One of the strongest relationships in ecology is that species richness (a measure of diversity) increases with area. Therefore buffer zones that increase the probability of protection of the entire SNA are likely to enhance biodiversity.[75]
- A zone around a SNA [ESMS] is likely to limit the indirect effects of trawl and dredge disturbance such as elevated sediment concentrations. This may allow protected habitats to export organisms to aid disturbed habitats.
- SNAs [ESMSs] not only support high biodiversity but are also a source of colonists to supply organisms across the country.

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198. The report writer referred to the fact that for other reasons an overlay map is amended to create the two categories of significance:

- Category A – which will cover the 11 Category A sites that are vulnerable to dredging, bottom trawling, anchoring, mining, deposition of dredged materials
- Category B – which will cover the 61 (as amended below) Category B sites that are vulnerable to dredging, and bottom trawling

199. The report continued to recommend that the same appendix providing for those two categories be utilised as the base data for the establishment of buffers. The report writer recommended buffers being included to provide a method of management of activities adjacent to ESMSs to ensure avoidance of adverse effects on those sites sensitive to seabed disturbance. In his recommendation the report writer provided a table for category A and B sites that identified the relevant buffer distance depending on species composition within the ESMS. This was based on the Davidson et al (2015) report.

Consideration

200. In the light of this evidence, the Panel questioned whether the mapping of ESMSs was sufficiently precise to provide the necessary protection. Mr Baxter's reference to the often irregular shape of ESMSs and the omission of buffers is of concern.

[75] EDS, Professor Simon Thrush Evidence, pages 12-13.

201. We concluded buffers are important to provide but queried in what form and how they should be defined. MPI[76] sought that buffers not be included in the Plan, but if buffers were to be imposed their preference was to utilise straight lines to assist fisherman or other users of the coastal marine area in being able to more readily recognise the boundaries of the buffers.

202. However, the Panel considered that the use of straight line definitions at particular locations resulted in further complications. That could affect large areas of the coastal marine area not relevant to the purpose of the buffer, which is to protect the ESMS from adverse effects.

203. The Panel instead decided to utilise a methodology based on Mr Baxter's evidence which defines the recommended buffer boundaries from ESMSs using a range of distances, which relate to the species composition within the ESMS. That will be achieved by an appendix which will form the basis for the mapping of the buffers. That electronic mapping will be able to be utilised to assist users of the coastal marine area. (On the printed version of the maps because of the scale of 1:80,000 the buffers may be indistinct if visible at all. However on the electronic version they will be readily observable because of the ability to zoom into individual ESMS sites.)

204. A consequence of establishing buffers is that management must apply to activities within the specified buffer distance. The Panel does not believe that the prohibition applying to bed disturbance activities within the ESMS is appropriate in the context of the intent of the buffers. The buffers are intended to provide precautionary protection in the immediate vicinity of the sites. A discretionary activity is more appropriate in managing potential adverse effects of bed disturbance activity adjoining ESMS. This would allow those effects to be considered through a resource consent process utilising the direction provided by the objectives and policies of Chapter 8.

Decision

205. That buffers are to be established for all ESMS sites listed in Category A and Category B sites in new Appendix 27 in accordance with distances specified in Davidson et al (2015).

206. Insert a new discretionary activity rule prior to Rule 16.6.6 as follows:

Any dredging, bottom trawling, or deposition within the buffer for any Ecologically Significant Marine Site specified in Appendix 27.

[76] MPI, Stephen Halley Evidence, paras 9.4, 9.5 and 77 - 88

Clova Bay ESMS 3.14

207. In terms of ESMSs, Mr Caddie for KCSRA and CBRA drew our attention to the fact that ESMS 3.14 in Clova Bay (potentially among the most important areas for snapper in Pelorus Sound) had been omitted as a site warranting Category B protection.[77] ESMS 3.14 is described as 'the intact subtidal habitats immediately offshore'. We concluded the site had been overlooked in error.

208. The Panel was also referred to Deep Bay, Tory Channel on the eastern side of Arapea Island where an ecologically significant marine site referred to in Davidson et al identified at ESMS 5.7 as having a significant cockle bed, particularly because of the larger size of the cockles. The submitter expressed alarm that overland sediment flows from forestry activities in the Deep Bay catchment had caused the cockle bed to be smothered either entirely or substantially. The result is that the gatherers of māhinga kai no longer visit. The Panel sought a re-survey of the substantial cockles which was undertaken by Davidson et al.

209. Divers collected samples to investigate cockle density and size from the head of Deep Bay. The results of this survey indicate that cockle data collected in 2003 prior to logging, and in 2019 after logging, show cockle abundance and mean size have changed little over this period despite the evidence we received of a period of heavy sedimentation. The survival of this cockle bed is therefore fortunate. However, it remains vulnerable to a combination of forest harvest and heavy rain events or any other physical disturbance. This cockle bed is the only known feature of its kind in Marlborough and a representative example of cockle beds once more widespread throughout New Zealand.[78]

210. Given the Panel's decision on buffers for ESMS elsewhere in this decision, the Panel also had to consider the appropriate buffer for ESMS 3.14. Although the Panel did not receive specific evidence on this matter, it considered the source document for the Section 42A recommendations with respect to buffer width.[79] The Panel notes that the criteria for a 100 metre buffer is small bays or sites located near the shore.[80] The Clova Bay site meets this criteria. The Panel has therefore reached the view that a buffer of 100 metres should apply to ESMS 3.14. The decision is consistent for like habitats in other locations.

Decision

[77] See also Davidson et al Categorisation Report, Figure 2 map.

[78] Response to Panel Minute No 45, Davidson et al, Research, survey and monitoring report number 934.

[79] Davidson et al (2015): Reassessment of selected significant marine sites (2014/15) and evaluation of protection requirements for significant sites with benthic values.

[80] Davidson et al (2015), page 21

211. Site 3.14 is reinstated in the Category B sites with a buffer of 100 metres.

Overlay maps 17 and 18

212. Decisions are needed as to issues in respect of Overlay Maps. Maps 17 and 18 as to whale and dolphin habitats or marine mammal routes were not included in the maps of ESMSs of maps 1 – 16 but showed a legend that included them as 'Ecologically Significant Marine Sites'. That legend is misleading and should be deleted.

213. The question under the general heading of 'Maps' is should they be Distribution maps only, or ESMS maps?

214. Policy 8.3.5(i) requires that in the context of Policies 8.3.1 and 8.3.2, adverse effects to be avoided or otherwise remedied or mitigated, and may include:

… (i) impacts on marine mammal sanctuary, marine mammal migration route or breeding, feeding or haul out area.

Whales

215. MFA and AQNZ oppose the FNHTB request to amend the definition of 'Ecologically Significant Marine Site' to include Maps 17 and 18 which relate to whales and dolphins. The aquaculture witnesses, Drs Clement and Childerhouse, gave evidence that the Inner Sounds regions should not be included as part of the mapped area on Map 17. It should not be part of the whale migratory corridor as no whales are regularly found in these areas, and there is no evidence that any whale species are breeding, feeding or resting there either. The witnesses assume that 'lines on the map have been drawn substantially from (onlookers) sighting data and that the presence of an occasional individual in these areas has meant that these areas are equated to significant habitat' in the PMEP. They are critical of this approach.[81]

216. Other experienced witnesses agree with Drs Clement and Childerhouse and state that whales have rarely been observed travelling through Tory Channel. The Davidson 2011 Significant Site Report refers to the whales inhabiting Cook Strait rather than Tory Channel. This information is also endorsed not only by Andrew Baxter for the Minister of Conservation but by former whalers, including Thomas Norton who stated that in his extensive experience he and his whaling colleagues had seen whales head in to Tory Channel (by mistake) then turn and head back out again. Mr Perano, a descendant of whalers and former professional whaler, had never seen humpback whales stop to rest and feed in their northern and winter migration in

[81] AQNZ and MFA, Counsel Submissions, Dr Deanna Clement and Dr Simon Childerhouse, Cawthron Institute, Joint Statement of Evidence, paragraphs 18, 19, 37-40.

the Cook Strait whale migratory corridor. To his evidence he attached Figure 1 detailing the Perano whaling stations and the humpback whale migration route in the Strait.

217. East Bay (an inlet) is also identified in ESMS 7.15 of Overlay Map 17 but it is also not part of a Cook Strait migratory corridor.[82] Mr Perano is very confident that East Bay is not part of the Cook Strait whaling corridor.

218. Counsel for the aquaculture industry make the valid point that while Maps 17 and 18 are excluded from the definition of an ESMS, they are based on the mapping in Davidson 2011. Presumably, therefore, they implicitly meet the significance criteria in Policy 8.1.1 and Appendix 3. As a result, a strict avoidance approach will apply to these entire areas under Policy 8.3.2(a) if they remain.

Dolphins

219. The witness for the Minister of Conservation indicated the areas mapped by Davidson et al (2011) represented a good starting point at the time for recognising some key marine mammal values. He believes the Cloudy/Clifford Bay Hector's dolphin area and the Admiralty Bay dusky dolphin foraging area are still reasonable in terms of mapping their known core values. The Cloudy/Clifford Bay Hector's dolphin area aligns with the Clifford and Cloudy Bay Marine Mammal Sanctuary.[83]

220. However, Drs Clement and Childerhouse, witnesses for the aquaculture industry, consider Map 17 is based on out-of-date information on dusky and Hector's dolphins. The map does not, for example, account for bottlenose dolphins, common dolphins or killer whales.[84]

221. Admiralty Bay (ESMS 2.17, Map 18) is an important winter feeding area for dusky dolphins, where they employ cooperative feeding strategies. Despite being one of the most heavily studied areas, Drs Clement and Childerhouse identify that marine mammal experts have been unable to agree on the extent of this important habitat.[85] This habitat does not equate to nationally significant habitat in terms of NZCPS Policy 11(a).[86] Admiralty Bay caters for only 6–9% of the Kaikoura population of dusky dolphins, or approximately 2–4% of the wider New

[82] Section 42A Report, Topic 21 Definitions (2018) at paragraph 85.

[83] Minister of Conservation, Andrew Baxter Evidence, paragraph 115.

[84] AQNZ and MFA, Clement and Childerhouse Evidence, paragraphs 41-49.

[85] AQNZ and MFA, Quentin Davies/Amanda Hills/Savannah Carter Legal Submissions, paragraphs 61-62.

[86] AQNZ and MFA, Quentin Davies/Amanda Hills/Savannah Carter Legal Submissions, citing Markowitz TM, Harlin AD, Wursig B, McFadden CJ 2004. Dusky dolphin foraging habitat: overlap with aquaculture in New Zealand. Aquatic Conservation: Marine and Freshwater Ecosystems 14: 133- 149.

Zealand population of some 30,000 dusky dolphins. Consequently, in the submission of counsel for AQNZ and MFA, a strict avoidance policy is not justified in terms of ESMS 2.17.[87]

Consideration

222. The Section 42A report writer's recommendation is to retain the definition as notified because the relevant rules in the PMEP provide for the protection of the sea floor only within significant sites (as mapped in 1-16). These are not the focus of the dolphin and whale maps.

223. Map 17 is a distribution map and does not include ESMS. It indicates areas where observations of marine mammals including dolphins have occurred indicating habitat, but removing the inner Sounds from Map 17 using the northern tip of Long Island as the central location of a line linking Capes Koamaru and Jackson. The line for Map 17 is to be drawn across the entrances to Tory Channel and Port Underwood so they too are excluded.

224. Map 18 too is a distribution map only, with no ESMS involved. The motivation underlying the submission of protection (ability to carry on aquaculture) is not affected by this map – the concern would arise if Policy 8.3.5(g) came into play: *(g) impacts on habitats important as breeding, nursery or feeding areas, including for birds;* and on the evidence it does not, as the map is only a record of some sightings of dolphins, not at importance level.

Decision

225. Delete legend "Ecologically Significant Marine Sites" from maps 17 and 18 as to marine mammal (whale) and marine mammal (dolphin).

226. Maps 17 and 18 are to be included on a separate overlay series as species distribution maps only.

227. The boundary for Map 17 is to be drawn across the entrance to Totaranui/Queen Charlotte Sound (from Cape Koamaru to Cape Jackson), and across the entrances to Kura te au/Tory Channel and Te Whanganui/Port Underwood.

228. The status of site 7.15 is to be renamed 'Cook Strait Whale Migratory Corridor'.

229. Site 4.17 is to be renamed 'Hector's dolphin'.

230. Insert the following sentence in Method 8.M.4:

Whale migration routes and dolphin distribution in Marlbrough's coastal marine area are depicted on maps in Volume 4.

[87] AQNZ and MFA, Quentin Davies/Amanda Hills/Savannah Carter Legal Submissions, paragraphs 62.

ESMS 12

231. Port Marlborough, AQNZ and MFA sought exclusion of the Port Zone at Havelock from site 3.20.They requested that the Port Zone and reclaimed land be excluded from site 3.20 because Rule 13.1.25 provides for dredging and associated disturbance of the foreshore and seabed within the Port Zone at Havelock. The Port Zone at Havelock extends from the physical port facilities out past Cullens Point to approximately Kaiuma Point and includes the navigational channel. The Port Zone overlaps with site 3.20. Due to the use of the navigational channel and associated maintenance of that channel it is not expected that the significant biodiversity values will exist within the Port Zone.

232. For these reasons, the Panel considers that the Port Zone should be removed from site 3.20.

Decision

233. The Port Zone is excluded from ESMS 12, site 3.20

ESMS 13

234. A submission was received from PMNZ seeking a more accurate definition of the boundaries of the extent of the ecological feature (eel grass bed) at the head of Shakespeare Bay denoted as site 4.10. The Section 42A Report recommended that the issue be referred to the expert panel for ESMSs but the submitter had presented to the Panel a scientific report which is public information by Berthelsen et al 2016 which delineated in a research manner a suggested boundary for the eel grass bed. The Panel accepts that the evidence is sufficient to be reliable in fixing that boundary in planning terms and accordingly the boundary needs a slight adjustment as compared to the notified PMEP to reflect that report.

Decision

235. The boundaries of site 4.10 ESMS 13 be delineated in the PMEP in accordance with the boundaries outlined in the Berthelsen et al 2016 report.

Birds

236. We considered whether the Important Bird Area (IBA) maps as sought by FNHTB should be used to identify feeding habitat areas in the PMEP.[88]

[88] MFA Counsel submissions challenged whether there was scope for inclusion of IBA maps raised in the Section 42A Report.

Policy 8.2.3

Priority will be given to the protection, maintenance and restoration of habitats, ecosystems and areas that have significant indigenous biodiversity values, particularly those that are legally protected.

New Zealand king shag

237. Under Issue 8A of Chapter 8 and the heading 'Marine Environments' and Policy 8.3.5(i), the PMEP identifies that Marlborough's marine environment supports a significant diversity of sea birds, most of which rely on the area for breeding, raising young or for feeding. Of particular note is the New Zealand king shag, which is endemic to the Marlborough Sounds.[89]

238. FNHTB consider that Policy 8.1.1 is a duplication of Appendix 3 but the criteria in those two documents do not recognise bird feeding areas as required by NZCPS Policy 11(v) which states 'includes habitats, including areas and routes, important for migratory species'. The submitter provided strong evidence that the feeding areas of the New Zealand king shag constitute an ecologically significant site. He identifies that the map of data points currently in the ESMS of the PMEP is not complete, with the data points from western Marlborough Sounds not shown.

239. The MFA and AQNZ oppose this request and support the Section 42A report writer's recommendation that any potential change to the significance criteria around the king shag should be considered and endorsed by the Marine Expert Panel.[90]

240. Mr Hamill does not agree that bird feeding areas specifically need to be included in the criteria as other classes of animal are equally important. He believes that by adding to the 'High' H guideline and the Diversity and Pattern criteria in Appendix 3 the fact that the site is an important feeding area for threatened indigenous species will recognise the importance of those feeding areas.[91] In that way the relief may be partly granted by amending the importance of these feeding areas.

241. Dr Urlich takes a different approach. He identifies the Rarity criterion in Appendix 3 already considers a site that contains nationally threatened or endangered species is of High Significance. He notes that the king shag is classified by DOC as 'nationally endangered'. In addition, an Environment Court decision has made a determination that these feeding areas would be threatened by the addition of a marine farm which would have removed potential feeding habitat and consequently contribute to the king shag's extinction. The next step, Dr Urlich considers, is for the Expert Panel on Ecologically Significant Marine Farm Sites to

[89] MEP, Volume 1, page 8-3.

[90] Section 42A Report (Hamill and Urlich), Reply to Evidence (Policy 8.1.1, Appendix 3 and Volume 4, Significant Marine Farm Sites Overlay, page 8).

[91] Section 42A Report (Hamill and Urlich), para 64

consider information that identifies and endorses the spatial extent of the king shag feeding area.[92]

Consideration

242. The king shag habitat is recorded in the list of Ecologically Significant Marine Sites (ESMS) Appendix 5. The king shag is assessed to be 'nationally endangered' under the New Zealand Threat classification while NZCPS Policy 11 (i), (ii), (iii) requires the protection of indigenous biological diversity in the coastal environment, and those indigenous fauna that are listed as threatened or at risk in the New Zealand Classification System lists (stated). The authors of Davidson Environmental et al recognised the Port Gore Hunia site 2.35 as a colony used by approximately 30 king shags and the site was subsequently adopted as a significant site by the peer review panel.[93]

243. We concluded the reasons for the decision are to be worded in a manner which refers to Method 8.M.4 referring to the fact that Appendix 5 lists ESMS 1.6, 2.11, 2.14, 2.21, 3.3 and 3.9 which depict the breeding locations on the ESMS overlays. There is no scope, however, to include the IBA maps.

244. A new possible breeding site at Tawhitinui has only just gone to the Expert Panel for recommended inclusion and would have to be subject to a variation to be included in the PMEP. These breeding colonies are identified as needing protection in Policy 8.3.5(g) as notified.

245. The evidence is that the feeding habitat of king shags is up to a 25 km radius from breeding colonies, but they are limited by their flying habit which avoids flying over major ridge lines, hence those ridge lines in the Tory Channel do not appear to be flown over by these birds.

246. The IBA maps are regarded as too imprecise and are non-specific to king shags. They are based on habitat for both the shags and other non-threatened bird species, and a clear example of that was that they did not take into account the topographical flight limitation on king shags.

247. These background considerations require an explanatory statement for the proposed new policy which is set out in the decision below.

Decision

248. Sites 1.6, 2.11, 2.14, 2.21, 3.3 and 3.9 are retained in the ESMS overlays.

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[92] Section 42A Report, Reply to Evidence, Policy 8.1.1, Appendix 4 and Volume 4, Significant Marine Farm Sites Overlay, page 8.

[93] Davidson Environmental et al. *Significant marine site survey and monitoring programme: Survey 2015-2016,* Research, survey and monitoring report number 836, page 42.

249. In terms of Policy 8.2.3, 'king shag' is added to the bird examples of the explanation to that policy as follows:

A number of specific areas will fall into Priorities 2 and 3, for example wetlands, the stony beach ridges at Rarangi and the coastal limestone cliffs. In terms of Priority 4 habitats, in Marlborough bird species such as king shag, the New Zealand falcon, weka, rifleman and plant species such as pīngao, Muehlenbeckia astonii and native broom species are either acutely or chronically threatened.

250. A new Policy 8.3.5 is inserted as follows:

[C]

Take into account that king shag could feed in the coastal marine area within 25km of the breeding sites recorded as Ecologically Significant Marine Sites 1.6, 2.11, 2.14, 2.21, 3.3 and 3.9

251. Insert a new explanation to that new policy 8.3.5 as follows:

King shag are endemic to the outer Marlborough Sounds. The breeding and roosting sites of king shag are recognised as Ecologically Significant Marine Sites within the Plan (sites 1.6, 2.11, 2.14, 2.21, 3.3 and 3.9 in Volume 4). The limited number of king shag and the restricted breeding sites make king shag vulnerable.

King shag leave the breeding and roosting sites to forage for food in the coastal marine area. The foraging can occur up to 25km from sites. It is therefore important to consider the potential for adverse effect on king shag feeding as part of the exercise of assessing the actual or potential adverse effects of activities in the coastal marine area. However, such an assessment is only necessary within 25km of sites 1.6, 2.11, 2.14, 2.21, 3.3 and 3.9. It will also be important to take into account that land topography can limit the ability of king shag to access some areas of the coastal marine area within such a distance.

Threatened Environments Overlay

252. Clearance of indigenous vegetation within a 'Threatened Environments – Indigenous Vegetation Site' overlay (TEO) is not permitted within the PMEP. TEOs seek to protect the areas within Marlborough that have the least remaining indigenous biodiversity cover. Any clearance of indigenous vegetation in these areas requires consent as a discretionary activity.

The rules are contained within a number of zones. Appendix 4 of the PMEP includes an overlay map identifying the threatened environments.[94]

253. There are a number of submitters that seek: the TEO to be removed or amended to exclude areas that do not require protection such as urban areas, the Coastal Living Zone, working rural and forestry areas;[95] other submitters consider the proposed rules are too onerous and include highly productive land and modified valley floors and plains;[96] another suggests the TEOs are not mentioned in Chapter 8 and therefore the implementation of the overlay areas is confusing.[97] One other supports the inclusion of the TEO as there is very little surviving indigenous biodiversity.[98]

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254. The report writer considers the TEO is a blunt instrument for protection, as it will protect all vegetation within the overlay areas regardless of the quality or value of the protection (for example, the landowner planting in a domestic garden). 'This is a very inefficient method of protection.' He tentatively recommends that the TEO be removed from the PMEP as the environmental benefits gained through restricting the removal of indigenous vegetation would be outweighed by the potential costs associated with implementing the rule.[99]

255. If the TEO and its associated rule is removed, the report writer considered Standard x.3.x.3(b) in fact protects indigenous vegetation within 20 metres of an ESMS; Standard x.3.x.4 protects specific indigenous vegetation within the coastal environment; while various voluntary methods otherwise seek to maintain and enhance areas of biodiversity.

256. Nevertheless retaining the TEO is identified by the report writer as the best way to achieve Objectives 8.1 and 8.2 and to achieve that retention, he identifies several recommendations to assist those objecting to the overlay, and to that end:

- make additions to Standard 3.x.3(a);
- remove the overlay from the Coastal Living Zone which has similar characteristics to those of urban areas;

[94] Section 42A Report, pages 49-58.

[95] Sharon Parkes (339.15), Talley's Group Limited (374.10), Okiwi Bay Limited (458.5), M and R Hippolite (488.2), Karaka Project Limited (502.6), the Oil Companies (1004.100), NZ Forest Products (995.23), A Harvey (388.6), Raeburn Property Partnership (861.16), E and A Ryan (347.8), M Chapman (448.31), Dominion Salt Limited (355.12).

[96] Federated Farmers (425.534), M. Chapman (348.30).

[97] PMNZ (433.34).

[98] DOC (479.198).

[99] Section 42A Report, pages 49-50.

- remove the overlay from any zone to which it does not relate;
- provide an addition to the explanation of Policy 8.3.3;
- provide an addition to one of the methods of implementation to achieve the direction set out within Policy 8.3.3 (control vegetation clearance to retain ecosystems, habitat and areas with indigenous biodiversity value.

Consideration

257. Among those who seek to have the overlay retained (Marlborough Environment Centre, Forest & Bird), Mr Ensor for the Minister of Conservation put forward a case for retaining TEO. He notes that the report writer for the Council sees somewhat doubtful merit in retaining the facility but, as some sites are modified, the indigenous vegetation remaining may rank highly against the Appendix 3 criteria. Further, the TEO and its associated rule implements Policy 8.3.1 Managing effects of subdivision use and development in the coastal environment (a)-(c), and gives effect to Policy 11(a) NZCPS Avoiding adverse effects on (a)(i)-(vi). This result would be compromised by the change to exclude the TEO. Mr Ensor also suggested a number of clearance rules and modifications to Standards X.3.X.3 and X.3.X.6 which the Panel considered in our evaluation of this topic.[100]

258. The evidence produced by another witness for the Minister of Conservation addresses TEOs and identifies that the inclusion of vegetation clearance rules in the PMEP goes some way to protecting SNAs and potential SNAs, particularly in areas which are most depleted. The risk of removing the overlay and its related rules would mean that the regulatory protection over most of the most depleted parts of Marlborough would be substantially eroded.[101]

259. Forest & Bird also strongly recommends the retention of the TEO,[102] noting that the limitation of this approach is that it does not cover the hilly areas of South Marlborough which have been identified in Marlborough's Protected National Areas programme. Ms Martin believes that the reasons for removal suggested by those who opposed the inclusion may be dealt with through limited and specific rule exceptions (identified in Appendix 1 to her evidence).

260. The report writer recommends that if the TEO were to be retained, the overlay relate only to the Rural/Coastal Environment/Open Space 1/Open Space 2/Open Space 3/Open Space 4 Zones, and that the PMEP maps are amended so the TEO layer is removed from the zones or

[100] Minister of Conservation, Tim Ensor Evidence, paragraph 6.10, citing Marlborough District Council, 2016. Summary Report on the Results of the Significant Natural Areas Project 2015-2016, Report No. 16-004 (Simon Moore Evidence).

[101] Minister of Conservation, Simon Moore Evidence, paragraphs 3.3.2

[102] Forest & Bird, Deborah Martin, Evidence, page 8

areas to which the layer does not relate. Urban areas, the Coastal Living Zone, working rural and forestry areas would be excluded. This will avoid confusion for plan users. The report writer considers this approach could be an interim one while the SNA programme is fully established.

261. The report writer also recommends an explanation associated with Policy 8.3.3 and also the methods of implementation to achieve the direction achieved in the policy.[103]

262. The questions for the Panel encompassed whether the TEO be retained, coupled with stricter standards, or be deleted. We concluded that all those zones and areas to which the layer does not relate as referred to in the Section 42A Reports need to be removed from the TEO.[104]

263. We also considered from the recommendations and the submitters who informed the issue that several methods of implementation require amendment to reflect the intention of the TEO as do the AERs. We turn now to address the methods.

Method 8.M.2 District rules

264. MDC seeks that there should be a better link between the method and subsequent standards relying on the TEO. The Council seeks that the following sentence is added to the end of 8.M.2:

This includes clearance of indigenous vegetation in areas that have 20% or less of remaining indigenous cover, as identified in the Threatened Environment Overlays Maps.[105]

Method 8.M.9 Regional Pest Management Plan for Marlborough

265. Method 8.M.9 seeks to implement Policy 8.2.7. There were a number of submissions to Policy 8.2.7 that sought clarification of the relationship between the policy and Method 8.M.9, while Mr Chapman sought the deletion of Method 8.M.9.

Section 42A Report

266. The report writer had a firm view that it was not appropriate for Method 8.M.9 to direct the process for reviewing or implementing the Regional Pest Management Plan. He recommended a change to the notified wording of Policy 8.2.7 to, in part, clarify the relationship with Method 8.M.9 (which the Panel has adopted). The report writer went on to recommend the replacement of Method 8.M.9 with a new method placing emphasis on the development of biosecurity strategies to guide the management of invasive species threatening indigenous biodiversity.

[103] Section 42A Report, Reply to Evidence, page 30.

[104] Section 42A Report, pages 49-50; Reply to Evidence, page 30.

[105] MDC (91.134)

Consideration and Decision

267. The Panel agrees with the report writer and Mr Chapman[106] that the current method is inappropriate. Method 8.M.9 is too specific and relies on a single means of implementation. The Regional Pest Management Plan may not be an appropriate means of managing of invasive species threatening indigenous biodiversity. The Panel's view is that the method should be broader in intent.

268. Method 8.M.9 is amended as follows:

Method 8.M.9 ~~Regional~~ Pest management ~~Plan for Marlborough~~

~~*The Regional Pest Management Plan for Marlborough (prepared under the Biosecurity Act 1993) classifies a range of plant and animal species as pests because they cause or have the potential to cause significant adverse effects on Marlborough's economy and/or environment. Individual pests are placed in one of three categories. The management regime, which includes rules for each pest, applies mostly to terrestrial environments but does include aquatic plant and animal pests. The plan also lists plant and animal species that pose potential threats to ecological values in Marlborough. These species do not have a specific regime for control because they do not pass the required cost benefit tests set out in the Biosecurity Act. However, control of these pests will likely be based on a 'site led' approach, targeted to sites with significant ecological value where the reduction of a range of pests would be effective in protecting those values.*~~

The Council will consider the development of strategies to guide the management of invasive species threatening indigenous biodiversity in Marlborough. Such strategies can guide the use of a combination of regulatory and non-regulatory mechanisms. They will also recognise the role of Council under other statutes such as the Biosecurity Act 1993 to manage new and emerging threats, and other initiatives to manage the immediate threats from established species. An underlying principle will be the recognition of the important role that landowners play in this regard.

Method 8.M.10

269. We note from the Section 42A Report that the MDC recommended that riparian margins can also be planted.[107] MDC seeks an addition to 8.M.10 to convey that the Council will undertake

[106] M Chapman (348.14).

[107] Section 42A Report, pages 34-35.

planting not only of riparian margins but also of other land with indigenous species on land owned or administered by the Council.[108]

270. The report writer considers this is appropriate as it provides greater clarity as to how the Council will achieve the outcomes in Objective 8.2. Accordingly, 8.M.10 is recommended to state as follows:

The Council will undertake planting of riparian margins <u>and other land</u> with indigenous species on land owned or administered by the Council where appropriate.

Decisions

271. The Methods of Implementation 8.M.2 District rules, 8.M.9 Regional Pest Management Plan for Marlborough, 8.M.10 Riparian planting on Council-owned land are all amended as recommended above.

272. The submissions seeking the deletion of TEO's from the plan are not accepted entirely. The Threatened Environment Overlays will apply to the following zones only:

273. Rural, Coastal Environment, Open Space 1, Open Space 2, Open Space 3, Open Space 4

Indigenous vegetation clearance rules and standards

Standard X.3.X.3(a) Clearance of indigenous vegetation

274. One submitter considers that the rules and standards within the PMEP do not cover all areas that are 'significant' under the criteria in Policy 8.1.1. It seeks protection of all areas considered significant, and that clearances of any indigenous vegetation meeting significant criteria should be a non-complying activity.[109] Another submitter echoes this submission and is concerned that this permitted activity standard will potentially allow for the clearance of indigenous vegetation deemed significant when assessed against the criteria contained within Appendix 3.[110] Another submitter considers that vineyards within a TEO should be required to plant a percentage (potentially 2% of each new vineyard) in natives.[111]

Section 42A Report

275. The report writer rejects these submissions on the grounds that restricting the removal of significant indigenous vegetation would not be an efficient or economic method of achieving Objective 8.1. To determine whether a particular area is considered significant would prompt specialist assessment, adding time, cost and uncertainty to an activity. In contrast, the report

[108] MDC (91.163). Section 42A Report, pages 29-30.

[109] Forest & Bird (715.378).

[110] Minister of Conservation (479.190).

[111] Rarangi District Residents Association (1089.13).

writer considers that the voluntary programme allows significant indigenous biodiversity to be identified and measures put in place to ensure it is protected on a property-wide scale.

276. Forest & Bird particularly targeted the permitted clearance of vegetation relating to X.3.X.3(b) and (c):

277. (b) indigenous vegetation dominated by manuka, kanuka, tauhinu, bracken fern and silver tussock, and which has grown naturally from previously cleared land (i.e. regrowth) and where the regrowth is less than 20 years in age;

278. (b) indigenous vegetation dominated by matagouri, and which has grown naturally from previously cleared land (i.e. regrowth) and where the regrowth is less than 50 years in age;

279. The witness provided an amended set of rules within her Appendix 1 which the report writer considered a significant tightening of the permitted activity standards. He cites Policy 8.3.3 which seeks to 'control indigenous vegetation clearances to retain ecosystems, habitats and areas with indigenous biodiversity value'. The Panel considered the contrasting views in the submissions and evidence and concluded that the vegetation clearance rules are too generous in the notified plan and should be reduced respectively to only allow exemptions for clearance of indigenous biodiversity which is less than 10 years old for all species other than matagouri and for matagouri 20 years. The Panel accepted the evidence of Mr Moore for the Minister of Conservation that these communities of emergent indigenous species have important ecological roles and should not be undervalued by generalised exemptions.

280. As a concession, within the coastal environment the report writer recommended a reduced permitted threshold.

Consideration

281. The Panel assessed the standards for indigenous vegetation clearance and considered they did not go far enough in two of the provisions providing protection.[112]

282. Greater protection of indigenous biodiversity is required in the coastal environment to meet the requirements of NZCPS Policy 11.

283. In order to achieve this, amend standards for the Coastal Environment, Port, Open Space 3 and Lake Grassmere Saltworks zones so as to halve the allowed area of clearance as set out:[113]

x.3.x.5. Clearance of indigenous forest <u>within the coastal environment</u> must not exceed ~~1,000~~ 500m^2 per Computer Register in any 5 year period.

[112] Section 42A Report, page 54.

[113] Section 42A Report, Errata, paragraph 6.

x.3.x.6. Clearance of indigenous vegetation within the coastal environment, per Computer Register, must not exceed:

(a) ~~2,000~~ 1000m² in any 5 year period where the average canopy height is between 3m and 6m;

(b) ~~10,000~~ 5000m² in any 5 year period where the average canopy height is below 3m, except for the following species where clearance in any 5 year period must not exceed:

i. ~~500~~ 250m² of indigenous sub-alpine vegetation;

ii. ~~100~~ 50m² of tall tussock of the genus Chinochloa

Decision

284. The indigenous vegetation clearance standards in Coastal Environment, Port, Open Space 3 and Lake Grassmere Saltworks zones (at x.3.x.2) are amended as follows:

(a) indigenous vegetation under ~~or within 50m of~~ ~~commercial forest,~~ woodlot forest or shelter belt;

(b) indigenous vegetation dominated by manuka, kanuka, tauhinu, bracken fern and silver tussock, and which has grown naturally from previously cleared land (i.e. regrowth) and where the regrowth is less than ~~20~~ 10 years in age;

(c) indigenous vegetation dominated by matagouri, and which has~~ve~~ grown naturally from previously cleared land (i.e. regrowth) and where the regrowth is less than ~~50~~ 20 years in age;

(d) where the clearance is associated with the maintenance of an existing road, forestry road, harvesting track~~,~~ ~~or~~ farm track, fence line, cycling track or walking track;

(e) where the clearance is on a Threatened Environments – Indigenous Vegetation Site ~~and~~ where the clearance is within the curtilage of a dwelling~~.~~;

(f) where the clearance is associated with operation and maintenance of the: National Grid, existing network utility operations, and existing electricity distribution activities;

(g) where the clearance is associated with the maintenance of existing fire breaks.[114]

285. Standard x.3.x.3 in Coastal Environment, Open Space 3, Port and Lake Grassmere zones are amended as follows:

x.3.x.3. - Clearance of indigenous vegetation within the coastal environment must not occur …~~:~~

[114] Section 42A Report, Errata, page 6.

x.3.x.5. - Clearance of indigenous forest within the coastal environment must not exceed ~~1000~~500m² per Computer Register in any 5 year period.

286. Standards x.3.x.4 in Coastal Environment, Port and Lake Grassmere zones are amended as follows:

x.3.x.4 Clearance of indigenous vegetation within the coastal environment must not include the following habitats/species:

(a) duneland vegetation;

(b) coastal grassland;

~~(c) coastal flaxlands;~~

(d) coastal vegetation dominated by (making up >50% of the canopy cover) ~~whaririki/coastal flax (~~Phormium species~~cookianum);~~

(e) coastal broadleaved shrubland;

(f) coastal small-leaved shrubland;

(g) coastal salt turf;

(h) coastal speargrass herbfield

287. Standard x.3.x.6 in Coastal Environment, Open Space 3 and Lake Grassmere zones are amended as follows:

x.3.x.6. - Clearance of indigenous vegetation, per Computer Register, must not exceed:

(a) ~~2,000~~ 1,000m² in any 5 year period where the average canopy height is between 3m and 6m;

(b) ~~10,000~~ 5,000m² in any 5 year period where the average canopy height is below 3m, except for the following species where clearance in any 5 year period must not exceed:

i. ~~500~~ 250m² of indigenous sub-alpine vegetation;

ii. ~~10~~0 50m² of tall tussock of the genus Chinochloa.

288. Standard 13.3.20.6 in the Port Zone is amended as follows:

13.3.20.6. - Clearance of indigenous vegetation, per Computer Register, must not exceed:

(a) ~~2,000~~ 1,000m² in any 5 year period where the average canopy height is between 3m and 6m;

(b) ~~10,000~~ 5,000m² in any 5 year period where the average canopy height is below 3m.

Reordering policies (Policies 8.3.1-8.3.8)

289. The Panel considered reordering the policies would assist in the flow of management to be applied. This change is minor and can be made under Clause 16 RMA.

Decision

290. Shift existing policies in the following order:

8.3.1, 8.3.2, 8.3.5, 8.3.8, 8.3.3, 8.3.7, 8.3.4

Policies 8.3.1 and 8.3.2 and [New] Policy 8.3.3

291. Transpower in its submissions challenged both Policies 8.3.1 and 8.3.2 inter alia on the basis that those policies filed to properly recognise and provide for the National Grid which it said would inevitably in some physically constrained situations could not practically avoid create some adverse effects to indigenous biodiversity in the types of locations protected or managed by those policies. In the evidence of Ainsley McLeod on Transpower's behalf in the hearing of both Topic 5 Natural Character & Topic 6 Indigenous Biodiversity she outlined some suggested wording amendments as follows:

> *I therefore support the inclusion of the following additional clause in Policy 8.3.1 and 8.3.2 respectively:*
>
> *"Policy 8.3.1 – Manage the effects of subdivision, use or development in the coastal environment by:*
>
> *… (x) recognising that there will be situations where the operation, maintenance, development and upgrade of the National Grid will result in unavoidable adverse effects. …"*
>
> *"Policy 8.3.2 – Where subdivision, use or development requires resource consent, the adverse effects on areas, habitats or ecosystems with indigenous biodiversity value shall be:*
>
> *… (x) in the case of the National Grid, avoided, remedied or mitigated to the extent possible having regard to the National Grid's technical, locational and operational constraints…"*[115]

[115] A. McLeod Evidence dated 11 December, 2017

Section 42A Report

292. The Section 42A report[116] addressed those amendment requests in respect of Policy 8.3.2 and again in respect of Policy 8.3.1[117] but did not address in detail the precise wording proposed. Rather he accepted as a matter of law that the NPSET required express provision for the National Grid which the report writer considered was best dealt with by a specific policy.

293. His observations in that regard were:

> *I acknowledge that Policy 2 of the NPSET provides direction that the Council must recognise and provide for the effective operation, maintenance, upgrading and development of the electricity transmission network, and Policy 5 requires that decision-makers must enable the reasonable operational, maintenance and minor upgrade requirements of established electricity transmission assets.*
>
> *However, I also note that Policy 8 of the NPSET requires that, in rural environments, planning and development of the transmission system should seek to avoid adverse effects on areas of high natural character and areas of high recreation value. As such, I consider that the enabling functions of the NPSET must be balanced against the direction within Section 6(c) and the direction within Policy 8 of the NPSET.*
>
> *In my view, the best way to achieve this balance is to include an additional policy specific to management of the adverse effects on indigenous biodiversity from the construction, maintenance, or upgrade of the National Grid. I consider that the MEP needs to acknowledge that in some circumstances these adverse effects may be appropriate if there are no other practical alternatives. I consider that the inclusion of an additional policy, and the suggested amendments to Policy 8.3.2 will allow a processing officer the ability to consider the merits of a proposal on a case by case basis, weighing up the requirement to avoid, remedy, or mitigate any adverse effects, with the direction to enable the construction, maintenance, or upgrade of National Grid.*

294. He then proposed a new Policy be inserted as Policy 8.3.3 the wording of which the Panel agreed as discussed below.

295. The report writer did not recommend appropriate wording in an explanatory statement for this required provision - (and nor did Ms. McLeod's evidence for her amendments.)

Consideration

[116] Page 41

[117] Page 57

296. The Panel considered both Ms. McLeod's suggested method of dealing with this provision required for the National Grid by additions to the existing policies but preferred the specific approach of a new Policy as suggested by the report writer, which is set out in the decision below.

297. Furthermore the Panel preferred his suggested wording as the Panel's view is that a route or method of operation for the National Grid involving potential for adverse effects on sensitive indigenous biodiversity should only be considered - where the operator of the National Grid can demonstrate that there are no practical alternatives; that avoidance of effects is not possible; and that those effects cannot be remedied or mitigated.

298. A policy to that effect still recognises and provides for the "*effective operation, maintenance, upgrading and development"* of the National Grid. However, it is important that any such enabling policy also provides objectivity in the decision-making as to whether those potential adverse effects cannot be avoided, remedied or mitigated. The Panel was not satisfied that the wording proposed by Ms. McLeod would provide that appropriate level of objectivity in decision-making. The report writer's suggested new policy does achieve that.

299. A new explanatory statement is necessary to capture all those issues and the Panel has decided on a wording to that effect, which is set out in the decision below.

Decision

300. Insert a new policy at 8.3.3 as follows:

[R, C, D]

Policy 8.3.3 – Provide for the construction, maintenance or upgrade of National Grid infrastructure that adversely affects the values and attributes associated with the areas identified in Policies 8.3.1 and 8.3.2, provided that:

(a) There are no practical alternative locations or routes; and

(b) The avoidance of adverse effects required in Policies 8.3.1 and 8.3.2 is not possible; and

(c) The adverse effects that cannot be avoided are remedied or mitigated.

301. Insert new explanatory statement to the new Policy 8.3.3 as follows:

Operating, maintaining, upgrading and/or developing the National Grid have the potential to result in unavoidable adverse effects on indigenous biodiversity values. Reflecting the national significance of the National Grid for electricity transmission, this policy directs that, despite of

Policies 8.3.1 and 8.3.2, it is important to provide for these critical activities to occur. However, the policy also places limits on the ability to adversely affect indigenous biodiversity values. The National Grid operator will have to demonstrate that the circumstances in both (a) and (b) apply. Where they can do so, the national Grid operator will be required to remedy or mitigate any adverse effects.

The policy assists to give effect to Policies 2, 5 and 8 of the NPSET.

Eel Grass Beds at Waikawa Bay

302. Te Atiawa o Te Waka-a-Maui sought that Zoning Map 41 be modified to create a new overlay for 'significant habitat' being the eel grass beds at the mouth of the Waikawa Stream. In doing so, reference was made to the publication "Waikawa Estuary (Marlborough) - Broad Scale Habitat Mapping 2016". This publication, commissioned by the Council, identifies the marine habitats that exist in Waikawa Bay Estuary.

Section 42A Report

303. This submission point was considered in the Miscellaneous Section 42A Report. The report writer sought the views of Peter Hamill, Team Leader – Land and Water at the Council. Mr Hamill had previously provided advice to the Panel in the Topic 6 hearings in terms of assessing sites of ecological significance (including significant wetlands). Mr Hamill stated, as replicated in the Section 42A Report:

> *From my knowledge of the extent of seagrass beds in the Marlborough Sounds and reading the Waikawa Estuary (Marlborough) Broad Scale Habitat Mapping 2016 report prepared by Leigh Stevens and Barry Robertson I am in agreement with Te Atiawa's submission that it is a habitat that is ecologically important for many species that live in Queen Charlotte Sound. It is my view that the Waikawa seagrass beds are ecologically significant based on the criteria set out in Appendix 3 of the Proposed Marlborough Environment Plan based on the representativeness and rarity criteria. It Ranks H for representativeness as it is one of the best examples of the characteristic ecosystem in the region and Ranks H in Rarity as the seagrass bed is a regionally rare community.*[118]

304. The report writer did not make it clear in the report what their recommendation was in respect of this submission point.

[118] Section 42A Report, pg 38-39

Consideration

305. The Panel has considered the publication "Waikawa Estuary (Marlborough) - Broad Scale Habitat Mapping 2016" (the "Wriggle Report"). The figure below provides an aerial view of the relevant area. The eel grass beds are visible in the photo.

306. The area of eel grass in Waikawa Bay has been accurately mapped in the Wriggle Report at Figure 6.[119]

307. The report concludes that the Bay supports "…extensive areas of high value seagrass beds."[120] The authors go on to comment:

> *Based on the relatively large area of intertidal seagrass present in Waikawa Estuary, environmental conditions appear highly conducive to supporting this important high diversity habitat, which is not a widely represented habitat in the Marlborough Sounds.*[121]

308. Mr Hamill's expert opinion is that the sea grass bed meets the criteria for ecological significance set out in Appendix 3 of the Plan. In the absence of any other evidence, the Panel has relied upon the findings of the Wriggle Report and Mr Hamill's assessment.

309. Mr Hamill did also recommended that the request be further considered by the expert panel utilised as part of the Ecologically Significant Marine Site programme. Although we appreciate the reasons why this recommendation was made, the Panel considers that there is already sufficient information before it to determine that the eel grass beds should be included in the Plan as an Ecologically Significant Marine Site. The Panel has also taken into account that this

[119] Wriggle (2016), pg 13
[120] Wriggle (2016), pg vii
[121] Wriggle (2016), pg 12

is a rare ecosystem in a Marlborough context. In this context, it is appropriate that the site is protected from bed disturbance through provisions of the Plan as soon as possible.

310. The Panel also took into account the cultural significance of Waikawa Bay to Te Atiawa. Although the Panel did not receive specific evidence of this matter at the hearing, the association between the iwi and Waikawa Bay is commonly understood. The Waikawa Marae is only a short distance from Waikawa Bay.

311. The submitter sought that the site be added to the zoning maps in Volume 4. Other ecological significant marine sites are mapped in a specific set of overlays in Volume 4. This is the appropriate location for mapping the Waikawa Bay eel grass beds.

312. The Panel debated how best to depict the eel grass habitat given the mapping in Figure 6 of the Wriggle Report. That figure depicts a large area of cover in the centre of Waikawa Bay, two large "islands of eel grass" immediately to the west and to the north-east of the contiguous area, and then very small remnants of eel grass in the north of Waikawa Bay. In terms of mapping habitat, the Panel determined that areas of contiguous cover only should be mapped. However, the Panel also considered that the two larger proximate 'islands' should also be mapped. The fact that recolonisation of eel grass can readily occur from adjacent eel grass habitat[122] influenced this decision.

Decision

313. That the sea grass bed in Waikawa Bay be added as a new Ecologically Significant Marine Site in the Ecologically Significant Marine Site Overlays, as shown on the attached map.

314. That the site be allocated the next available number in the sequence of Ecologically Significant Marine Sites in Queen Charlotte Sound (i.e., 4.X).

[122] Wriggle (2016, pg 12