



# Proposed Marlborough Environment Plan

## Topic 7: Public Access and Open Space

**Hearing dates:** 12 – 13 March and 3 April 2018

**S42A Report Writer:** Paul Whyte

**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)*

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## List of Abbreviations

MDC	Marlborough District Council
MSRMP	Marlborough Sounds Resource Management Plan
PMEP	Proposed Marlborough Environment Plan
RMA	Resource Management Act 1991
RPS	Regional Policy Statement
S42A Report	Section 42A Report

## Submitter abbreviations

AQNZ	Aquaculture New Zealand
DOC	Department of Conservation
FENZ	Fire and Emergency New Zealand
FIS	The Fishing Industry Submitters
Fish & Game	Fish and Game New Zealand
Forest and Bird	Royal Forest and Bird Protection Society NZ
FNHTB	Friends of Nelson Haven and Tasman Bay Incorporated
HNZPT	Heritage New Zealand Pouhere Taonga
MDC	Marlborough District Council
MFA	Marine Farmers Association Incorporated
MFIA	Marlborough Forestry Industry Association Incorporated
NFL	Nelson Forests Limited
NMDHB	Nelson Marlborough District Health Board
NZDF	New Zealand Defence Force
NZIS	New Zealand Institute of Surveyors
NZWAC	New Zealand Walking Access Commission
NZTA	New Zealand Transport Agency
PMNZ	Port Marlborough New Zealand Limited
TRONT	Te Rūnanga o Kaikōura and Te Rūnanga o Ngāi Tahu

## 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<sup>1</sup>.
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

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<sup>1</sup> (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.)

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

## Introduction

8. The Introduction to Chapter 9 states that there are two regionally significant elements of community wellbeing in Marlborough. These are the access to rivers, lakes, high country and coast and the ability to enjoy areas of open space for recreation or other purposes. As there is a strong relationship between providing for areas of public access and areas of open space, the issues and supporting policies are considered together in this chapter. The chapter is also provided direction by s 6(d) RMA which states that 'the maintenance and enhancement of public access to and along the coastal marine area, lakes and rivers' is of national importance.
9. There were a number of general submissions on Chapter 9<sup>2</sup> that variously seek additional reference to 'cycling'; the control of weeds; increased consultation with Ngāti Koata, particularly around riparian rights and mooring sites; recognition that current access to Port Underwood is sufficient and should therefore not be a priority for public access (if access is enhanced, it is said there will be additional presence of logging trucks in the area, which is of particular concern); recognition that some types of subdivision cannot provide esplanade reserves and provide for the operational requirements, such as those that require operational connections between land and sea (these operational issues should be accounted for); objectives and policy should avoid too restrictively zoning privately owned in breach of s 85 RMA (zoning of any land not owned by the Council or Department of Conservation as Open Space Zone is opposed); inclusion of freedom camping in the chapter's policies; amendment to create a more concise and succinct chapter; Council to make a clear commitment to ensuring public spaces are managed through regulatory and non-regulatory provisions; recognition that public access is not supported by whanau who hold riparian rights in private ownership.

### Section 42A Report

10. The proposed amendments are not accepted in the Section 42A Report. The report emphasises that public access is a matter of national importance and the overall chapter content is considered reasonable. Riparian rights cannot be altered without some kind of statutory process and this should not derogate from the public access rights under the MEP. Mooring is also addressed separately in the MEP as a discretionary activity under Rule 16.6.2.

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<sup>2</sup> Kevin Wilson (210.5), Murray Chapman (348.11), George Elkington (727.1), NZ Forest Products Ltd (995.15 and .44), Flaxbourne Settlers Association (712.19,.20 and .24-.29) and KF Lowe (454.13-.18 and.30-.31), Federated Farmers (452.152), P Rene (1023.18).

11. Very little of the land that has been zoned as Open Space Zone is private land and where private land has been zoned, the appropriate activities will be provided for as a permitted activity.

**Consideration**

12. Given the statutory direction in s 6 RMA the Panel agrees with the report writer's advice.

**Decision**

13. There are no changes to the Introduction of Chapter 9.

**Policy 9.1.1**

**The following areas are identified as having a high degree of importance for public access and the Marlborough District Council will as a priority focus on enhancing access to and within these areas: [(a) – (e)]**

14. There were a number of submissions on this policy that variously seek: public access be limited to the form of esplanade reserves and strips; Policy 9.1.1 be restricted to apply only to Coastal Marine Zone areas and that Policies 9.1.6-9.1.8 better apply to access to the Marina and Port Zones; addition of 'iwi specific areas'; addition of White Bluffs; inclusion of public access policies in the River Management Section of the MEP and inclusion of the Opawa River stop bank as part of an overall cycle network;<sup>3</sup> an additional area (f) for conservation land;<sup>4</sup> clarification on the policy's application to rivers that only flow intermittently and the liability for damages;<sup>5</sup> amendment to the policy to include the need to protect conservation values and mitigate natural hazards;<sup>6</sup> identification of parts of water bodies considered 'high priority' for public access;<sup>7</sup> amendment to Policy 9.1.1 to include the phrase 'zoned Coastal Marine' after 'coastal marine area'.<sup>8</sup>

**Section 42A Report**

15. The Section 42A Report identifies that the generic nature of the policy providing for public access, as required by s 6(d) RMA as a matter of national importance, prevents many of these amendments being adopted. The focus of the policy is on public access and some of the submissions raise other issues addressed elsewhere in the PMEP. (Policies 9.1.6-9.1.8, for example, recognise that marinas and jetties provide opportunities for public access and give effect to s 6(d).)

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<sup>3</sup> Bike Walk Marlborough Trust (471.1) and NZWAC (481.3)

<sup>4</sup> Te Runanga o Toa Rangatira (501.37)

<sup>5</sup> ME Taylor (472.9)

<sup>6</sup> FNHTB (716.135)

<sup>7</sup> Fonterra Cooperative Ltd (1251.300).

<sup>8</sup> PMNZ, Louise Taylor Evidence, Appendix B\_. Section 42A Report, Reply to Evidence, pages 1-2, 3 April 2018.

### Consideration

16. Policy 9.1.1(c) should not be restricted to the Coastal Marine Zone as it is a general policy referring to coastal and land areas and there are other policies to address issues such as safety. Similarly, the reference to conservation land is also too specific, particularly as the policy focuses on a broad range of geographical areas and features.
17. In response to the identification of waterbodies, reference to the overlay 'High Priority Waterbodies for Public Access' suggested by PMNZ was omitted from the policy at the time submissions were made. This should be inserted and resolves the issue by identification of high priority areas.

### Decision

18. Policy 9.1.1 is amended to read:

*'... (b) high priority waterbodies for public access on the Wairau Plain (as shown in the overlay map) and in close proximity to Picton, Waikawa, Havelock, Renwick, Seddon, Ward and Okiwi Bay; ...'*

19. All other submissions on Policy 9.1.1 are rejected

### Policy 9.1.3

**Where public access is enhanced in priority locations, steps shall be taken to ensure this does not result in:**

- (a) adverse effects on the wider environment of that location from littering, unsanitary disposal of human waste or damage to vegetation; or**
- (b) conflicts between users that would detract from public enjoyment of the area.**

20. This policy relates to minimising the effects of public access on the wider public and conflicts between users.
21. The policy is supported by a number of submitters.<sup>9</sup> Others seek: inclusion of the wording 'where necessary' as not all circumstances will be appropriate to provide for the disposal of litter or human waste;<sup>10</sup> further provisions relating to trespass, landowner access and effects on neighbouring land use;<sup>11</sup> an express exclusion of Port, Port Landing and Marina Zones.<sup>12</sup>

### Consideration

22. The proposed inclusion of 'where necessary' in relation to disposal of waste is not supported as it would weaken the policy. The required flexibility is already provided for in the existing policy wording 'steps shall be taken'. The inclusion of reference to trespassing could occur as

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<sup>9</sup> H Thomson (111.1), J Wilson (231.3), NZWAC (481.5), KiwiRail Holdings (873.5) and Fish and Game (509.139)

<sup>10</sup> MDC (91.201)

<sup>11</sup> Federated farmers (425.156), DA Sycamore, Evidence; Section 42A Report Reply to Evidence 3 April 2018.

<sup>12</sup> PMNZ (433.44)



that concern could arise, but landowner access as a permitted activity, does not fit the intent of this particular policy<sup>13</sup> as increased access would likely increase damage and littering by individuals. Again, it is not considered that reference to landowner access is necessary as it is at the discretion of the landowner. The exclusion of Port, Port Landing and Marina zones sought by PMNZ is not supported, as the policy appears to be favourable to operators of the facilities in these zones.<sup>14</sup>

23. The inclusion of the words ‘cumulative’ to ‘adverse effects’ and ‘trespass’ sought by Federated Farmers related to the particular effects in this setting of the combination of minor effects that arise from public access. In other parts of this decision the Panel has drawn attention to the fact that the definition of effect in s 3 RMA includes cumulative effects and has not favoured the addition of that word in other settings in the Plan. In this particular situation where that is the primary effect of concern the Panel accepts the Federated Farmers request.

#### **Decision**

24. That Policy 9.1.3 is amended by the following:

*Policy 9.1.3 – Where public access is enhanced in priority locations, steps shall be taken to ensure this does not result in:*

- (a) *cumulative adverse effects on the wider environment of that location from littering, trespassing, unsanitary disposal of human waste or damage to vegetation; or...*

#### **Policy 9.1.11**

**An esplanade reserve to be taken for public access purposes will be preferred to an esplanade strip or access strip in the following circumstances: [(a) – (c)]**

25. This policy is supported by one submitter;<sup>15</sup> others seek: an additional standard to recognise the requirements of s 229(c) RMA where the site adjoins a river;<sup>16</sup> inclusion in the policy of ‘rivers used for angling’;<sup>17</sup> the deletion of the transfer of ownership of an esplanade reserve from Crown to MDC as this relates to Sounds Foreshore Reserves.
26. This policy does not apply to rivers in a local context, except in circumstances where Policy 9.1.1(a) and (c) apply. Extending the wording of the policy to include adjoining rivers is therefore not supported. Additional wording should be added to the explanation section to clarify this situation. Similarly, ‘rivers used for angling’ are not a priority and do not require explicit mention.

<sup>13</sup> Section 42A Report, paragraphs 74-75.

<sup>14</sup> Section 42A Report, paragraphs 74-75.

<sup>15</sup> DOC (479.98).

<sup>16</sup> NZWAC (481.10).

<sup>17</sup> Fish and Game (509.144).

### Section 42A Report

27. The Section 42A Report states that deletion of transfer of ownership from Crown to Council in the policy is not justified as this submission is likely an over-reaction to the explanation wording where it refers to esplanade reserves being transferred from the Council to the Crown where esplanade reserves are largely owned by the Crown and managed by DOC (such as the Sounds Foreshore Reserve).<sup>18</sup> This ownership, as the explanation provides, enables the Department to manage in an integrated manner access to the foreshore for the general public as well as residents and bach owners with adjoining land.<sup>19</sup>
28. The Section 42A Report concluded with a recommendation that the following was added to the explanatory statement:

*This ownership enables the Department to manage in an integrated manner access to the foreshore for the general public as well as for residents and bach owners with adjoining land. Council will give priority to taking esplanade reserves adjacent to rivers and lakes where (a) and (c) above apply.*

### Consideration

29. The Panel has taken into account the provisions of s 229 RMA and considers the existing wording of the Policy is consistent with that provision.
30. The Panel has also considered the recommended addition to the explanatory statement but believes that it adds nothing in real terms to the expressions of objective intent in the policy itself. Hence the recommended wording is unnecessary.

### Decision

31. The policy and explanatory statement are to be retained as notified.

### Policy 9.1.12

**In considering whether to waive the requirement for, or to reduce/increase the width of an esplanade reserve or esplanade strip of 20 metres in width, the Marlborough District Council shall have regard to: [(a) – (h)]**

32. This policy relates to the circumstances of waiving, reducing, and increasing the requirement for esplanade strips.
33. One submitter requests the extension of the existing policy to provide for defence lands, existing road reserve, sensitive machinery, network utilities etc, a subdivision involving a

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<sup>18</sup> Section 42A Report, paragraphs 95-99. DA Sycamore, Further Evidence, Reply to Evidence, page 5.

<sup>19</sup> Section 42A Report, paragraph 98.

minor boundary only, or where the land is protected in perpetuity, so long as public access is secured along margins of coasts, rivers, lakes etc.<sup>20</sup>

#### **Section 42A Report**

34. The report writer identifies that (h) should remain generic and reference land that is already protected. In terms of (j), 'a minor boundary adjustment' is not defined and could result in allotment of substantially smaller than 4 ha. The other proposed amendments would act to either narrow the policy's force or would result in ambiguity or relate to potential issues such as in Chapter 19 Climate Change.<sup>21</sup>
35. The report writer recommends a new (i) to the policy to identify existing protection mechanisms of legal public access as part of the decision-making process.<sup>22</sup>

#### **Consideration**

36. We agree that the insertion of the word 'legal' between 'existing' and 'mechanism' in the policy is important to the landowners and farmers of the region.

#### **Decision**

37. Policy 9.1.12 is amended by inserting a new (i) as follows:

(i) whether there is an existing legal mechanism in place that provides for public access.

#### **Policy 9.1.13**

**When considering resource consent applications for activities, subdivision or structures in or adjacent to the coastal marine area, lakes or rivers, the impact on public access shall be assessed against the following: [(a) – (i)].**

38. This policy was supported by two submitters;<sup>23</sup> others seek: amendment to ensure there is no reduction in public access to rivers unless this is unavoidable, and that the policy also applies to the areas 'adjacent to rivers';<sup>24</sup> amendment to take into account the presence of marine farms;<sup>25</sup> the addition of a criterion taking into account the positive impacts of an activity, subdivision or structure from locating the development in that location;<sup>26</sup> inclusion of a further matter referring to restrictions imposed by the Submarine Cables and Pipelines

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<sup>20</sup> Federated Farmers (425.162) DA Sycamore, Section 42A Report, pages 9-10, 11-15; Reply to Evidence, paragraph 124.

<sup>21</sup> Section 42A Report, paragraph 100.

<sup>22</sup> Section 42A Report, paragraph 100.

<sup>23</sup> DOC (479.99) and KiwiRail Holdings Limited (873.26).

<sup>24</sup> Fish & Game (509.145).

<sup>25</sup> Totaranui Ltd (233.27).

<sup>26</sup> Trustpower (1201.88), NI Foran Evidence, Federated Farmers (425.163) DA Sycamore Evidence. Section 42A Report.

Protection Act 1996 in respect of the Cook Strait electricity cable;<sup>27</sup> assertion that restricted discretionary activity status would not allow for positive effects.<sup>28</sup>

#### **Section 42A Report**

39. The Section 42A Report considers the requested amendments are generally not relevant to the policy, which relates to the criteria for assessing effects on public access to the coastal marine area, lakes or rivers. Assessment of the positive effects of an activity is already included as part of a (resource consent) application and is not needed in the policy.<sup>29</sup> Also the reference to unavoidable is not relevant to the criteria while 'riverbed' areas can be covered by water. The particular characteristics of marine farms can be considered in terms of existing criteria.
40. Amendment to include reference to the Transpower Cook Strait electricity cable is supported, however, as it is a matter that may impact on public access. The new policy highlights restrictions on public access imposed by other legislation.<sup>30</sup>

#### **Consideration**

41. The Panel agrees with the S42A report writer.

#### **Decision**

42. Policy 9.1.13 is amended by inserting a new (j) as follows.

*(j) whether there are restrictions on activities or access imposed by other legislation including the Submarine Cables and Pipelines Protection Act 1996.*

#### **Policy 9.1.14**

**Where existing public access to or along the coastal marine area, lakes and rivers is to be lost through a proposed use, development or structure, alternative access may be considered as a means to mitigate that loss.**

43. This policy is supported by one submitter;<sup>31</sup> others seek: amendment to strengthen the requirement for providing alternative access;<sup>32</sup> and an addition of a new policy to read: 'The 2005 Maritime New Zealand Guidelines for Aquaculture Management Areas and Marine Farms do not need to be considered in the Marlborough Sounds context.'<sup>33</sup>

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<sup>27</sup> Transpower (1198.22)

<sup>28</sup> Federated Farmers (425.163).

<sup>29</sup> Section 42A Report, paragraph 107.

<sup>30</sup> Ibid.

<sup>31</sup> Trustpower (1201.94).

<sup>32</sup> NZWAC (481.11), Fish and Game (509.146). Section 42A Report, paragraphs 108-109.

<sup>33</sup> MFA and AQNZ, Counsel's Legal Submissions. Section 42A Report, Reply to Evidence, page 6.

### Section 42A Report

44. The report points out that the Maritime Guidelines have a wider application than just public access. The guidelines may be best dealt with by a marine farming plan, and are not referred to in the current Plan. The additional policy is not recommended.

### Consideration

45. The Panel considers, however, after reviewing NZWAC's submission, that alternative access 'shall' be considered (rather than 'may') as this gives the policy more force in circumstances where existing access is lost. The Panel considers the amendment suggested is important in the context in which it arises so as to ensure a greater commitment by Council to address loss of access.

### Decision

46. A minor amendment to Policy 9.1.14 is as follows:

*Policy 9.1.14 – Where existing public access to or along the coastal marine area, lakes and rivers is to be lost through a proposed use, development or structure, alternative access ~~may~~ shall be considered as a means to mitigate that loss.*

### Policy 9.1.15

#### **Recognise the benefits of the presence of unformed legal road as a means to enhance access to and along waterbodies (including the coast) and to public land.**

47. This policy is supported by one submitter;<sup>34</sup> opposed by two others.<sup>35</sup> They seek: inclusion of reference to potential incompatibility with adjoining activities;<sup>36</sup> deletion of the reference to 'waterbodies' as not all roads are located adjacent to these;<sup>37</sup> additional reference to safety for forestry operations;<sup>38</sup> a provision included relating to the stopping of roads.<sup>39</sup>

### Section 42A Report

48. As the policy already refers to 'public land' the additional specificity obtained from deleting the reference to 'waterbodies' is not required (the definition of 'land' in s 2(a) RMA includes land covered by water). The Section 42A Report references the fact that road stopping takes place under the Local Government Act 2002 which involves a public process, rather than

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<sup>34</sup> Fish and Game (509.147).

<sup>35</sup> G and C Robbins (640.5), GV Robb (738.8).

<sup>36</sup> Federated Farmers (425.164).

<sup>37</sup> NZWAC (481.12).

<sup>38</sup> Te Rūnanga o Ngāti Kūia (501.39), NFL (990.214), H Arnold Evidence, Section 42A Report Reply to Evidence pages 6-7.

<sup>39</sup> Queen Charlotte Sound Residents Association (504.47).

under the RMA (as acknowledged in the explanation to Policy 9.1.16). Finally, it is not up to the landowner to open the road as it is already public.<sup>40</sup>

### Consideration

49. The inclusion of reference to safety considerations relating to forestry operations does not detract from the overall thrust of the policy and should be included. The presence of unformed legal road that has not been formed or used for road purposes and to which the public have right of access potentially forms an important resource for public access purposes. Where possible and appropriate in terms of public safety opportunities should be made.<sup>41</sup>

### Decision

50. The explanatory statement to Policy 9.1.15 is amended as follows:

*The presence of unformed legal road has not been formed or used for road purposes and to which the public have a right of access (often referred to as a paper road) potentially forms an important resource for public access purposes. Where possible, and appropriate in terms of public safety, opportunities should be made to ensure access over unformed legal roads, especially to areas identified as having a high priority for public access in Policy 9.1.1, is enhanced.*

### Policy 9.1.16

**In considering an application to stop any unformed legal road, the Marlborough District Council shall consider the following: [(a) – (e)]**

51. This policy is supported by one submitter;<sup>42</sup> others seek: inclusion of consideration of whether the road is on or near a culturally significant site;<sup>43</sup> addition of criteria (f)-(g) relating to whether there is public access at the other end of the unformed legal road, and the existing land use and degree of disruption to the nearby activities;<sup>44</sup> the deletion of the existing considerations (a)-(e) and replacement of these with a public notice;<sup>45</sup> minor amendment to include reference to future use;<sup>46</sup> the deletion of the policy in its entirety as it is a matter best dealt with by the Local Government Act.<sup>47</sup>

### Consideration

52. As the policy relates to 'public access' it sits well within the current chapter and should not be deleted. Most of the amendments appear more limiting. The policy is thus focused on 'access'

<sup>40</sup> Section 42A Report, paragraphs 111-112.

<sup>41</sup> NFL (990.214). Ngāti Kuia (501.39). Section 42A Report, Reply to Evidence, pages 6-7.

<sup>42</sup> M and K Gerard (424.41).

<sup>43</sup> Te Runanga Toa Rangatira (166.52).

<sup>44</sup> Federated Farmers (425.165).

<sup>45</sup> NZWAC (481.13).

<sup>46</sup> NMFH Peter Wilson Evidence, Section 42A Report, Reply to Evidence, pages 7-8.

<sup>47</sup> Fish and Game (509.148) Peter Wilson Evidence, Section 42A Report, Reply to Evidence, pages 6-7.

factors and accordingly such matters as cultural matters and adjoining activities are better addressed elsewhere.

53. It is accepted, however, that 'future use' is an appropriate amendment and should be included.

**Decision**

54. The submissions are accepted only to the extent that an amendment is made to Policy 9.1.16 is as follows:

*Policy 9.1.16 – In considering an application to stop any unformed legal road, the Marlborough District Council shall consider the following:*

- (a) current and future level of use ...*

**Objective 9.2**

**Identification of circumstances when public access to and along the coast and the margins of lakes and rivers can be restricted.**

55. Submissions on this objective mainly supported the need for such an objective but one by NMFG requested its amendment to ensure it provided clearer direction aligned with the public access purpose of s 6(d) RMA which provides that one of the matters of national importance which plans shall recognise and provide for is as follows:

*(d) the maintenance and enhancement of public access to and along the coastal marine area, lakes, and rivers:*

**Section 42A Report and Consideration**

56. The report writer agreed with the need for some clearer identification of that statutory emphasis and recommended an appropriate amended wording for both the objective and the explanatory statement to achieve that. The Panel, too, agreed that clearer direction was needed in Objective 9.2 to ensure the statutory direction was recognised and provided for, but changed the wording slightly from that recommended.

**Decision**

57. Amend Objective 9.2 and its explanatory statement to read:

*Objective 9.2 – ~~Identification of circumstances when~~ Public access to and along the coast and the margins of lakes and rivers will only be restricted where necessary for security, health and safety, conservation, cultural or other similar reasons. ~~can be restricted.~~*

*There are some situations where public access to the coast, lakes and rivers is already restricted, for example by natural physical restrictions like those imposed by the coastal cliffs on the western side of d'Urville Island. Public access is also restricted where land to*

*the water's edge is in private ownership (riparian rights). However, there are other circumstances where access is or may need to be limited.*

*Public access is already restricted in some parts of the Marlborough Sounds to protect special values such as endangered wildlife. The restriction on public access to these locations (generally islands) is governed by legislation other than the RMA. Access can also be restricted to defence areas, including areas used for temporary military training activities, under the provisions of the Defence Act 1990 for security and safety reasons. Port operations in Picton and Havelock may result in restrictions on public access to protect public safety and for security reasons.*

*Given the imperatives regarding the maintenance and enhancement of public access in Section 6(d) of the RMA, it is important that any restrictions placed on public access to and along the coast and the margins of lakes and rivers are well justified.*

### **Policy 9.2.1**

**Public access to and along the coastal marine area and the margins of lakes and rivers may be restricted to:**

- (a) ensure a level of security consistent with the purpose of a resource consent or designation;**
- (b) protect areas of significant indigenous vegetation and/or significant habitats of indigenous fauna;**
- (c) protect cultural values of Marlborough's tangata whenua iwi;**
- (d) allow for foot access only;**
- (e) protect public health and safety and animal welfare and to manage fire risk;**
- (f) protect heritage, natural or cultural values; and**
- (g) in other exceptional circumstances sufficient to justify the restriction, notwithstanding the national importance of maintaining that access.**

58. This policy is supported by a number of submitters;<sup>48</sup> others seek: the addition of a further subsection to allow access to and along the coastal marine area to manage threats to biosecurity;<sup>49</sup> the addition of a further subsection to ensure that the restriction does not result in trespass or adverse effects to neighbouring land;<sup>50</sup> additional provisions to recognise the potential damage vehicles can do to the foreshore;<sup>51</sup> the deletion of (g): 'other exceptional circumstances'.<sup>52</sup>

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<sup>48</sup> FENZ (993.7), KiwiRail Holdings Ltd (873.28), Port Marlborough Ltd (433.47) and Te Runanga Ngati Kuia (501.41).

<sup>49</sup> AQNZ (401.114) and MFA (426.119) Counsel's Legal Submissions.

<sup>50</sup> Federated Farmers (425.166).

<sup>51</sup> Forest & Bird DJ Martin Oral Evidence. Reply to Evidence page 10

<sup>52</sup> Fish and Game (509.151).



59. Trustpower<sup>53</sup> requested in the Public Access and Open Space chapter that where public access may be restricted in the coastal marine area and rivers and lakes, the following be added to the policy (f) 'protect significant infrastructure and network utilities'.

**Section 42A Report**

60. This submission was inadvertently overlooked by the report writer who subsequently addressed it<sup>54</sup> by recommending it is appropriate to add these activities (such as hydroelectricity infrastructure) because they are likely to be incompatible with unrestricted access. While the policy does refer to public health and safety, the proposed recommended addition will reinforce this aspect, the amendment to read:

*(g) protect significant infrastructure and network utilities*

(with consequential change to numbering).

61. Forest & Bird also sought additional provisions to recognise potential damage that vehicles can do to the foreshore.<sup>55</sup> The Section 42A Report identifies this matter is addressed in NZCPS Policy 13.13.3 which includes reference to NZCPS Policy 20, Policy 13.13.7, and Method 13.M.18 Bylaws.

62. The final report made the following recommendation:

*Add the following to the explanation to Policy 9.2.1 "The potential adverse effects on the foreshore by motorised vehicles is addressed in Chapter 13 Use of the Coastal Environment."*

The Panel accepts that recommendation but to align more closely with Policy 20 NZCPS inserts the phrase 'or adjacent to' so that the complete wording reads 'on or adjacent to the foreshore'.

**Decision**

63. Amend Policy 9.2.1 to include a new (g) and consequential changes to numbering as follows:

*(g) protect regionally significant infrastructure and network utilities; and*

*(hg) in other exceptional circumstances sufficient to justify the restriction, notwithstanding the national importance of maintaining that access.*

64. Amend Policy 9.2.1 by adding the following to the end of the explanatory statement:

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<sup>53</sup> Trustpower (1201.89). N I Foran, Evidence. Section 42A Report, Addendum (2018), Reply to Evidence, pages 9-10.

<sup>54</sup> Section 42A Report Reply to Evidence, page 8 and 9

<sup>55</sup> Forest & Bird, D Martin Evidence.

*The potential adverse effects on or adjacent to the foreshore by motorised vehicles are addressed in Chapter 13 Use of the Coastal Environment.*

### **9.M.9 Liaison**

**The Council will liaise with the Department of Conservation to identify areas along Marlborough's coastline where the use of vehicles on the foreshore and seabed is not appropriate.**

**The Council will liaise with the Department of Conservation to assess the need for additional or upgraded public facilities for areas identified in Policy 9.1.1 as having a high degree of importance for public access.**

#### **Section 42A Report and Consideration**

65. The Section 42A Report made the following observation about this liaison Method:

*170. In terms of 9.M.9 Liaison, Kevin Loe (454.21), Queen Charlotte Sound Residents Assoc (504.49) and Flaxbourne Settlers Association (712.32) suggests that as well as consultation with DOC, landowners and the community also be consulted in terms of vehicle use and upgraded public facilities. Consultation with these parties is likely to occur and given their interests it makes sense to include them.*

66. The Panel agreed with that recommendation but also was cognisant of the need, stressed in relation to similar provisions throughout the hearing process by various of Marlborough's tangata whenua submitters, that to meet Part 2 RMA obligations the provision should also include reference to the need to liaise with Marlborough's tangata whenua iwi.

#### **Decision**

67. Amend Method 9.M.9 to read:

*The Council will liaise with Marlborough's tangata whenua iwi, the Department of Conservation, coastal landowners and interest groups to identify areas along Marlborough's coastline where the use of vehicles on the foreshore and seabed is not appropriate.*

*The Council will liaise with Marlborough's tangata whenua iwi, the Department of Conservation, coastal landowners and interest groups to assess the need for additional or upgraded public facilities for areas identified in Policy 9.1.1 as having a high degree of importance for public access.*

## Open Space

### Open Space 1, 2 and 3 Rules

68. A number of submissions were received on the rules in the Open Space 1, 2 and 3 Zones. A number are more appropriate for other chapters, or lack specificity. Those that are identified here seek as follows:

- Clarification as to whether as Open Space 3 Zone covers all the Sounds Foreshore, DOC reserves, Titirangi Farm Park and some privately covenanted land, and if so should there be no exotic plantings or clearance of indigenous vegetation on this land.<sup>56</sup> (It is the understanding of the report writer that these types of land are included in Method 9.M.1 and the rules in the Open Zone 3 cover the matters referred to.)
- Addition of standards relating to direction of outdoor lighting to the permitted activities in Open Space 1, 2 and 3 Zones<sup>57</sup> (deferred until Nuisance Effects considered). The report writer considers this issue may need addressing but the standard is not in urban residential zones as stated by the submitter.
- A setback of 5 metres for new buildings adjacent to the rail corridor in respect of reverse sensitivity effects in the Open Space 1 and 3 Zones.<sup>58</sup> KiwiRail Holdings Ltd requests a setback of 5 metres adjacent to the 'rail corridor' in respect of reverse sensitivity effects in the Open Space 1 and 3 Zones. Provision be made for new emergency service facilities as controlled activities in Rule 18 Open Space 2 Zone and that additional standards be included relating to requirements to provide firefighting water supply and access to buildings<sup>59</sup> (the existing Renwick Fire Station is located in the Open Space 2 Zone (Rule 18.1.8); the issue is whether fire stations should be controlled where Council can refuse consent or be a discretionary activity.
- Addition of new standards relating to reverse sensitivity noise effects in respect of activities adjacent to ports at Picton, Shakespeare Bay and Havelock in the Open Space 2 and 3 Zones.<sup>60</sup> This matter is dealt with in Topic 18 Nuisance Effects.
- Addition of a new rule and standards in respect of livestock crossing rivers in the Open Space 3 Zone; these provisions were inadvertently omitted from the Plan and included

<sup>56</sup> M and K Gerard (424.189).

<sup>57</sup> NZTA (1002.211), Kathryn Barrett tabled Letter, Section 42A Report, paragraph 182; Reply to Evidence, page 15.

<sup>58</sup> KiwiRail Holdings Ltd (873.167 and .170).

<sup>59</sup> FENZ (993.80) tabled letter Liz White advice, Section 42A Report Reply to Evidence, pages 16-17.

<sup>60</sup> PMNZ (1284.6 and .7).

in other zones.<sup>61</sup> As the Open Space Zone contains some farms, it is the recommendation of the report writer that the rule and standard should be inserted.

- Addition of provision for directional and educational signage in the Open Space 3 Zone.<sup>62</sup> As the Open Space 3 Zone contains some farms, Wither Hills Reserve and Molesworth Station, the report writer accepts the rule and standard should be inserted – echoing submissions that apply to the Rural Zone, Coastal Environment Zone and to beds of lakes and rivers.<sup>63</sup>
- Exclusion of Rangitoto ki te Tonga/D’Urville Island and private land from being zoned as an Open Space 3 Zone, to retain riparian rights and rights to refuse people access to cross private land.<sup>64</sup> The zoning does not preclude the submitter from retaining their riparian rights or refusing people access. The report writer recommends no change is appropriate.
- Freedom camping in Open Space 2 and 3 Zones as provided in Rules 18.1.3 and 19.1.3 is opposed.<sup>65</sup> The report writer identifies the MDC bylaw is the main determinant of freedom camping but it is under review – see Marlborough District Council Camping Control Bylaw 2012.
- Under Rules 19.1, 19.3 there should be provisions managing stock access to rivers, given that farming is a permitted activity and that in many cases land adjacent to rivers is zoned Open Space 3.<sup>66</sup>
- In respect of all four Open Space zones the erection of pouwhenua or other cultural signage should be a permitted activity.(Te Atiawa)

#### **Section 42A Report and consideration**

69. The report writer considers that the 5 metre setback for buildings adjacent to the rail corridor requested by KiwiRail is reasonable for health and safety reasons. But given that the Plan does not have a definition of ‘rail corridor’, we sought further information about other South Island plans in relation to a definition of ‘rail corridor’ and how other district plans had defined the term.

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<sup>61</sup> MDC (91.153 and .154).

<sup>62</sup> Fish and Game (509.409).

<sup>63</sup> Section 42A Report, paragraph 194.

<sup>64</sup> Ragged Point Limited (1086.2).

<sup>65</sup> D and C Robbins (640.60 and .61), GV Robb (738.60 and 712.33), MJ Robb (936.60 and .61), H. Thomson (113.1), KF Loe (454.124), Timms Family (475.8), Fish and Game (509.421), Flaxbourne Settlers Association (738.61), P Wilhelmus and Ormond Aquaculture (1035.9) and further evidence from SM Wilkes. Section 42A Report, Reply to Evidence, page 19.

<sup>66</sup> Section 42A Report, pages 24, 27-28.

70. In terms of the Hurunui District Plan, there is no definition of 'rail corridor'. The zones variously require 4 metres from a boundary of any rail corridor in the Rural Zone, a 4 metre setback for yards adjoining the rail corridor in the Residential Zone, and for the Business Zone, 4 metres in the yards adjoining the rail corridor. The Palmerton North City Plan also does not define rail corridor; a rule in the Whakarongo Residential Plan requires no buildings to be located within 25 metres of the Palmerston North to Gisborne railway tracks. In the Rural Zone no building is to be located within 30 metres of the nearest railway track. The Christchurch City Plan Residential Suburban Zone requires buildings, balconies and decks on sites adjacent to or abutting a designated 'rail corridor' to be set back 4 metres from the rail corridor boundary and the same for the Industrial General Zone.
71. The report writer recommends that 5 metres is appropriate in the Open Space 3 Zone which encompasses the Wither Hills and Molesworth Station. Whether it is appropriate for other zones is not identified. The report writer suggests that the mostly similar standards throughout the South Island should be applied to Marlborough.
72. This issue is common to a number of zones and was particularly addressed by the Panel in the context of the urban zones as well as the Rural Zone. The decision reached by the Panel was that the buffer is appropriate to enable safe maintenance of buildings but a buffer of 5m was too large for this purpose. The Panel's view was that a 1.5m buffer for maintenance of buildings was sufficient and the Panel also formed a view that it should be a consistent approach. The detailed reasoning is provided in our decision in both the Urban and Rural Environments.
73. As to the issue of permitted activity status for pouwhenua in the Open Space zones the Panel considered that was appropriate to meet the Part 2 RMA requirements of recognising and providing for the cultural significance of places of importance to Marlborough's tangata whenua iwi. Most areas zoned in this way are under public ownership through the Department of Conservation or Council which will provide a measure of practical control, coupled with the need to meet zone standards for permitted activities.

**Decision**

74. New rules are inserted as 17.2.1.7 and 19.2.10 and are to read as follows:

*A building or structure must not be within 1.5m of the legal boundary with the rail corridor of the Main North Line.*

75. That pouwhenua be provided for as a permitted activity in Open Space zones 1-4. The rule detail of how this is to be achieved is set out in Topic 2: Marlborough's tangata whenua iwi decision.

### Zoning requests

76. A number of submissions were made requesting rezoning various sections of land in respect of open space.<sup>67</sup> These variously seek that:

- **Map 3** - Clearwater Reserve, Blenheim is more appropriately zoned as Open Space 1<sup>68</sup> than Urban Residential 2 as a Council-owned and managed park.
- **Maps 9, 159** - Seymour Square, Blenheim is more appropriately zoned from Open Space 1 to Open Space 2 due to the special events that are held in the square.<sup>69</sup>
- **Maps 35, 37, 138** - Pt Sec 1244, Sec 1260 and Sec 1258 Town of Picton and Lot 4 DP3342 should be rezoned from Open Space 2 to Business 1.<sup>70</sup> The land is currently open space and used for car parking and access to boats berthing adjacent to the car park. It also provides an important link to the Fisherman Reserve and Coat Hanger Bridge.
- **Maps 35, 37, 138** - Secs 1180 and 1181 Town of Picton, and Lots 1, 2 and 3 DP 7913, Pt Lot 3 DP 1682, Lot 4 DP 3342 and Lot 1 DP 1972 are rezoned from Open Space 2 to Business 1 as this would allow for future commercial opportunities in this area.<sup>71</sup> It is currently zoned for commercial purposes in the MSRMP. (Map page 32 Section 42A Report will be helpful in accurate mapping.) Rezone Secs 1180 and 1181 Town of Picton, Lots 1, 2 and 3 DP 7913, Pt Lot 3 DP 1682, Lot 4 DP 3342 and Lot 1 DP 1972 as Business 1, as set out on page 39 of the Original Report. Note that the map on page 32 of the Original Report will be helpful in accurately mapping the rezoning.
- **Map 219** - Private land property number 182692 on Ward Beach Road be rezoned from Open Space 3 to Rural Environment Zone, as the original zoning was done in error, as shown on Planning Map 219.<sup>72</sup>

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<sup>67</sup> Section 42A Report, paragraphs 256-284.

<sup>68</sup> MDC (91.115)

<sup>69</sup> MDC (91.114).

<sup>70</sup> MDC (91.255).

<sup>71</sup> MDC (91.256).

<sup>72</sup> MDC (91.95).

- **Map 80** - An area shown on Planning Map 80 in proximity to Tuamarina be rezoned as the area includes private land some of which is subject to a long term lease which is highly modified agricultural land.<sup>73</sup>
- **Map 93** - Secs 1 and 2 SO 428440 private land located at Catherine Cove, D’Urville Island zoned Open Space 3 are rezoned to Coastal Living Zone as the titles were subdivided from Crown Land as part of the Treaty settlement processes.<sup>74</sup>
- **Map 111** - Sec 1 SO 429448 private land at Wharf Road, Okiwi Bay zoned Open Space 3 be rezoned to Coastal Living Zone as this land was declared not to be suitable for residential development. Transferred from the Conservation Estate to Ngāti Koata through the Treaty process.<sup>75</sup>
- **Map 114** - Rezone covenanted areas as Open Space 3. Landowner wish. (Refer to tabled evidence General.)
- **Map 114** - Property at Hopai Bay, two areas that covenanted with DOC in Oaheka Peninsula had not been included in the Open Space 3 Zone.<sup>76</sup>
- **Map 124** - Sec 14 Block 1 Linkwater Survey District, which has recently been subdivided, should be rezoned as Coastal Living Zone from Open Space 3 given its private ownership.<sup>77</sup> Rezone Sections 17 and 18 (part of Lot 5), Section 3 (part of Lot 2), Section 21 (part of Lot 4), Section 15 (part of Lot 6), and Sections 11, 12 and 8 (part of Lot 7) to Coastal Living. Note that the survey plan and subdivision plan on page 37 of Original Report will be helpful in accurately mapping the rezoning.
- **Map 149** – Remove Open Space 3 Zone from true left of Cravens Creek (Mr Tozer has concerns that Open Space 3 Zone along Cravens Creek will result in expectation of public access).<sup>78</sup>
- **Map 219** – Private land (PN182692) is zoned Open Space 3 in error. Rezone private land currently Open Space 3 as Rural Environment.<sup>79</sup>
- W363 Significant Wetland (Planning Map 57) be ‘declassified’ and rezoned to Coastal Marine Zone.<sup>80</sup>

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<sup>73</sup> Gary Barnett (1258.11).

<sup>74</sup> Jarvie Family Trust and TM and MS Raumati (11.1).

<sup>75</sup> Hura Pakeke Trust (498.1).

<sup>76</sup> M and K Gerard (424.190) Evidence, Section 42A Report, Reply to Evidence, page 20.

<sup>77</sup> Ashley Cook (520.1)

<sup>78</sup> Section 42A Report, page 38; Reply to Evidence, page 19-20.

<sup>79</sup> MDC (91.95), Section 42A Report, pages 32-33, 40.

77. Opposition to a number of zonings were also submitted.<sup>81</sup> Other zoning requests are largely accepted as listed below.
78. The subdivision of DOC and private land in Block 1 Linkwater Survey District at Pinohia, Paradise Bay also requires rezoning of additional lots. These areas shown on SO Plan 481651 should be rezoned from Open Space 3 to Coastal Living as they are now in private ownership (Planning Map 114).
79. In addition, there are a number of sections in the Scenic Reserve which should be rezoned from Coastal Living Zone to Open Space 3 (Planning Map 124). Although there was no specific submission on these areas it is a consequential change from the submission of Ashley Cook and is a rationalization of Paradise Reserve.
80. In terms of Planning Map 80, a title search reveals the area is owned by MDC and is considered as part of an inactive riverbed and as such, zoned Open Space 3. This zoning allows farming as a permitted activity and there is no need for change.<sup>82</sup>
81. In regard to the declassifying an area from being a Significant Wetland to a Coastal Marine Zone (Planning Map 5), this is better addressed under the Significant Wetlands chapter. However, given that the wetland does not encroach on the submitter's property it is considered unlikely that rezoning is required.
82. Concerns about zoning of Open Space 3 on Planning Map 149 and as a consequence attracting freedom campers are held by one submitter but as explained, the process of mapping here relates to mapping riverbeds and active and non-active channels. The report writer explains that the desirability of zoning 'land' provides the Council with controls. Open Space Zoning appears the most appropriate given that it is public land but farming still permitted. No recommendation is made.<sup>83</sup> However, the Panel was of the view that the area involved here is so small that it serves no useful practical purpose to zone it Open Space 3 as it is surrounded by rural zoned privately owned land. It should be zoned Rural Environment on the southern side of Cravens Creek consistent with the zoning of surrounding land.
83. Two submitters<sup>84</sup> clarified the location of covenanted areas at Hopai – one is zoned Open Space 3 and the other site is Coastal Environment. There is no objection to rezoning the other

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<sup>80</sup> Tim Marshall (137.2).

<sup>81</sup> Te Atiawa further submissions and Mt Zion Trust and AM and WW Scholefield (515.2). Evidence by Mt Zion Trust and others (Reply to Evidence 3 April 2018).

<sup>82</sup> Section 42A Report, paragraphs 260-262, 264-265, 268-270, 273-275.

<sup>83</sup> Section 42A Report, paragraph 272.

<sup>84</sup> M and K Gerard (424.190).



site Open Space 3 although not critical as there is a covenant in place to protect its attributes: see Planning Map 114.<sup>85</sup>

#### **Section 42A Report recommendations**

84. The following are recommended for rezoning:

- Clearwater Reserve, Clearwater Place, Blenheim (Lot 33 DP 372968 (PN530180)) Planning Map 3 is rezoned from Urban Residential 2 to Open Space 1.
- Seymour Square, Blenheim (Lot 1 DP 6917) Planning Map 9 is rezoned from Open Space 1 to Open Space.
- Pt Sec 1244, Sec 1260 and Sec 1258 Town of Picton and Lot 4 DP 3342, Picton Foreshore Planning Map 35 is rezoned from Business 1 to Open Space 2.
- Sections 1180 & 1181 Town of Picton, Lots 1, 2 and 3 DP 7913, Pt Lot 3 DP 1682, Lot 4 DP 3342 and Lot 1 DP 1972 Planning Map 37 are rezoned from Open Space 2 to Business 1.
- Specified parts of Property Number 182692 is rezoned from Open Space 3 to Rural Environment Zone on Planning Map 219.
- Sections 1 and 2 SO 428440 are rezoned from Open Space 3 Zone to Coastal Environment Planning Map 93 as the Coastal Environment Zone is the prevalent type of zoning in the area.
- Section 1 SO 429448 is rezoned from Open Space 3 to Coastal Living on Planning Map 111.
- SO Plan 481651: Sections 17 and 18 (part of Lot 5), Section 3 (part of Lot 2), Section 21 (part of Lot 4), Section 15 (part of Lot 6), and Sections 11, 12 and 8 (part of Lot 7) are rezoned from Open Space 3 to Coastal Living on Planning Map 124.
- Sections 1, 9-10, 13-14, 16, 19-20, and 22-23 on Planning Map 124 are rezoned from Coastal Living to Open Space 3.<sup>86</sup>
- The two covenanted areas on Planning Map 114 are rezoned to Open Space 3 Zone.<sup>87</sup>

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<sup>85</sup> Section 42A Report, paragraph 268.

<sup>86</sup> Section 42A Report, paragraphs 276-284. <sup>87</sup> Reply to Evidence, page 20

<sup>87</sup> Reply to Evidence, page 20

**Decision**

85. For the reasons given, all of the recommendations are accepted, except for Map 149 where the small isolated Open Space 3 zoning on the southern side of Cravens Creek is removed and replaced with Rural Environment zoning.

**Overlay maps**

86. There are several submissions relating to the High Priority Waterbodies for Public Access Overlay Maps that seek inclusion of the section of Co-op Drain between behind Brooklyn Drive to Dry Hills Lane; removal of the section of Doctor's Creek and Opawa River as this area is used for a vineyard; inclusion of further information on the Overlay.<sup>88</sup>
87. The Section 42A Report identifies that inclusion of the additional section of Co-op Drain is appropriate to prioritize as it is shown in the Marlborough Walking and Cycling Strategy. The area near Doctor's Creek should be retained as the general intent of the policy remains and there may be other methods to avoid identified constraints. Finally, as discussed in Policy 9.1.1, the reference to 'High Priority Waterbodies for Public Access' had been omitted inadvertently and is now corrected.

**Recommendation and decision**

88. The overlay map is amended to show the section of Co-op Drain between Brooklyn Drive and Dry Hills Lane.

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<sup>88</sup> PM Gilbert (192.4), Constellation Brands NZ Ltd (631.57), P Rene (1024.2).