

BEFORE THE ENVIRONMENT COURT  
AT CHRISTCHURCH

I MUA I TE KŌTI TAIAO O AOTEAROA  
KI ŌTAUTAHI

IN THE MATTER of the Resource Management Act 1991  
AND of appeals pursuant to clause 14 of the First  
Schedule of the Act  
BETWEEN TIMBERLINK NEW ZEALAND LTD  
(ENV-2020-CHC-30)  
and all other appellants concerning the  
proposed Marlborough Environment Plan  
(as set out in the Schedule attached)  
Appellants  
AND MARLBOROUGH DISTRICT COUNCIL  
Respondent

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MINUTE OF THE ENVIRONMENT COURT  
(29 October 2020)

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**Introduction**

[1] This Minute makes further case management directions for the appeal proceedings concerning the proposed Marlborough Environment Plan ('pMEP').

[2] On 21 August 2020 the court issued directions requiring the respondent Marlborough District Council ('MDC') to file a further case management memorandum and put in place a timetable for any party to file memoranda in reply. The Registrar has now referred to me:

- (a) case management memorandum No. 2 for the Marlborough District Council dated 4 September 2020;
- (b) memorandum of counsel for the Environmental Defence Society Inc ('EDS') dated 10 September 2020;
- (c) memorandum of counsel for Te Ātiawa Trust dated 11 September 2020;



- (d) memorandum of counsel for Friends of Nelson Haven & Tasman Bay Inc ('FONHTB') dated 11 September 2020;
- (e) memorandum of counsel for the Aquaculture parties dated 11 September 2020;
- (f) memorandum of counsel for Trustpower Ltd dated 11 September 2020;
- (g) memorandum of counsel for Yachting NZ Inc dated 11 September 2020;
- (h) memorandum of counsel for the NZ King Salmon Co Ltd dated 16 September 2020;
- (i) memorandum of counsel for the McGuinness Institute dated 16 September 2020;
- (j) memorandum of counsel for the Aquaculture parties and related reports (in respect of the King Shag sub-topic) dated 18 September 2020;
- (k) memorandum of counsel for Beleve Ltd, R J Davidson Family Trust and Treble Tree Holdings Ltd withdrawing their interests on certain appeal points/sub-topics dated 22 September 2020; and
- (l) memorandum of counsel for EDS dated 2 October 2020.

### **Jurisdiction matters**

[3] A number of jurisdictional issues have been raised by parties concerning various matters on appeal and these are noted in the court's 21 July Minute. In case management terms, a key issue concerns when matters of jurisdiction are best determined, i.e. at a preliminary stage or later in the context of considering the substance of relevant appeals. As directed, MDC has conferred with relevant parties. Various positions are expressed in the related memoranda.

### ***Appeal by Friends of Nelson Haven***

[4] MDC raised a jurisdictional issue in relation to FONHTB's requested relief that referenced s293 directions. MDC prefers to address its concerns about this appeal at the same time as addressing the substance of appeals on ss6(a) and 6(b) matters, rather than as a separate preliminary matter.<sup>1</sup> That is also FONHTB's preference<sup>2</sup> and that of the parties who have responded.<sup>3</sup>

<sup>1</sup> MDC case management memorandum No. 2 dated 4 September 2020 at [9].

<sup>2</sup> Memorandum of counsel for FONHTB dated 11 September 2020 at [3].

<sup>3</sup> Consultation document records that the Guardians of the Sounds, Minister of Conservation, Clove Bay, KCRSA, EDS and Aquaculture Interests all support the position.



[5] I agree this issue does not need to be dealt with at a preliminary stage. It is appropriate that it remain as part of the substantive mix of matters to be considered during mediation and, if need be, determined in due course. However, I reserve leave for any party to bring the jurisdictional matter forward (by proposing a timetable) at any stage.

***Appeal by McGuinness Institute***

[6] New Zealand King Salmon Co Ltd ('NZKS') considers that the court lacks the jurisdiction to hear the McGuinness Institute appeal (ENV-2020-CHC-48).<sup>4</sup> MDC and McGuinness Institute consider that this issue should not be determined as a preliminary matter. Their agreed reasons are:<sup>5</sup>

- (a) the argument is focussed on marine aquaculture and the issues may dissolve when the marine aquaculture provisions are addressed through schedule 1;
- (b) the parties do not want to delay the resolution of any other appeals;
- (c) the McGuinness Institute did not engage to a significant extent with the Council hearings and is likely just conducting a watching brief; and
- (d) if dealt with as a preliminary matter, it will not create any material efficiencies for the process given the relief sought in other appeals.

[7] In response, NZKS reiterates its position that the court lacks jurisdiction to hear this appeal. It maintains that the appeal would not survive a strike out application. It acknowledges that time and effort need not be expended on a preliminary determination adding "one presumes the McGuinness Institute will withdraw their appeal in due course".<sup>6</sup>

[8] I am satisfied there is no present need to make a preliminary determination on this jurisdictional matter. However, in case any party later seeks to bring the issue forward for determination, leave is reserved for application to strike out the appeal.



<sup>4</sup> Memorandum of counsel on behalf of NZKS dated 14 August 2020.

<sup>5</sup> MDC case management memorandum No. 2 dated 4 September 2020 at [13]; memorandum of counsel for McGuinness Institute dated 16 September 2020 at [3].

<sup>6</sup> Memorandum of counsel on behalf of NZKS dated 16 September 2020 at [2].

***Appeals seeking relief concerning king shag and Important Bird areas***

[9] As the 21 August 2020 Minute set out, Fisheries Inshore New Zealand, the Paua Industry Council and the NZ Rock Lobster Industry Council ('Fishing Industry Parties') as s274 parties raise a jurisdictional issue as follows:

the substance of sub-topic 5.4 and the extent to which the inclusion of king shag feeding areas and important bird areas as ecologically significant marine sites (with corresponding controls on certain fishing activities) is within the scope of submissions on the proposed Plan.

[10] MDC records that it does not express a view on whether or not there is such an issue of jurisdiction (and that it continues to research this question). However, it prefers that this jurisdictional issue be dealt with as a preliminary matter. It observes that the jurisdictional point is a legal question concerning scope within reasonable parameters and is likely to be determinative if it is decided against the appellants. If it is so decided, that would mean MDC would not need to devote significant resources to assessing its position on the relief the appellants seek. MDC notes that there are several technical and planning complexities, including as to the proper interpretation of the New Zealand Coastal Policy Statement 2010 ('NZCPS'). It points out that the inclusion of maps of king shag feeding habitats and important bird areas was not in MDC's summary of submissions because it was not proposed in any submission. As such, MDC did not carry out a s32 RMA analysis of such matters.<sup>7</sup>

[11] MDC's position is supported by the Fishing Industry Parties and the Aquaculture Interests.<sup>8</sup>

[12] The Aquaculture Interests raise a further jurisdictional issue, querying the court's ability to provide for changes to prohibited activity rule 16.7.6 as it relates to king shag.<sup>9</sup> Counsel submits that none of the submissions by EDS, FONHTB or Forest and Bird fairly or reasonably raised the relief which is now sought (either in form or substance) and nor did MDC's summary of submissions identify such relief. Counsel submits that EDS's foreshadowing of a s293 application is a separate matter.<sup>10</sup>




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7 MDC case management memorandum No. 2 dated 4 September 2020 at [19].  
 8 MDC case management memorandum No. 2 dated 4 September 2020 at [20].  
 9 Memorandum of counsel for Aquaculture Interests dated 18 September 2020.  
 10 Memorandum of counsel for Aquaculture Interests dated 18 September 2020 at [6].

[13] EDS and FONHTB each oppose a preliminary determination of the jurisdictional claim.

[14] EDS considers the Fishing Industry Parties' claim of want of jurisdiction is spurious. It refers, by way of example, to submissions by FONHTB seeking that king shag feeding habitat be integrated in the Ecologically Significant Marine Sites and by EDS seeking habitat protection in policies and consequential changes to rules. Furthermore, it disagrees with MDC that the matter of jurisdiction is able to be cleanly separated out, noting that the argument would require supporting evidence that would likely significantly overlap with evidence required to determine the substantive issue.<sup>11</sup>

[15] Counsel observes that the decisions version of the pMEP includes a policy directing MDC and plan users to "take into account that king shag could feed in the coastal marine areas within 25km of the breeding sites recorded as Ecologically Significant Marine Sites ..." but does not provide an associated rules framework that would enable this to be taken into account. Counsel submits that this issue is a matter of national importance in terms of s6(c) and NZCPS Policy 11, given the threatened status of the New Zealand king shag. As such, it says that if the Fishing Industry Parties are correct as to want of jurisdiction, recourse to s293 may be required to ensure this matter can be appropriately considered and the NZCPS be given effect to.

[16] Counsel for FONHTB adds that it is premature for MDC to make its recommendation while not having yet informed itself of whether or not there is any sound basis for the Fishing Industry Parties' position.<sup>12</sup>

[17] My view at this stage is that it is not appropriate to assign this jurisdictional issue to preliminary determination. That is particularly because I am not persuaded that it is such a clean cut issue as MDC has assumed. Rather, in the various ways noted by Ms Gepp for EDS, it would appear that it could well require consideration of an evidential context. As such, there would appear a real risk that a preliminary determination approach could significantly increase the costs and lessen efficiencies to the detriment of several parties and, of course, the process. I also bear in mind that MDC offers its view not having properly researched the position to form a view on whether or not there is any sound basis for the claim of want of jurisdiction. Given MDC's position as the



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<sup>11</sup> Memorandum of counsel for EDS dated 10 September 2020 at [3].

<sup>12</sup> Memorandum of counsel for FONHTB dated 11 September 2020 at [2].

statutory planning authority and respondent in the proceedings, I agree with Mr Ironside for FONHTP that it is incumbent on MDC to put its considered position forward, once it has given it proper consideration.

[18] As such, I will reserve leave for MDC to make application for any related directions once it has fully researched the position.

[19] However, I signal that, even if MDC concludes that there may be a jurisdictional issue, it would be unlikely that directions for its preliminary determination would be forthcoming unless it could be determined without having to consider contextual evidence in the nature of what would be called in a substantive hearing.

[20] I reach the same present view concerning the further jurisdictional issue alleged on behalf of the Aquaculture Interests. The proper course for a party challenging relief in an appeal is to apply for strike out. Leave is reserved to the Aquaculture Interests to do so. However, whether any such application is determined at a preliminary stage or reserved to be determined in light of the substantive hearing would be contingent on the matters I have noted.

[21] In the meantime, the proper course is for matters to be progressed through mediation processes. A timetable for evidence exchange (and any further application by MDC or the Aquaculture Interests) can be set in due course.

### **Topics and sequencing**

[22] MDC has further consulted with the parties to confirm topics and sequencing and seeks confirmation of the following groups and subgroups:<sup>13</sup>

- (a) Group 1 – ‘protection’ principles/values, and spatial extent. This will capture the following topics:
  - Natural character (Topic 3)/Landscape (Topic 4);
  - Indigenous biodiversity (Topic 5);
  - Public access and open space (Topic 6);
  - Cultural matters (Topic 1) and Heritage (Topic 7).
- (b) Group 2 – Utilities (Topic 19) and Transportation (Topic 16);



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<sup>13</sup> MDC case management memorandum No. 2 dated 4 September 2020 at [42].

- (c) Group 3 – Natural hazards (Topic 8), Air quality (Topic 12), Energy and climate change (Topic 17), Nuisance effects (Topic 18);
- (d) Group 4 – Water and soil resources. This covers the topics:
  - Water allocation and use (Topic 2);
  - Water quality (Topic 13);
  - Waste and discharges to land (Topic 15);
  - Soil quality and land disturbance (Topic 14).
- (e) Group 5 – Urban environments (Topic 9);
- (f) Group 6 – Coastal environments, including forestry in the coastal environment (Topic 10);
- (g) Group 7 – Rural environment (Topic 11) and Forestry (Topic 21);
- (h) Group 8 – Zoning (Topic 20);
- (i) Group 9 – Miscellaneous (Topic 22).

[23] MDC also agrees with the court's proposed sequencing for each group (as set out at [12] the Minute dated 21 August 2020).

[24] The Aquaculture Interests prefer that Group 1 commence with cultural and indigenous biodiversity matters such that they are followed by landscape and natural character. That is because the latter have their underpinning in the natural sciences.<sup>14</sup> Counsel submits that this will avoid addressing natural science values first in respect of natural and character and again as part of the indigenous biodiversity topic. Other parties were generally in agreement with MDC.

[25] I see some merit in Mr Davies' suggestion, at least in the sense that evaluative landscape and natural character opinion ought to be properly founded in related natural science. Parties are on notice of the importance of ensuring the proper briefing of experts in these matters in accordance with the Code. However, on balance, I do not consider this compels the change Mr Davies proposes to the delineation and ordering of topics MDC has proposed. The directions confirm MDC's proposal accordingly.




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<sup>14</sup> Second memorandum for Aquaculture Interests dated 11 September 2020 at [4].

## Mediation and conferencing

[26] In various memoranda, MDC has sought that the court make directions for mediation processes. It now reports that aspects of its initial mediation proposal were not supported by some parties it has consulted with. In response to that, it seeks modified directions as follows:<sup>15</sup>

- (a) The Court's Practice Note 2014 Appendix 2 applies subject to the specific directions made below.
- (b) Mediation will be in person rather than remote unless otherwise directed.
- (c) The parties must send to the Council ten working days prior to mediation a short summary of their issues and the provisions to which it relates. The Council will place these on the website.
- (d) The Council will supply under the umbrella of confidentiality the Councils' preferred wording or outcome on a mediation topic or sub-topic five working days before the mediation and identify appeal points/s 274s against each provision in a topic.
- (e) The mediator may direct expert conferencing as part of the mediation process, and that expert conferencing will be subject to Appendix 3 – Protocol for Expert Witness Conferencing; Environment Court Practice Note 2014.

[27] Mr Maassen explains that the suggestion for a direction requiring a summary of the issues is to enable MDC and the parties to reflect on what the issues are and how they may be addressed. Counsel emphasises MDC's intention is that these are statements of issues and are in the nature of better particulars, not confidential statements of position.

[28] EDS proposed that the directions require MDC to put its proposals up 10 days in advance of mediation (with no requirements for issues statements). It also proposed that MDC pre-circulate a tracked changes version of the provisions for a topic which include its preferred provision and identify appeal points. MDC has not taken these proposals up. Mr Maassen explains that an impediment to doing so is that some s274 relief is not clear and the timetable requires those parties to set out their positions on the record to make ADR processes as fruitful as they can be. As such, there is the potential for appellants to refine their positions after considering all the participants s274 notices. Appellants may want to clarify their issues. Overarching this, MDC needs the flexibility



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<sup>15</sup> MDC case management memorandum No. 2 dated 4 September 2020 at [54].



to be able to consider its response, deal with matters at pace, and offer views on a preliminary 'free and frank' and confidential basis to assist in framing mediations.<sup>16</sup>

[29] EDS considers that MDC's proposed mediation direction (c) above risks adding complexity with little practical benefit particularly as the short statements supplied will not be able to include any without prejudice suggestions for resolution.<sup>17</sup> It would prefer that parties be directed to describe their issues with provisions under discussion and their suggestions for how their concerns could be met at mediation in the normal (without prejudice and confidential) way as per the Practice Note. Its first preference is that MDC's proposed (c) not be made. As an alternative, it seeks that it be clarified to the effect that it is to enable MDC to identify appeal points/s274s against each provision in a topic as described in MDC's proposed direction (d) and does not constrain other matters being raised in mediation within scope and to assist resolution of appeals.<sup>18</sup>

[30] Te Ātiawa Trust generally supports EDS's proposed direction.<sup>19</sup> Counsel for Aquaculture Interests "adopt a halfway house" and suggest an approach in line with the Greater Wellington Regional Council's Regional Plan where court stated that:<sup>20</sup>

Where a party has a proposal, whether in concept or redrafted provisions, it wishes to table at the mediation that proposal is to be pre-circulated so participants have the opportunity to look at it ahead of the mediation. That proposal is to be pre-circulated by 9am one day ahead of the mediation at the latest and preferably earlier.

[31] Yachting New Zealand Inc ('YNZ') agrees that MDC's proposed (c) above is inappropriate and supports EDS's position.<sup>21</sup> If pre-circulation of summary statements is to proceed, YNZ supports the Aquaculture Interests' proposition above.

[32] In principle, I consider it appropriate that directions along the lines requested and suggested be made to assist effective ADR. At this stage, arrangements are being made to assign an Environment Commissioner to the role of lead facilitator, similar to the approach that has applied in the Queenstown district plan review. I will confer with that Commissioner and, in due course, a Minute will issue on these matters. In the meantime

<sup>16</sup> MDC case management memorandum No. 2 dated 4 September 2020 at [54], [57], [58].

<sup>17</sup> Memorandum of counsel for EDS dated 10 September 2020 at [10].

<sup>18</sup> Memorandum of counsel for EDS dated 10 September 2020 at [10].

<sup>19</sup> Memorandum of counsel for Te Ātiawa o te Waka-a-Māui Trust dated 11 September 2020 at [3](c).

<sup>20</sup> Second memorandum for Aquaculture Interests dated 11 September 2020 at [9] referring to *Various v Greater Wellington Regional Council* [2020] NZEnvC 109 at [28].

<sup>21</sup> Memorandum of counsel for YNZ dated 11 September 2020 at [5].



I will direct the MDC to propose some dates and estimated timeframes for mediation which the court will attempt to work with (Commissioner availability dependant).

### **Consideration of recent or imminent RMA higher order instruments**

[33] In its first memorandum MDC identified some potential value in modulating the appeal resolution process so that the implication of new and future policy instruments could be considered and addressed. MDC now advises that based on the groups and sequencing (as above) “the issue may be more theoretical than real”.<sup>22</sup>

[34] MDC says it is currently undertaking an analysis of the new freshwater management package and will be well placed to address the implications when mediation takes place.

[35] Most notably, that package includes the National Policy Statement for Freshwater Management 2020 (‘NPSFM 2020’).

[36] EDS queries how and when MDC intends to make its views on the implications of the NPSFM 2020 known to parties.<sup>23</sup> EDS accordingly seeks a direction that MDC provide this information at least four weeks prior to mediation (or four weeks prior to any step such as evidence exchange, if the topic does not proceed to mediation). EDS also referred me to recent directions made by the Environment Court on the proposed Southland Water and Land Plan with regards to how the freshwater package is to be dealt with in that proceeding.<sup>24</sup>

[37] Nelson-Marlborough Fish and Game Council,<sup>25</sup> Te Ātiawa Trust<sup>26</sup> and Trustpower Limited<sup>27</sup> support EDS’s proposed direction.

[38] I agree with Ms Gepp as to the importance, in procedural terms, of clarity in these matters. Directions are made accordingly.

<sup>22</sup> MDC case management memorandum No. 2 dated 4 September 2020 at [21].

<sup>23</sup> Memorandum of counsel for EDS dated 10 September 2020 at [5].

<sup>24</sup> Memorandum of counsel for EDS dated 2 October 2020.

<sup>25</sup> Memorandum of counsel for EDS dated 10 September 2020 at [7].

<sup>26</sup> Memorandum of counsel for Te Ātiawa o te Waka-a-Māui Trust dated 11 September 2020 at [3](b).

<sup>27</sup> Memorandum of counsel for Trustpower Limited dated 11 September 2020 at [3].



[39] As for the anticipated National Policy Statement on indigenous biodiversity (expected in April 2021), MDC report that parties on the biodiversity topic do not support a hiatus. As such, no directions are sought for this.<sup>28</sup>

### **Marine aquaculture variations**

[40] In the court's 21 July Minute, I noted that MDC appeared to be suggesting a somewhat inconsistent approach to when appeal points that may be impacted by variations it is pursuing on aquaculture are considered (i.e. MDC variations 1A, 1B, 1C). Those variations are being pursued because a large number of deemed coastal permits are due for re consenting in 2024 and to align with the NZCPS.<sup>29</sup>

[41] I directed MDC to confer with parties and report back to the court updating its position. In its second memorandum, MDC sets out the background on the marine aquaculture issue, outlines the new regulatory regime for existing marine farms and outlines why it considers it is legitimate to address that part of the coast environment before the shape of the marine aquaculture variations is known.<sup>30</sup>

[42] MDC considers that the natural character and landscape issues, (that only concern the Marlborough Sounds but applied the same methodology for the remainder of the district) can proceed as 'Group 1' matters. MDC says the topics should not be delayed while the marine aquaculture variations (yet to be approved and notified) 'catch-up'. All interested parties agree.<sup>31</sup>

[43] I am satisfied with MDC's explanation.

### **Other matters**

#### ***Waivers and directions***

[44] MDC seeks waiver directions as follows:

A party has sufficiently complied with its obligations of service if it

- (a) Serves the document electronically to the Council in PDF format.

<sup>28</sup> MDC case management memorandum No. 2 dated 4 September 2020 at [23].

<sup>29</sup> Minute dated 21 July 2020 at [28] and [29].

<sup>30</sup> MDC case management memorandum No. 2 dated 4 September 2020 at [25].

<sup>31</sup> MDC case management memorandum No. 2 dated 4 September 2020 at [24].



- (b) Receives confirmation from the Council that the document is uploaded to the Council's website and/or portal.
- (c) Notifies parties that it has submitted the document to the Court and that can be viewed at the Council website and/or portal.

[45] Mr Maassen clarifies that MDC does not seek a waiver or direction concerning the filing of documents.

[46] While I am satisfied, in principle, that a Council-hosted service regime is appropriate for a plan appeal process such as this, I am concerned about several aspects of the direction as framed. If I understand what is sought correctly, it would appear to leave parties having to send two emails when filing and serving documents. In addition, I am concerned that its paragraph (c) is unduly onerous and could result in mistakes and misunderstandings. Furthermore, any direction of this kind would have to be clear as to MDC's website URL address so there is no confusion there. Finally, I am not persuaded that it would be sensible to allow for the envisaged waiver of service to apply to documents of any kind. For example, it would not appear suitable where a document in issue seeks directions or other court intervention that is only of confined interest to some parties.

[47] In the circumstances, I consider the best way forward is to give opportunity to MDC to propose a refined direction on these matters. As it is appropriate for MDC, as respondent, to take a lead in these matters, I will allow for counsel for MDC to engage with the Registrar (Ms McKee) in the first instance. I flag that directions have been made of a broadly similar nature in other plan appeal proceedings and Ms McKee will be able to provide examples of these. If Mr Maassen requests, I will convene a teleconference as a vehicle for exploring any further matters of design of appropriate waiver directions. Parties with an interest will have opportunity to join any such teleconference, should they wish.

[48] The court has also received an application for waiver of time, supporting memorandum and s274 notices on behalf of Burkhart Fisheries Ltd ('BFL') wishing to join the appeals by Clearwater and Talley's Group Limited (ENV-2020-CHC-55) and Apex Marine Farm (ENV-2020-CHC-63). BFL has applied to join the proceedings out of time on the following grounds:<sup>32</sup>

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<sup>32</sup> Memorandum of counsel for BFL in support of application for waiver of time dated 20 October 2020.



BFL is a crayfish operator. It has worked in the area of Ward Beach for some decades. BFL is concerned about aspects of the proposed Marlborough Environment Plan that may affect its ongoing ability to operate in the area.

BFL filed submissions in respect of rule 16.7.5 (the predecessor to rule 16.7.7) and policy 8.3.7 (now policy 8.3.8) in 2016. After the s42a report and Panel's decision were released, it had understood that there would be no issue continuing to fish using cray pots within the Ward Beach area. It now understands that further clarification of the rules may be beneficial to ensure that the proposed plan aligns with what was discussed in those documents.

BFL is also interested in the mapping of the Ward Beach area. That is because it is having issues with accessing the coastal marine area in its vessels as a result of the Seddon earthquake raising the ground in the Ward Beach area. It is seeking to join the appeal on this point to ensure that access can be provided for.

[49] The application has been made in consultation with the relevant appellants and s274 parties. While the appellants confirmed they had no issues with BFL joining the appeals, the Kenepuru and Central Sounds Resident's Association ('KCSRA') (s274 party) had an issue with the time it took to file. It is unclear whether MDC were consulted.

[50] In any event, and while I agree with KCSRA's position that the request is quite out of time, given the proceedings are still at an early stage and have not yet progressed to mediation, I consider no party will be unduly prejudiced by the waiver being granted so will make the orders sought.

***Top-down or bottom-up?***

[51] MDC agrees with the court that a top-down approach is generally appropriate. However, it wants to ensure that "the framing and assessment of goals (using principles and values)" is with "an eye to the resource and environmental context and the potential consequences of implementing objective by means of policies and methods".<sup>33</sup>

[52] MDC advises that the grouping and sequencing of topics largely follows a top-down approach, noting that parties will continue to consult with MDC and attempt to resolve particular appeal points. MDC prefers to remain responsive to those requests and will continue in good faith negotiations with any party and associated interested

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<sup>33</sup> MDC case management memorandum No. 2 dated 4 September 2020 at [50].



parties to resolve appeal points. Where the MDC seeks a consent order, it will provide to the court with what it considers is a justification for making the orders.

[53] I consider this approach to be appropriate and make specific comments as to consent orders below.

**Consent documentation**

[54] The court has received the first few consent memoranda seeking to resolve appeals by agreement.<sup>34</sup> More can be anticipated. There are particular matters that need to be borne in mind when negotiating consent order settlements particularly in plan appeal proceedings. To minimise the potential for delays and avoid undue costs being incurred, I consider I should offer some guidance at this juncture.

[55] Experience in multi-party plan appeal processes reveals a common recurrence of the problems in the left column below. The court’s suggestions for addressing these are in the right column:

Recurrent problems	Suggestions
<p><i>Positions of non-signatory parties</i></p> <p>The consent memorandum does not identify all parties to the appeal e.g. overlooking s274 parties that did not take part in mediation.</p> <p>The consent memorandum does not report on whether non-signatory parties were provided a copy of the draft consent memorandum or on whether or not non-signatory parties are neutral or oppose or failed to respond to the draft consent memorandum.</p>	<p>The court needs to be satisfied it can safely treat any non-signatory parties as longer having an interest in the appeal points and/or not opposing the consent order. That includes those parties who have expressed only a general interest.</p> <p>As respondent, MDC should ensure any related enquiries of non-signatory parties are made prior to filing the consent memorandum. The consent memorandum should detail all parties to the appeal, including non-signatories, and their known positions on the draft consent order.</p> <p>Where a party has not signed, MDC must demonstrate in the memorandum that it has made adequate enquiries to ensure that party has been made aware of the relief sought by the consent order. It is helpful to provide footnote reference to copies of related documents (e.g. emails seeking responses, replies).</p>

<sup>34</sup> ENV-2020-CHC-21 Dominion Salt Ltd v MDC (Consent Order issued on 5 October 2020), ENV-2020-CHC-31 G J Gardner v MDC (Consent Order issued on 5 October 2020), ENV-2020-CHC-65 Levide Capital Ltd v MDC (currently being considered), ENV-2020-CHC-72 Oil Companies & ENV-2020-CHC-56 NZTA (currently being considered).



<p><i>Jurisdiction/scope</i></p> <p>Parties, and primarily MDC as respondent, have a duty to bring to the court's attention any issues of jurisdiction or scope as to the relief sought in a draft consent order that may require determination. Parties must be mindful that the court cannot issue a consent order beyond jurisdiction.</p>	<p>Consent memoranda must address scope/jurisdiction. If there are live issues for preliminary determination, these are to be addressed by formal application. MDC, as respondent, has primary responsibility in these matters.</p>
<p><i>Plan coherence/integrity &amp; higher order instruments</i></p> <p>A challenging dimension of plan appeal proceedings is, in dealing with specific or even narrow appeal points, the court needs to keep a watchful eye on the coherence and integrity of the plan as a whole and the RMA's directives on higher order instruments. This can sometimes mean that consent order memoranda must be put on hold pending determinations on related plan provisions.</p>	<p>It falls to MDC, as respondent, to be mindful of these matters and be proactive in informing the parties and the court on their implications for both the substance of any proposed settlement and the timing of when a consent order would be appropriate.</p> <p>Consent memoranda should report on any related matters including as to whether the consent order should remain on hold pending related determinations and why MDC and other parties are satisfied on matters of plan integrity/coherence, higher order instruments and prior decisions/consent orders on the pMEP process.</p>

[56] I attach a draft order that parties should use as a template for pMEP matters. The parties' use of this will also expedite the issuance of orders.

### Directions

[57] It is directed:

- (a) MDC's refined list of topics and sub-topics and proposed sequencing is confirmed (as set out in Annexure 1 to this Minute), including the fact that this would have natural character and landscape matters assigned to Group 1 in advance of marine aquaculture variations;
- (b) MDC is to file and serve a memorandum of counsel by **Thursday 12 November 2020** proposing a set of dates (and estimated timeframes) for mediation of topics (and sub-topics where necessary);



- (c) not less than 20 working days prior to scheduled court-facilitated mediation on the first related Topic(s), MDC is to file a memorandum of counsel to inform the court and parties as to MDC's position on each of the following:
  - (i) which parts of the NPSFM 2020 it seeks to implement in the pMEP;
  - (ii) to what extent would such implementation require a s293 direction, having regard to jurisdictional scope under related appeal(s);
- (d) leave is reserved for any relevant party, after consulting with MDC and all other relevant parties, to:
  - (i) apply for directions to have a preliminary determination of matters of jurisdiction concerning the FONHTB appeal;
  - (ii) apply to strike out the McGuinness Institute appeal – and to propose related timetabling directions;
- (e) leave is reserved to MDC, after further researching its position and consulting all relevant parties, to apply to have any issue of jurisdiction it may identify concerning sub-topic 5.4 and king shag feeding areas and important bird areas assigned to a preliminary determination and to propose any related timetable directions;
- (f) leave is reserved for MDC to:
  - (i) confer with the registrar as to potential other models for waiver directions as to service that allow for use of a Council website platform for such purposes;
  - (ii) apply for a teleconference to discuss related matters, if required, on a basis that any party seeking participation must be available at short notice;
  - (iii) apply for related directions.
- (g) being satisfied that no party will be unduly prejudiced in accepting Burkhart Fisheries Ltd's s274 notices late, I hereby make an order under s281(1)(a) granting the application for waiver of time dated 20 October 2020.

[58] Leave is reserved for any party to apply for further (or other) directions.

**J J M Hassan**  
**Environment Judge**

Issued: **29 OCT 2020**





**Annexure 1– Summary of MDC’s proposed topics  
(refer to MDC table – updated 15 October 2020 for complete list of topics related  
sub-topics)**

Group 1 – ‘protection’ principles/values, and spatial extent. This will capture the following topics:

- Natural character (Topic 3)/Landscape (Topic 4);
- Indigenous biodiversity (Topic 5);
- Public access and open space (Topic 6);
- Cultural matters (Topic 1) and Heritage (Topic 7).

Group 2 – Utilities (Topic 19) and Transportation (Topic 16).

Group 3 – Natural hazards (Topic 8), Air quality (Topic 12), Energy and climate change (Topic 17), Nuisance effects (Topic 18).

Group 4 – Water and soil resources. This covers the topics:

- Water allocation and use (Topic 2);
- Water quality (Topic 13);
- Waste and discharges to land (Topic 15);
- Soil quality and land disturbance (Topic 14).

Group 5 – Urban environments (Topic 9).

Group 6 – Coastal environments, including forestry in the coastal environment (Topic 10).

Group 7 – Rural environment (Topic 11) and Forestry (Topic 21).

Group 8 – Zoning (Topic 20).

Group 9 – Miscellaneous (Topic 22).



### Schedule – List of Appellants

ENV-2020-CHC-30	Timberlink
ENV-2020-CHC-32	Talley's Group Limited
ENV-2020-CHC-33	Friends of Nelson
ENV-2020-CHC-34	Omaka Valley
ENV-2020-CHC-35	Fish & Game
ENV-2020-CHC-36	Heritage
ENV-2020-CHC-37	Chorus/Spark
ENV-2020-CHC-38	Okiwi Bay Ratepayers
ENV-2020-CHC-39	Te Rūnanga a Rangitāne o Wairau
ENV-2020-CHC-40	Haro Partnership
ENV-2020-CHC-41	KPF Investments Limited & United Fisheries Limited
ENV-2020-CHC-42	Minister of Conservation
ENV-2020-CHC-43	Te Ātiawa o Te Waka-a-Māui Trust
ENV-2020-CHC-44	Beleve Ltd, RJ Davidson Family Trust & Treble Tree Holdings Ltd
ENV-2020-CHC-45	Aroma (N.Z.) Limited and Aroma Aquaculture Limited
ENV-2020-CHC-46	Te Rūnanga o Kaikōura and Te Rūnanga o Ngāi Tahu
ENV-2020-CHC-47	Goulding Trustees Limited and Shellfish Marine Farms Limited
ENV-2020-CHC-48	McGuinness Institute
ENV-2020-CHC-49	Port Marlborough NZ
ENV-2020-CHC-50	Trustpower Limited
ENV-2020-CHC-51	The New Zealand King Salmon Co. Limited
ENV-2020-CHC-52	Matthew Burroughs Broughan
ENV-2020-CHC-53	Cochran
ENV-2020-CHC-54	OneFortyOne
ENV-2020-CHC-55	Clearwater Mussels Limited and Talley's Group Limited
ENV-2020-CHC-56	New Zealand Transport Agency
ENV-2020-CHC-57	KiwiRail Holdings Limited
ENV-2020-CHC-58	Federated Farmers of New Zealand
ENV-2020-CHC-59	Colonial Vineyard Limited
ENV-2020-CHC-60	Sanford Ltd
ENV-2020-CHC-61	Villa Maria Estate Limited
ENV-2020-CHC-62	Oldham & Others
ENV-2020-CHC-63	Apex Marine Farm Limited



ENV-2020-CHC-64	Forest & Bird
ENV-2020-CHC-65	Levide Capital Ltd
ENV-2020-CHC-66	Brentwood Vineyards Ltd
ENV-2020-CHC-67	Environmental Defence Society
ENV-2020-CHC-68	Transpower New Zealand Limited
ENV-2020-CHC-69	Jeffrey Val Meachen
ENV-2020-CHC-70	Te Rūnanga o Ngāti Kuia Trust
ENV-2020-CHC-71	Horticulture New Zealand
ENV-2020-CHC-72	Oil Companies
ENV-2020-CHC-73	AJ King Family Trust and SA King Family Trust
ENV-2020-CHC-74	Marine Farming Association Inc and Aquaculture New Zealand
ENV-2020-CHC-75	Delegat Limited
ENV-2020-CHC-76	Minister of Defence
ENV-2020-CHC-77	Just Mussels Ltd, Tawhitinui Greenshell Ltd & Waimana Marine Ltd
ENV-2020-CHC-78	East Bay Conservation
ENV-2020-CHC-79	Rebecca Light



**BEFORE THE ENVIRONMENT COURT  
AT CHRISTCHURCH**

**I MUA I TE KŌTI TAIAO O AOTEAROA  
KI ŌTAUTAHI**

IN THE MATTER	of the Resource Management Act 1991
AND	of an appeal under clause 14 of the First Schedule to the Act
BETWEEN	...
	(ENV-20 )
	Appellant
AND	MARLBOROUGH DISTRICT COUNCIL
	Respondent

Environment Judge J J M Hassan – sitting alone pursuant to s279 of the Act

In Chambers at Christchurch

Date of Consent Order:

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**CONSENT ORDER**

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A: Under s279(1)(b) of the Resource Management Act 1991, the Environment Court, by consent, orders that:

- (1) the appeal is allowed subject to ... the Marlborough District Council are directed to amend the proposed Marlborough Environment Plan by...
- (2) the appeal is otherwise dismissed (or the appeal otherwise remains extant).

B: Under s285 of the Resource Management Act 1991, there is no order as to costs.

**REASONS**

**Introduction – heading one**

[1] This proceeding concerns...

[2] The court has now read and considered the consent memorandum of the parties dated ... which proposes to resolve the appeal.

**Other relevant matters – heading one**

[3] XXX had/have given notice of an intention to become a party/parties under s274 of the Resource Management Act (“the RMA”) and has/have signed the memorandum setting out the relief sought.

And / or

[4] No (other) person has given notice of an intention to become a party under s274 of the RMA.

And / or

[5] XXX had/have given notice of an intention to become a party/parties under s274 of the RMA but no longer/do not have an interest in the appeal points and/or not opposing the consent order and/or have withdrawn – footnote reference to copies of related documents (e.g. emails seeking responses, replies).

[6] Any issues of scope or jurisdiction... or confirmation that there are none.

**Orders**

[7] The court makes this order under s279(1) RMA, such order being by consent, rather than representing a decision or determination on the merits pursuant to s297. The court understands for present purposes that:

- (a) all parties to the proceedings have executed the memorandum [unless stated otherwise for specific reasons] requesting this order;

- (b) all parties are satisfied that all matters proposed for the court's endorsement fall within the court's jurisdiction, and conform to the relevant requirements and objectives of the RMA including, in particular, pt 2.

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**J J M Hassan**  
**Environment Judge**