

Departmental Memo



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In Confidence—Legally Privileged

Date: 24 October 2018
To: Minister of Conservation
From: s9(2)(a), Director Planning, Permissions and Land Unit
Subject: **Key issues in relation to DOC and Fisheries New Zealand joint advice on the South-East Marine Protection Forum's recommendations to Ministers**

Purpose

1. This memo expands on points of difference between DOC and Fisheries New Zealand as stated in briefing **18-B-0998** concerning the South-East Marine Protection Forum's recommendations for a marine protected area (MPA) network.

Context

2. On 23 February 2018 the South-East Marine Protection Forum (the Forum) provided you with its final Recommendations Report (refer **18-B-0157**).
3. You and the Minister of Fisheries indicated your preference for agency advice to be prepared jointly between DOC and Fisheries New Zealand, and for advice to note where the two agencies have differing views (refer **18-B-0004** and **18-B-0157**). Joint agency advice on the Forum's recommendations is attached to this cover memo.
4. Key differences between the two agencies are in relation to:
 - interpretations regarding MPA Policy (the Policy) protection standard (Planning Principle 2) for Type 2 MPAs;
 - Fisheries New Zealand's recommendation that some modifications to Network 1 are required;
 - the Forum's proposed set net prohibitions; and
 - interpretation of data.

These are expanded on below.

Issue One: DOC and Fisheries New Zealand have different interpretations regarding the Policy's protection standard (Planning Principle 2) for Type 2 MPAs.

Background

5. Fisheries New Zealand maintains that the protection standard is being met through restrictions on bottom-contacting methods and any further restrictions are unwarranted. This issue affects all Type 2 MPAs recommended by the Forum, none of which are fully supported by Fisheries New Zealand.
6. DOC does not agree with this position as it considers that it is not aligned with the MPA Policy nor with the agreement reached between agencies on this issue (dating back to 2008).

The protection standard

7. The Policy states that for the protection standard to be met “*a management tool must enable the maintenance or recovery of the site’s biological diversity at the habitat and ecosystem level to a healthy functioning state.*” The Policy further defines three outcomes the protection standard must provide to allow “*for the maintenance and recovery at the site of:*

- a) physical features and biogenic structures that support biodiversity;*
- b) ecological systems, natural species composition (including all life-history stages), and trophic linkages;*
- c) potential for the biodiversity to adapt and recover in response to perturbation.”*

The Policy considers that if (a) and (b) are met, part (c) will have been provided for too.

8. The Policy therefore does not dictate a minimum set of restrictions that classify a site as a Type 2 MPA.
9. For part (a) of the protection standard to be met, the Policy Guidelines define three fishing methods that are presumed to be prohibited: bottom trawling, dredging and Danish Seining. These methods are mobile across the seafloor and would be inconsistent with the type of protection sought by this part of the protection standard i.e. maintenance and recovery of physical features and biogenic structures. *Both agencies agree on this aspect of the protection standard.*
10. However, only meeting part (a) does not imply that the protection standard is met given that part (b) must also be met. When restrictions beyond bottom-contacting methods are considered, the Policy requires a case-by-case approach to evaluate what restrictions are required for the protection standard to be met in its entirety. *Herein lies the difference in opinion between DOC and Fisheries New Zealand.*
11. In paragraphs 96 and 97 of briefing 18–B–0998, DOC notes that Fisheries New Zealand considers that the sustainability of fisheries managed through the Quota Management System implicitly fulfils the ecosystem “*maintenance and recovery*” outcome sought through part (b) of the protection standard. Furthermore, Fisheries New Zealand has provided advice in the briefing stating that restrictions over and above bottom-contacting methods are unwarranted (for example paragraph 95 and the agency assessments contained in Appendix 4).
12. DOC does not agree with Fisheries New Zealand’s position because:
- a. Pre-emptively declaring all methods other than bottom-contacting methods “unwarranted” contradicts the case-by-case analysis approach required by the Policy Guidelines;
 - b. from a scientific and technical point of view, there is no empirical evidence to suggest ecosystem effects from fisheries are, or are not, occurring¹ given that the information collected for this purpose and the monitoring of ecosystem health is either inadequate or non-existent;
 - c. there is a fundamental mismatch in geographic scale between Quota Management Area sustainability (sustainability of the fish stock) and localised ecosystem effects of fishing activities at the scale MPAs operate; and

¹ For a detailed summary of the current state of knowledge of ecosystem effects of fishing, including information requirements to assess effects, see Aquatic Environment Biodiversity Annual Review 2017, Theme 4: Ecosystem Effects, page 414, Ministry for Primary Industries.
<https://www.mpi.govt.nz/dmsdocument/27471-aquatic-environment-and-biodiversity-annual-review-aebar-2017-a-summary-of-environmental-interactions-between-the-seafood-sector-and-the-aquatic-environment>

- d. the interpretation ignores the application of the precautionary approach when information is inadequate or uncertain (Planning Principle 8).
13. Overall, DOC is supportive of a case-by-case assessment noting that it is unlikely that a definitive causal link between fisheries and ecosystem health can be established due to a lack of fit-for-purpose data. DOC maintains therefore that any analysis must account for this in a precautionary manner.

The protection standard and implementation of Type 2 MPAs under the Fisheries Act 1996

14. The aforementioned difference in interpretation between the agencies dates back to correspondence in 2008 between the Ministry of Fisheries and DOC that set out an agreed agency position on the application of the protection standard to Type 2 MPAs when implemented under the Fisheries Act 1996.
15. The agreed position was that, *“to establish an MPA under the Fisheries Act 1996, the following measures are required to meet the protection standard:*
- *a prohibition on the following mobile bottom-contacting methods: bottom trawling; Danish seining, and dredging;*
 - *a prohibition on stationary bottom-impacting methods such as potting, bottom longlining and bottom set-netting where those methods are actively being deployed on fragile, biogenic habitats such as corals (the additional prohibitions being confined to the fragile area, not extending to the entire MPA); and,*
 - *restrictions on fishing, including a prohibition on any other fishing methods if they are actively being used in that area and, under the Fisheries Act, **have an adverse effect on the aquatic environment** (emphasis added).”*
16. At the time, DOC considered that this position was inconsistent with the wording in the Policy, however, conceded to the agreement to progress MPA implementation.
17. Unfortunately, the 2008 agreed position was not made available to the Forum until late in the process, whereupon it was raised by an MPI project team member.
18. DOC considers the Network 1 proponents have made recommendations consistent with the Policy and Guidelines.
19. DOC acknowledges that the 2008 agreement is in relation to implementation under the Fisheries Act, however briefing 18–B–0998 outlines other options that are available to apply fishing restrictions outside of the Fisheries Act, such as special legislation.

Issue Two: Differences regarding Fisheries New Zealand’s recommendation that some modifications to Network 1 are required

Background

20. It is DOC’s view that Network 1, as proposed by the Forum, would be undermined if some of the modifications sought by Fisheries New Zealand were to be implemented. DOC notes that Fisheries New Zealand considers that some modifications to Network 1 are required to minimise adverse impacts on users (captured in Recommendation 8 in briefing 18–B–0998). DOC considers this position is not aligned with the Policy and would likely affect MPAs with some of the highest potential biodiversity protection outcomes.
21. The task of minimising adverse effects on users as described under Planning Principle 5 in the Policy is embedded within the Forum process. The Recommendations Report provides instances where the Network 1 proponents have compromised and amended or, discarded proposals with a view of balancing effects on users with biodiversity protection outcomes. See paragraphs 54, 58 and 80 in Appendix 3 of briefing 18–B–0998 for an account of these. Agency staff attending the Forum meetings can further attest to Forum members making concessions consistent with the MPA Policy. These were however were made in confidence, as part of the process, and are therefore not reflected the report.

22. DOC considers that assessing the merits of individual proposals primarily on the impacts on users without taking into account biodiversity protection outcomes, and the gifts and gains that led to a proposal, is problematic. This is particularly evident in Fisheries New Zealand's view on Sites D1 (Pleasant River to Stony Creek) and I1 (Harakeke Point to White Island).
23. As proposed by the Forum, Site D1 holds the greatest representativity of habitats of any recommended site with seven coastal habitats, two estuaries and two biogenic habitats. As the Recommendation Report acknowledges this site was selected due to its reduced impacts on nearby commercial fishing areas. It does however potentially displace a considerable amount of rock lobster potting. DOC considers firstly that the Forum has applied Principle 5 as far as practicable and secondly that any modifications to Site D1 would impact on the biodiversity protection outcomes afforded by this site.
24. In briefing 18-B-0998 (paragraph 103) Fisheries New Zealand notes that they consider a marine reserve at Site I1 will impact recreational fishers to a greater extent than other proposed marine reserves in Network 1. DOC notes that Site I1 was specifically included within the network to protect exposed rocky reef habitats, at a location that would minimise potential impacts to both commercial users and sites of significance to whanau/hapu/iwi. That is, it was specifically included in the consultation (while other sites did not go forward for consultation) because of the benefit of reduced effects on existing users.
25. DOC considers that establishing an MPA other than a marine reserve at Site I1 would both undermine the objective for this site and be contrary to the Policy requirements under both Network Design Principle 1 and Planning Principle 5. In addition, DOC considers that partial protection for the rocky reef at this site is likely to result in a 'paper MPA' that provides little or no benefit to the habitats it was specifically designed to protect.

Implications

26. In general, altering any of the recommended sites with regards to protection level or boundaries would entail that certain habitats would no longer be afforded the minimum requirements for protection (the minimum requirement for representation under the MPA Policy is protection in a marine reserve, and replication in another MPA), a flow-on shortcoming that would subsequently need to be addressed elsewhere.
27. In addition, addressing any perceived undue impacts on fisheries would also require addressing gaps in representation, such as the sheltered habitats that are completely unrepresented (noting that these habitats were discussed and not progressed by the Forum, to minimise impacts as part of the gifts and gains approach).
28. Overall, DOC considers that the Network 1 proponents have, for all intents and purposes, completed the task that was asked of them and followed the MPA Policy as far as practicable. DOC supports the approach that Network 1 proponents took in balancing biodiversity benefits with minimising adverse impacts under Planning Principle 5. As such, DOC considers that anything more than minor adjustments to boundaries, or level of protection that can be explicitly justified by evidence (that would still allow the objective of the Policy and the Forum's recommendations to be met), are not warranted and would need to be matched with a concurrent addressing of gaps under the MPA Policy. Further, any significant changes to alter effects on users (as suggested by Fisheries New Zealand) would raise questions as to the validity of the Forum's recommendations and suggest that the Forum has failed to appropriately apply the MPA Policy and Guidelines. Subsequently, it could be argued that to do this would require a new process or approach to implement protection in the region. DOC considers it is not appropriate to separate the outcome from the process that the Forum went through.

Issue Three: Agency differences regarding the Forum’s proposed set net prohibitions

- 29. The MPA Policy refers to protection of habitats and ecosystems, and that species-specific protection is out of scope of the Forum. The Network 1 proponents acknowledged this in their deliberations and have recommended set net prohibitions to ensure part (b) of the protection standard (i.e. ecological systems and trophic linkages) is met.
- 30. DOC considers Network 1 proponents incorporated their species-specific concerns as part of a wider ecological assessment in developing their recommendations.
- 31. In briefing 18–B–0998 (paragraph 100) Fisheries New Zealand recommends that you consider the issue of set net use proposed at Sites E1 and L1 at a wider geographic scale that better reflects the particular ecological risks posed by this fishing methods. Fisheries New Zealand notes that they are undertaking a national review of set net use to address ongoing public concerns regarding bycatch of protected species in set nets. Fisheries New Zealand considers this review presents an opportunity to consider specific measures that could be taken to address the Forum’s particular concerns with set nets across parts of Network 1.
- 32. DOC considers this to be a mischaracterisation of what was proposed by the Network 1 proponents as required to meet the protection standard and that species-specific management measures complement rather than supplant the protection measures the Forum deems necessary to meet part (b) of the protection standard.

Issue Four: Interpretation of data

- 33. DOC is concerned that the Fisheries New Zealand’s assessment of the potential for impact on the eel fishery in the estuaries is based on data provided by the eel industry (via a submission).
- 34. DOC’s view is that the statement regarding the maximum displacement of fishing from the Quota Management Area appears to be misleading and remains unjustified as it does not account for the rotational nature of the fishery (i.e. summing individual maximum catches from each MPA does not equate to an annual maximum displacement).

Risk Assessment

s9(2)(h)



Next steps

39. There is a joint Ministers' meeting with officials on 31 October 2018 to discuss the advice contained in briefing 18-B-0998.
40. If you want further advice on the issues raised in this memo, officials are available to meet with you in advance of the joint Ministers meeting.

Contact for queries: s9(2)(a) Director Planning, Permissions and Land, Department of Conservation. Mobile: s9(2)(a)

ENDS
