



File: C162-14-03

Subantarctic Marine Protection Planning Forum
c/- Department of Conservation
P.O. Box 10 420
Wellington 6143

Tena koutou

Submission on the “Implementation of the Marine Protected Areas Policy in the Territorial Seas of the Subantarctic Biogeographic Region of New Zealand”

Introduction

1. This submission is from Te Ohu Kai Moana Trustee Ltd (Te Ohu Kaimoana) in its role as corporate trustee of Te Ohu Kai Moana Trust. It has been prepared in consultation with iwi and Maori Fishing Companies in response to the consultation document dated June 2009 and covering letter dated 5 June 2009. It does not, however, remove the obligation on the Department of Conservation and the Ministry of Fisheries to consult with iwi/Maori and other stakeholders in the appropriate manner. Nor does it seek to undermine any submission that you may receive from individual iwi or iwi collectives.
2. Te Ohu Kai Moana Trust was established under the Maori Fisheries Act 2004. The purpose of the trust is to advance the interests of iwi individually and collectively, primarily in the development of fisheries, fishing and fisheries related activities in order to:
 - Ultimately benefit the members of iwi and Maori generally
 - Further the agreements made in the Deed of Settlement (The Deed of Settlement is given effect by the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992) and to assist the Crown to discharge its obligations under the Deed of Settlement and the Treaty of Waitangi
 - Contribute to the achievement of an enduring settlement of the claims and grievances referred to in the Deed of Settlement.
3. In carrying out our role, Te Ohu Kaimoana works actively with iwi organisations that have received or will receive fisheries assets under the Deed of Settlement. We also work actively with the wider fishing industry and participate in industry organisations to protect the interests of iwi and Maori as beneficiaries of the fisheries settlement.

Background to the Subantarctic Marine Protection Planning Forum process

4. The Subantarctic Marine Protection Planning Forum (the Forum) was set up in early 2008 to develop options and provide recommendations for marine protected areas (MPAs) within the territorial seas of the three islands (Antipodes, Bounties, and Campbell Islands) in the subantarctic biogeographic region, in accordance with the Government's MPA Policy¹. Forum members include representatives from commercial fishing interests in the region, Ngai Tahu, Te Ohu Kaimoana, environmental groups and science organisations. The Forum has worked through the Government's Marine Protected Areas Policy and is now consulting on proposals for MPAs for the territorial seas of these three islands. These proposals are set out in detail in the Forum's consultation document, along with the Forum's terms of reference and membership.²
5. Te Ohu Kaimoana participated in the Forum because we considered that this provided the best opportunity to advocate for the advancement of Maori interests in the marine environment, in keeping with our mandate under the Maori Fisheries Act. However, throughout the process Te Ohu Kaimoana was concerned that the process appeared to promote a 'deal making' approach to marine protection, rather than following the process set out in the MPA Policy. This was evident by the lack of preparatory work that had been undertaken prior to the forum process commencing - contrary to the MPA policy. The process also reinforced our concerns about the policy itself.
6. Te Ohu supports the observations made in SeaFIC's submission about problems with the MPA policy as well as the way it has been implemented. We also support their call for the policy to be revised and better integrated with other related legislation and do not consider the need to repeat all those comment here.
7. In our submission, we set out:
 - our wider concerns in relation to the MPA policy as it affects the interests of iwi/hapu
 - comments on the specific options put forward during this current round of consultation.

¹ This policy is set out in the Government's *Marine Protected Areas Policy and Implementation Plan (2006)* and the *Marine Protected Areas: Classification, Protection Standard and Implementation Guidelines (2007)*. Both of these documents can be found at www.biodiversity.govt.nz

² Implementation of the Marine Protected Areas Policy in the Territorial Seas of the Subantarctic Biogeographic Region of New Zealand: Consultation Document, June 2009

Continuing concerns with the MPA Policy

8. Te Ohu Kaimoana considers it is important that human impacts on marine biodiversity are managed to avoid irreversible damage; however, we have previously expressed concerns with the approach taken in the Government's MPA Policy³. These concerns remain and have been exacerbated in the current Forum process, as well as in the concurrent MPA Forum for the South Island's West Coast, on which we will be preparing a separate submission. Briefly, our key concerns are as follows.

MPA policy fails to adopt a targeted approach to biodiversity protection & is inconsistent with Maori resource management

9. The MPA policy does not use a targeted risk-based approach to biodiversity protection. Instead, it seeks to apply blanket protection measures (primarily marine reserves). In the subantarctic context, this seems to have resulted in a process that takes a 'sledge hammer to crack a nut' - with one option providing for 100% of the area under consideration being proposed as a marine reserve, irrespective of any actual threat to biodiversity from human activity.
10. We note with concern that the policy establishes up to 44 habitats that must be protected through marine reserves in each of the fourteen regions around New Zealand coastline. Even if the 44 habitat types are grouped together (where possible) this will result in proposals for a very large number of marine reserves, all of which will have to go through a costly and time consuming application, consultation and approvals process, when another, lower cost option may just as effectively provide biodiversity protection. This is not consistent with the premise of the New Zealand Biodiversity Strategy and the MPA policy that a range of protection mechanisms should be used to achieve biodiversity protection objectives at least cost.
11. Neither is this approach consistent with Maori resource management, which seeks to provide for sustainable utilisation of the marine environment with activities and use being managed to ensure that marine biodiversity is not subject to unacceptable risks. We consider that management measures (including MPAs) should be targeted to addressing specific threats to biodiversity and not promoted as an end in themselves, as appears to be the case in the MPA policy - where little consideration appears to have been given to the question: "protection from what?"
12. We note that the ethic of sustainable utilisation of the environment is enshrined in both the Fisheries Act 1996 and Resource Management Act 1991, two of New Zealand's key resource management instruments. Both of these Acts seek to avoid, remedy or mitigate *adverse* effects. In contrast, the proposed MPA options for the subantarctic islands seek to prohibit certain activities (either through marine reserves or through blanket application of Fisheries Act tools) irrespective of whether the activity is occurring, are likely to occur in the future or will have adverse effects on marine biodiversity.

³ See Te Ohu Kaimoana submissions on the Marine Protected Areas Draft Classification and Protection Standard (26 September 2007) and the Marine Protected Areas Policy Statement and Implementation Plan (25 February 2005).

MPA Policy will diminish Treaty Settlement assets and rights

13. Te Ohu Kaimoana continues to be concerned that blanket application of marine reserves and other area based protection mechanisms will deny Maori access to customary commercial and non-commercial fishing grounds, irrespective of whether or not there is any threat to the associated marine biodiversity. This will diminish the ability of Maori to have access to the commercial and non-commercial fishing assets promised through the Deed of Settlement and the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 (the Settlement) and, in doing so, will undermine the value of the Settlement.
14. Promoting marine reserves in this way will result in a 'race for space' approach to access and use with an ever increasing number of sub-QMA areas being locked up. The resulting displaced effort will over time seriously undermine the integrity of the fisheries management regime and with it the integrity of the Settlement.
15. It also raises serious concerns about the choices that iwi/hapu may wish to make about managing their customary non-commercial interests, as provided through the Settlement. On the one hand iwi /hapu will have every incentive to apply for mataitai reserves as a means of preventing the establishment of marine reserves (note that marine reserves cannot be established over mataitai) – even though these management tools may not meet their management objectives in the most appropriate way. On the other hand, customary fishing is also widely practiced in areas that are not subject to mataitai, however the absence of established mataitai may be seen as a green light for establishing marine reserves. Te Ohu Kaimoana therefore opposes the requirement in the MPA policy that "*a marine reserve [be] established to protect at least one sample of each habitat and ecosystem type*" in each of the fourteen biogeographic regions, irrespective of any actual threats to marine biodiversity.
16. An additional matter of particular concern is the potential for MPAs to unnecessarily prevent the potential future development of commercial and non-commercial fishing rights. For example the approach adopted in each island's option 2 has been to apply a 'use it or lose it' approach rather than an approach that seeks to mitigate the effects on existing and potential use rights. As acknowledged in the current consultation document, fishing activities are not constrained to current use patterns because new fisheries and/or areas are likely to be established in the future. Thus if access to future fisheries and/or areas is constrained by unnecessarily broad area based MPAs (when a lesser intervention may be sufficient to achieve biodiversity objectives), then the value of fisheries quota derived through the Settlement will also be diminished unnecessarily. Similarly any displacement of existing fishing effort resulting in reduced catch levels will also diminish quota value and, consequently, Settlement assets. The difficulties of implementing customary non-commercial tools will be compounded by these dynamics together with demand from the recreational sector for exclusive recreational fishing zones.
17. We note that paragraph 55 of the consultation document specifies that no compensation mechanism is available where marine reserves are declared or fishing activities are constrained by implementing MPAs. Te Ohu Kaimoana strongly advocates that every effort is made to maintain the value of Settlement assets in preference to providing compensation for diminishing these assets in order to achieve conservation objectives. The denial of compensation is

inconsistent with the approach taken in other comparable jurisdictions. It may also conflict with common law property rights for affected quota holders.

18. For example, the Australian Government's *Marine Protected Areas and Displaced Fishing Policy (January 2004)* specifies that, "where MPA/zones create additional requirements for fishing effort reduction beyond that required to meet fisheries management objectives, Australian Government funded adjustment assistance may be considered to support additional adjustment to fishing effort." While this policy is differently implemented in each of the Australian states, it is worth noting that the Queensland Department of Primary Industries has concluded that, "an important lesson learned from marine park planning exercises ... is that it is preferable to properly address socio-economic issues during, not after, the planning process".⁴ The principle of addressing socio-economic issues at the front end of MPA planning processes would seem to apply equally in the New Zealand context.
19. We also draw your attention to comments in the SeaFIC submission in relation to the potential for compensation for property rights to be established via the common law right or presumption for compensation for expropriation of property, even where there is no automatic right to compensation via the Marine Reserves Act or the Fisheries Act. SeaFIC cites several Canadian legal cases on compensation for the deprivation of property to support this view, which we endorse.

Support for a review and revision of the MPA policy

20. Te Ohu Kaimoana believes that the MPA policy needs urgent review to address the issues we have raised and strongly support the proposal in the *Fisheries 2030* report to implement a revised MPA policy and legal framework.⁵ Our experience on the Forum has confirmed that the current policy is difficult to implement and does not deliver targeted, least cost outcomes for biodiversity protection. Nor does it provide for iwi to manage their fishery resources and protect marine biodiversity in accordance with their own tikanga (customs, protocols and laws).

⁴ *Fishing and Marine Protected Areas – How can we best share the fish to meet fisheries and conservation objectives*, Zena Dinesen, Queensland Department of Primary Industries, 2006

⁵ Price Waterhouse Coopers (November 2008)

Comments on the proposed options for the Subantarctic Islands

Summary of proposals

21. Two MPA options are presented for each of the three subantarctic island groups (i.e. the Antipodes, Bounty and Campbell Islands). These options are summarised in the following table, which shows the two MPA options, along with current and future commercial and customary fishing in FMA6 – the relevant fishery management area for the subantarctic islands.

	Antipodes Islands	Bounty Islands	Campbell Islands
MPA Option 1 100% MPAs	44% territorial sea in a marine reserve	33% territorial sea in a marine reserve	39% territorial sea in a marine reserve
	Benthic Protection Area prohibition on bottom trawling & dredging Prohibition on Danish seining over the remainder of territorial sea. Allows for some future commercial fishing outside the marine reserve.		
MPA Option 2 100% MPAs	100% territorial sea in a marine reserve. Prohibits all fishing.		
Current commercial fishing	None at present	Iwi/Maori Ling long lining, some associated catch of black cod & rough skate	Iwi/Maori interest in exploratory fishing for deep sea crab
Future commercial fishing	None at present but future options still open	Ling long lining future options still open	Potential development of deep sea crabs & giant spider crab
Customary fishing	Ngai Tahu has no plans to establish mataitai or taiapure		

Option 1 is an acceptable interpretation of the MPA policy given the special nature of the subantarctic islands

22. Option 1 proposes a mix of marine reserves (required by the MPA policy) and additional Fisheries Act regulations (to meet the protection standard) for the territorial seas surrounding each of the subantarctic island groups.

23. This option will enable 100% of the area under consideration to be included in the MPA network for each of the territorial seas because while the marine reserves do not encompass the whole area the existing benthic protected areas together with the prohibitions on Danish Seining over the remaining area will meet the protection standard. This level of protection considerably exceeds the requirements of the New Zealand Biodiversity Strategy target of protecting 10%

of New Zealand's marine environment through a network of marine reserves. Te Ohu Kaimoana acknowledges that this very high level of protection reflects the special nature of the subantarctic islands and the existing protection provided by the Benthic Protection Areas, but notes that such a high level of protection will not be appropriate in other regions.

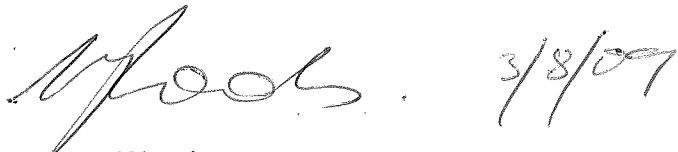
24. Te Ohu Kaimoana considers that only Option 1 represents an acceptable interpretation of the MPA policy for each of the island groups because it:
- Is appropriate to the special nature of the subantarctic islands (although will not be appropriate in other regions)
 - Has relatively low impacts on current commercial fishing
 - Provides some opportunity for development of future fisheries
 - Has minimal impact on customary fishing given that Ngai Tahu has indicated that it has no plans to establish mataitai or taiapure in the subantarctic region.
25. However, as noted above, we continue to have significant concerns about the MPA policy, which we believe needs reviewing to remove, at the very least, the requirement to protect at least one sample of each habitat and ecosystem type in each biogeographic region through a marine reserve. Our support for Option 1 does not mean that we endorse the MPA policy or any applications for marine reserves that may follow from the Forum's eventual proposals. Any resulting applications for marine reserves or regulatory closures will need to succeed on their own merits and following the statutory process. We reject special legislation as a means to expedite the establishment of any marine reserves through this MPA Policy implementation process.

Option 2 is not acceptable

26. For the reasons outlined at the beginning of our submission, Te Ohu Kaimoana can not support Option 2, which proposes that 100% of the territorial sea surrounding each island becomes a marine reserve. Specifically, we are concerned that this option
- Seeks to establish marine reserves over the entire territorial sea of each island group rather than adopting a targeted approach to biodiversity protection
 - Forecloses options to develop fisheries and thus potentially diminishes Settlement assets
 - Extinguishes Maori customary commercial and customary non-commercial rights in these areas through the creation of excessively large marine reserves
 - Is unnecessary to meet the MPA protection standard, which is more than adequately achieved for each island through Option 1.

If you have any questions concerning this submission please do not hesitate to me directly at the office on 04 931 9534.

Naku noa, na.

Handwritten signature of Kirsty Woods and the date 3/8/09.

Kirsty Woods
Manager of Policy and Fisheries Development