Submission on the Marine Protected Areas (MPA) Draft Classification and Protection Standards

SUBMISSION ON BEHALF OF NON-COMMERCIAL FISHERS

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Background

- In November 2004 MFish and DoC released a draft MPA Policy Statement and Implementation Plan (MPA Policy) based on the New Zealand Biodiversity Strategy (NZBS).
- Sixty-eight submissions on the draft MPA policy were received by the deadline of 28th February 2005.
- The completed Marine Protected Areas Policy and Implementation Plan (Implementation Plan) was released in January 2006.
- Stage one of the Implementation Plan was due for completion by June 2006 but was deferred until February 2007.
- The MPA Draft Classification and Protection Standard document (MPA Draft Classification) was finally released for public comment in June 2007.
- Submission deadline originally 31st August has been extended to 30th September 2007.
- More information is available on the option4 website at

  http://www.option4.co.nz/Marine_Protection/mpas.htm

Classification and Protection Standards

What the MPA Draft Classification is about

The *MPA Draft Classification* document explains the process to give effect to the MPA Policy.

There are two parts to the *MPA Draft Classification*:

- Explaining the process to identify and classify different marine regions; and
- Setting out the implementation process to achieve the MPA Policy objective:

  "Protect marine diversity by establishing a network of MPAs that is comprehensive and representative of New Zealand's marine habitats and ecosystems."

The intention of MFish and DoC is that the proposed classification will be science-based. Notwithstanding the statutory obligations on MFish and DoC to have particular regard to kaitiakitanga (guardianship), there is no mention or description of kaitiakitanga throughout the *MPA Draft Classification*.

The main features of the *MPA Draft Classification* are:

- The marine environment is classified as either coastal or deepwater;
- There are 13 coastal regions around the country including the Kermadec and Three Kings Islands. The boundary between the nearshore and offshore boundary is defined as the 12-nautical mile (nm) line – the Territorial Sea limit. Maps and sub-strate types[1] of these coastal regions are described in the draft document;
- The intention of MFish and DoC is to have a consistent approach to classifying areas, devise an inventory of marine protected areas and to determine 'gaps' in the network;

[1] The type of bottom sediment, such as sand, gravel or rock.

- Identification of representative as well as 'outstanding and rare' areas;
- At least one marine reserve covering each habitat or ecosystem in each region; with discussion of the benefits of having fewer, larger MPAs.

MPA Draft Classification tools

A range of tools and mechanisms will be used including:

- Marine reserves (Marine Reserves Act 1971);
- Customary tools such as taiapure, mataitai, rahui (Fisheries Act 1996 and the Fisheries (Kaimoana Customary Fishing) Regulations 1998);
- Resource Management Act 1991 tools such as coastal plans.

The intention of MFish and DoC is that regional MPA fora (MPA Forum) will decide which tools are appropriate for each area identified for protection.

An MPA Forum has been established for the South Island's west coast while the Otago/Southland, Sub-Antartica Islands and Hauraki Gulf fora are still in the planning phase.

The intention of MFish and DoC is to have 10 percent of the marine environment in coastal waters protected by 2010.

Implementation of the MPA Policy from the 200m-depth limit to 200nm from the coast – the Exclusive Economic Zone (EEZ) – will not begin until 2013.

Introduction

This submission:

- Is in response to the MPA Draft Classification and Protection Standard document (MPA Draft Classification) issued by the Ministry of Fisheries (MFish) and Department of Conservation (DoC) in June 2007.
- Represents the views of a wide range of people including those of option4, the New Zealand Big Game Fishing Council and the Hokianga Accord, the mid north – Te Tai Tokerau - iwi fisheries forum.

Whilst the submitters acknowledge that the intention of the *MPA Draft Classification* is, in part, designed to address concerns with the ad-hoc approach to marine protection taken to date, and that identifying habitats and marine life in the marine environment is a first step, it is unrealistic to consider the issue of classification in isolation.

Hand in hand with such consideration must go the explanation and context of the relevant laws that govern fisheries management and conservation and also an explanation of the purpose of such laws, including the need to manage our fisheries and aquatic environment to provide for utilisation whilst ensuring sustainability to enable people to provide for their social, economic and cultural wellbeing.

Maintaining marine biodiversity is accepted as an important management aim. Degraded or polluted environments typically have low biodiversity. In healthy marine environments there is often competition for space and resources. Some disturbance, natural or man-made, provides opportunities for change and diversity. Management systems need to be sympathetic and responsive to the physical and biological characteristics of an area.

Kaitiakitanga expressed in existing marine protection measures such as taiapure, mataitai and rahui is able to address marine biodiversity goals, as biodiversity does not need a virgin or pristine marine environment in order to exist.

The practice of kaitiakitanga is conspicuously absent from the *MPA Draft Classification*. More particularly there is no recognition or explanation of the Crown's obligation to *have particular regard to kaitiakitanga*, as the Minister of Fisheries must do when considering a sustainability measure[2].

The customary management tools are now the only mechanisms available to tangata whenua to manage areas on a scale of interest to hapu and local coastal communities. The wider community often benefit from the implementation of these customary tools yet both MFish and DoC have done little to educate the public about them. In fact, quite the opposite, as evidenced by the broad-brush reference to customary fisheries management being for the purpose of customary harvest.

The submitters desire is for healthy and abundant fisheries and a marine environment producing "more fish in the water/ kia maha atu nga ika i roto i te wai" in order to provide for all New Zealander's wellbeing and for tomorrow's mokopuna (grandchildren).

Appendix One and Two form part of this submission.

[2] Fisheries Act 1996, section 12 (1).

Overview of MPA Draft Classification

MPA Draft Classification intention – to find gaps in marine protection?

1. The Department of Conservation (DoC) and the Ministry of Fisheries (MFish) are currently consulting on the Marine Protected Areas Classification and Standards document (MPA Draft Classification) released in June 2007.

2. The stated intention of the *MPA Draft Classification* is to identify and classify different marine regions in order to find 'gaps' in marine protection and then establish a network of protected areas that are representative of habitats and ecosystems of our coastline.

Minimal emphasis on customary tools

3. Customary fisheries management tools such as mataitai, taiapure and rahui (temporary closures) receive minimal attention despite the Crown's ongoing obligations to tangata whenua enshrined in statute arising from the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 to observe the principles of the Treaty of Waitangi (Treaty) in respect of non-commercial fishing.

4. The primary tool intended by DoC and MFish for implementation of marine protection appears to be marine reserves under the Marine Reserves Act 1971 (the MRA) even though the scope of the MRA is limited to setting apart unique areas of New Zealand's coastal waters for scientific study in the national interest.

MPA Draft Classification – a design for further confiscation

5. On the face of it this appears to be another government scheme which could see New Zealanders denied access to a food source from large parts of our coastal waters and marine environment.

6. This is a major concern considering the increasing problem of obesity in our communities. Access to fresh kai moana to provide for people's wellbeing cannot be under estimated. Wellbeing was described by the High Court as *"the state of people's health or physical welfare"*[3].

7. What DoC and MFish have omitted to say is many of our key fish stocks are struggling to recover from many years of unsustainable commercial fishing under the current quota management system (QMS) and this has resulted in the depletion of our coastal fisheries.

8. There is also no mention of the failure of commercial fishing interests to modify their methods. A direct consequence of the absence of incentives, or disincentives in the 'output control' based property rights regime within the QMS framework.

[3] NZ RECREATIONAL FISHING COUNCIL INC AND ANOR V MINISTER OF FISHERIES And Ors High Court AK CIV-2005-404-4495 [21 March 2007], para55.

MFish – absence of leadership and considering peoples' wellbeing in fisheries management

9. It is ironic that one government agency, DoC, which is not involved in fisheries management campaigns for more marine reserves to fix our fisheries when DoC's partner in the *MPA Draft Classification*, MFish for over 20 years has not demonstrated the leadership in fisheries management demanded by the Fisheries Act 1996.

10. MFish' lack of consideration for the people's wellbeing, by ensuring abundant fisheries, was highlighted in the recent High Court decision on kahawai. In March 2007 the High Court held that 'sustainability (was) the bottom line', and that the Minister has a mandatory obligation to manage fisheries to achieve the purpose of the legislation, which is to enable people to provide for their social, economic and cultural wellbeing.

No acknowledgement of kaitiakitanga in conservation and fisheries management

11. As mentioned above, the Minister of Fisheries, MFish and DoC have ongoing statutory obligations to Maori to ensure that the tikanga (principle) of kaitiakitanga (guardianship) is observed and practiced. This includes consultation with tangata whenua and communities, and providing for the input and participation of tangata whenua having a non-commercial interest in the particular stock or area in relation to proposed fisheries sustainability measures.

12. Kaitiakitanga properly put into practice involves:

    - guardianship over and caring for our fisheries and marine environment so that all New Zealanders can provide for their wellbeing by being able to provide kai (food) for their whanau (families);
    - understanding and knowing that nature supports life and that we are part of (not separate from) nature, and as one with our natural environment.

13. This means treating our environment as a taonga (treasure.) Not contaminating, polluting and exploiting, but guarding our environment so that our land, forests and waters continue to provide abundance for present and future generations of New Zealanders.

Marine reserves = confiscation = grievance – a two edged sword

14. Apart from the narrow focus of the purpose of marine reserves for scientific study Parliament, in enacting the MRA, did not intend marine reserves the size DoC proposes for Aotea (Great Barrier), of some 49,000 hectares as a method of restoring our fisheries damaged by unsustainable commercial fishing. Especially when tangata whenua-led customary tools and mechanisms involving local communities to achieve the purpose of the Fisheries Act - utilisation whilst ensuring sustainability - are available just for that purpose, and are also not being promoted by MFish or DoC among tangata whenua or coastal communities.

15. New Zealanders can be forgiven for asking of DoC and MFish where and how they propose that tangata whenua and local communities will catch their kai (food), as they have done for generations, following such a large confiscation as this.

16. It is a confiscation or displacement such as this which is faced by Ngatiwai, Ngati Rehua and the community of Aotea as they now await the outcome of the Minister of Fisheries' deliberations on whether to agree with the Minister of Conservation's decision to set apart a marine reserve in respect of those waters at Aotea which, if implemented, would extend out to the 12-nautical mile limit.

17. If the Minister of Fisheries concurs with his Minister of Conservation colleague, there would be a confiscation and displacement of tangata whenua, the Aotea community and many visitors in their pleasure boats from accessing kai moana within that rohe (area). Moreover this would be against the express wishes of tangata whenua and the Aotea community ignored by DoC over many years.

18. It is indeed unfortunate that such circumstances are not unique to Aotea. Te Runanga o Ngai Tahu, the Papatipu Runanga, Onuku, Waiwera and Koukourarata as tangata whenua have strenuously opposed the marine reserve at Akaroa known as Dan Rogers for over ten years.

19. The Akaroa Harbour community has supported tangata whenua in their effort to implement the Akaroa Harbour taiapure and Pohatu marine reserve while defending claims to another area within the harbour. Despite the best efforts of tangata whenua and the local community to date, tangata whenua, the local community, other interests and the government agencies have reached no satisfactory resolution.

New Zealanders' right to food

20. All New Zealanders have a non-commercial right to access to our fisheries and marine environment for food. DoC and MFish now understand that increasing numbers of people know their rights are under threat by vested interests and an absence of leadership in managing our fisheries sustainably. It took the court action by non-commercial fishers against the Minister of Fisheries and MFish in relation to kahawai, and the High Court decision in that case to bring the relevant fisheries management issues into the public eye.

The way forward – an accord

21. With this increasing awareness, tangata whenua and local communities want DoC and MFish to assist them to replenish the fisheries not confiscate traditional sources of food from New Zealanders.

22. Tangata whenua are increasingly being supported by local communities as each reaches a greater understanding of the others circumstances and the realisation that all New Zealanders face the same issues, albeit from a different perspective.

23. This "greater understanding" of kaitiakitanga stems from the opportunity for Maori and non-Maori to work together in order to respond to a continuous stream of policy development from MFish and DoC, as opposed to any readily identifiable effort by any Crown agency to work with tangata whenua and local communities to achieve an understanding and appreciation of the relevant issues.

24. Abundant fisheries may well have been achieved if more resources had been used to promote the benefits of kaitiakitanga as opposed to promoting marine reserves where people are shut out from both fishing and active management. This imbalance has been repeatedly pointed out to MFish and DoC, officers of which are public servants whose salaries are paid by New Zealanders, to no avail.

25. What tangata whenua also need is help from government agencies to have the customary tools and mechanisms implemented, to bring back our ika (fish) and kai moana (shellfish), and not be excluded from their coastal food basket. In remote or isolated areas kai moana is much more important to the wellbeing of tangata whenua and the local community. Often there are

no supermarkets and high wages available to the people, as is the case at Aotea (Great Barrier).

26. New Zealanders seek a combined tangata whenua, communities and regulatory authorities approach. The Hokianga Accord, the regional iwi fisheries forum of mid Te Tai Tokerau (mid-north) demonstrates this can be done and is leading the way, even though MFish to date has not yet recognised the Accord despite the Hokianga Accord meeting MFish' criteria for an iwi regional fisheries forum and the Minister of Fisheries endorsement in August 2005[4].

Apply the customary tools – kaitiakitanga -for conservation and fisheries management now

27. Although customary tools and mechanisms such as mataitai, taiapure and rahui (temporary closures) have been available under our fisheries laws for some years, an absence of government agency support has held back enhancing our fisheries quickly. Despite this obstacle, many communities are working hard to apply a range of conservation measures to their land, coastal waters and fisheries that represent kaitiakitanga.

28. New Zealanders know that their coastal waters and fisheries are under pressure, and want to be involved in the work of rebuilding, enhancing and conserving the fisheries. They want to be involved in a collaborative approach to solutions and do not accept the 'we know what's best for you' response from DoC and MFish.

29. Success can be achieved by involving the whole community in marine protection. A prime example is the Cheltenham Beach Caretakers (CBC) initiative on the North Shore of Auckland. Communal concerns for the environment, the unsustainable harvest of tuanga (cockles) and the lack of official response were the impetus for the implementation of a temporary closure in the early 1990's.

30. Maori and non-Maori have continued to actively protect and monitor the tuangi and pipi beds. Nineteen surveys have been conducted involving over 300 individuals and under the supervision of dedicated marine biologists who have freely given their time and knowledge to this project. Neither DoC nor MFish have provided resources to support this initiative despite its ongoing success. Ngati Whatua, the North Shore community and particularly Forest & Bird society members have been the mainstay support for this initiative.

31. The CBC temporary closure was applied using the now defunct section 86A of the Fisheries Act. The annulment of s86A has left coastal communities with only one alternative for active management of local waters, that is the mechanisms available to tangata whenua – mataitai, taiapure and rahui.

32. The purpose of the Hokianga Accord is about tangata whenua and local communities working together to have kaitiakitanga put in practice to achieve 'more fish in the water', to enable people to provide for their social, economic and cultural wellbeing. Having a policy to lock up, as a minimum, 13 areas for marine reserves i.e. at least one in each identified coastal bioregion, in addition to existing MPAs is seen as another confiscation of customary and well settled common law rights by the Government.

33. The *MPA Draft Classification* has no upper limit to the proportion of the New Zealand nearshore waters that could be locked up with this policy. Some groups may claim that 30

[4] http://www.option4.co.nz/Fish_Forums/images/halminr805.gif

percent of the marine environment should be no-fishing zones and this policy could be the tool used to justify confiscation of rights on that scale.

34. Sustainable utilisation of our fisheries must be achieved immediately so that our fisheries do not suffer the decline such as that experienced in European waters. It is unfortunate that commercial fishers to whom too much quota for too few fish has been issued must bear the brunt of any quota reductions. Non-commercial fishers also have their part to play in ensuring the health of our fisheries. However, until we have sustainable utilisation of our fisheries drastic marine protection is arguably premature and penalises non-commercial fishers both customary and amateur.

Sustainability is the bottom line - fish come first

35. In the case of kahawai, the High Court held that sustainability is the bottom line without which there will be no utilisation.

36. In the submitters' opinion, the *MPA Draft Classification* falls short of the government's statutory obligations principally by failing to:

    - acknowledge the Crown's ongoing statutory obligations to Maori under the 1992 fisheries settlement to observe the principles of the Treaty in respect of non-commercial fishing;
    - give due weight to the customary tools and mechanisms as conservation and fisheries management vehicles to have kaitiakitanga fully implemented;
    - actively promote kaitiakitanga as a uniquely Aoteoroa/New Zealand way to provide abundance for present and future generations of all New Zealanders in the form of the customary tools and mechanisms.

37. Section 4 of the Conservation Act 1987 states the Act "should be so interpreted and administered as to give effect to the principles of the Treaty of Waitangi". Therefore the Crown must act in accordance with the principles of partnership, of active protection and the principle of redress.

38. In the context of fisheries management the Crown has specific obligations to tangata whenua as contained in section 10 of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992, the Fisheries (Kaimoana Customary Fishing) Regulations 1998, the Fisheries (South Island Customary Fishing) Regulations 1999 and sections five and twelve of the Fisheries Act 1996.

39. Tangata whenua and local communities have witnessed the decline in the health and abundance of our fisheries in the last few decades. People in these communities demand the government and their agents adhere to, and give meaningful effect to, current legislation and the ongoing obligations to Maori under the Treaty.

40. To do otherwise means taxpayer funding applied to endless policy development, and the risk of further alienating tangata whenua and local communities from supporting sensible conservation and active, hands-on fisheries management.

41. Conservation and fisheries management grounded on kaitiakitanga by applying the customary tools presently available, together with appropriate sustainability measures applied to commercial fishing will provide for the 'utilisation whilst ensuring sustainability' purpose of the Fisheries Act - 'more fish in the water/kia maha atu nga ika i roto i te wai' in order to provide for people's wellbeing.

MPA Draft Classification - more policy development

42. The *MPA Draft Classification* is as another example of DoC and MFish developing policy without fully explaining the relevant statutory obligations to the reader. This is similar to the approach taken by MFish during the *Shared Fisheries* discussions seven months ago and was resoundingly rejected at the time. The Crown's statutory obligation must be clarified before the public can begin to make informed decisions.

43. In addition, the *MPA Draft Classification* is written in a technical manner and difficult for a reader not fully conversant with fisheries management and marine protection language. This discourages rather than encourages the reader to offer feedback. Both DoC and MFish know that greater understanding of the issues and proposed solutions will inevitably mean improved feedback on the *MPA Draft Classification* which will properly reflect the public's view.

44. The release of this document has been delayed without an adequate explanation being given. Undoubtedly years of research, substantial resources, planning and policy development have gone into this project by 'experts'. Those likely to be most affected by these proposals have not been given sufficient time to respond to this project, if indeed they are aware of its existence.

45. At the very least interested parties ought to have been given equal time and opportunity as these 'experts' have had, to submit on the proposals. This is particularly so given the incomplete nature of the *MPA Draft Classification* document.

46. Consequently there has been inadequate time to read, discuss and provide considered feedback, especially for tangata whenua and non-commercial interest groups that are poorly resourced. This is grossly unfair and unacceptable consultation practice by both MFish and DoC.

47. This process has been designed by bureaucrats for bureaucrats. It is also a wasted opportunity to engage meaningfully with those who want more fish in the water and a healthy aquatic environment.

48. Although Maori customary fishers and all other non-commercial (amateur) fishers will be most affected by the *MPA Draft Classification* and policy implementation, there is no discussion in the document of the consequence of a confiscation not only from Maori but from all New Zealanders by:

    - the establishment of a marine reserve;
    - the loss of rights;
    - compensation or mitigation measures for those displaced;
    - the effect of displacing fishing effort from a closed area to other areas that will remain accessible.

49. Moreover, the Government's obligations to tangata whenua under the Treaty of Waitangi 1840, and the rights of non-commercial and commercial fishers must be clearly described to enable New Zealanders to make informed submissions.

50. The MPA Strategy and Implementation Plan and now the MPA Draft Classification are intended government policies telling us why, what and how the government intends to carry out marine protection.

51. As we have learnt through the judicial review of the Minister of Fisheries' kahawai decision process, more important is the legal framework and process government departments and their Ministers are required to follow in making decisions.

Statutory obligations in fisheries management – fish come first

52. It is obvious to many people the Minister of Fisheries and MFish are not managing our fisheries in a way that will maximise the benefit for all New Zealanders. The vast majority of fishing rights are now owned by the companies that established the largest catch histories by overfishing stocks prior to the introduction of the QMS.

53. Sections 8, 9 and 10 of the Fisheries Act 1996 (Fisheries Act) are often referred to as the 'religious' parts of the Fisheries Act concerned with sustainability, environmental and information principles.

54. If such purpose and principles are adhered to as intended then there ought to be abundant fisheries and a healthy marine environment for all New Zealanders to enjoy.

55. Section eight is set out as,

> **8. Purpose—**
>
> (1) The purpose of this Act is to provide for the utilisation of fisheries resources while ensuring sustainability.
>
> (2) In this Act—
>
> ``**Ensuring sustainability**'' means—
>
> (a) Maintaining the potential of fisheries resources to meet the reasonably foreseeable needs of future generations; and
>
> (b) Avoiding, remedying, or mitigating any adverse effects of fishing on the aquatic environment:
>
> ``**Utilisation**'' means conserving, using, enhancing, and developing fisheries resources to enable people to provide for their social, economic, and cultural wellbeing.

56. Section nine is as follows,

> **9.Environmental principles—**
>
> All persons exercising or performing functions, duties, or powers under this Act, in relation to the utilisation of fisheries resources or ensuring sustainability, shall take into account the following environmental principles:
>
> (a) Associated or dependent species should be maintained above a level that ensures their long-term viability:
>
> (b) Biological diversity of the aquatic environment should be maintained:
>
> (c) Habitat of particular significance for fisheries management should be protected.

57. The information principles are in section ten,

> **10. Information principles—**

> All persons exercising or performing functions, duties, or powers under this Act, in relation to the utilisation of fisheries resources or ensuring sustainability, shall take into account the following information principles:
>
> a. Decisions should be based on the best available information;
>
> b. Decision makers should consider any uncertainty in the information available in any case;
>
> c. Decision makers should be cautious when information is uncertain, unreliable, or inadequate;
>
> d. The absence of, or any uncertainty in, any information should not be used as a reason for postponing or failing to take any measure to achieve the purpose of this Act.

58. The Minister must:

- Follow the processes prescribed in the Fisheries Act when making fisheries management decisions. This means the necessary research, consultation and providing for the input and participation of tangata whenua, and having particular regard to kaitiakitanga; and
- Provide a written decision when deciding management issues; and
- Adhere to the sustainable utilisation purpose, and the environmental and information principles in the Act.

59. In doing so, the Minister, in effect, is required to make sure there are sufficient fish in the water to meet current and future needs of all New Zealanders.

60. A conscientious Minister and MFish ought to be able to use the provisions of the 'religious' sections of the Act, which effectively require a husband-like approach to fisheries management to produce more abundant fisheries.

61. Part Three of the Act sets out the sustainability measures. Sections 11 to 16 (inclusive) describe different mechanisms to achieve the Act's purpose.

62. The value of all New Zealander's right of access to our fisheries will only be fulfilled with adherence to the proper application of sections 8, 9 and 10 of the Act.

63. The Minister, through MFish, appears to pay lip service only to the consultation rights of tangata whenua and the community as set out in section 12 of the Fisheries Act 1996.

64. The effect of section 12 is that before giving any approval or carrying out any functions specified in relation to sustainability measures the Minister shall – there is no discretion – provide for the input and participation of tangata whenua and consult widely.

65. The Fisheries Act also provides that fisheries be maintained at or above a biomass (stock) level that can produce the maximum sustainable yield (Bmsy). This allows Ministerial discretion to manage fisheries to a target level beyond Bmsy, to meet alternative management objectives.

66. The difficulty fisheries managers worldwide have is that methods of estimating population size are problematic and based on assumptions. Fish populations are also known to vary from year to year so often there is insufficient information on which to base Ministerial decisions.

67. New Zealanders know first-hand the outcome this uncertainty produces. History has proven that Bmsy has proven to be a difficult management target however this has not stopped our fisheries being managed on a 'knife-edge' with little margin for error if a mistake is made.

68. A more conservative management target would protect our fisheries from overfishing and provide sufficient abundance to meet the purpose of the Fisheries Act – sustainable utilisation to enable people to provide for their wellbeing. This is the best way of ensuring long-term sustainability of mobile fish species rather than closing areas to fishing.

69. Recent support for this sensible approach can be found in the recent High Court ruling regarding the kahawai decision, namely:

    - Sustainability is 'the bottom line' and must be the Minister's ultimate objective; and
    - Every man, woman and child in Aotearoa has a well settled common law right to fish to provide for their needs.

70. Taking the long-term view to provide abundance for present and future generations has to be the priority for managers in charge of our marine environment.

Customary fisheries management tools and mechanisms

71. While not totally dismissive of customary management tools, the *MPA Draft Classification* pays little attention to the rights of guardianship conferred by statute on tangata whenua as kaitiaki of their rohe moana (marine area), which is expressed in the tikanga (principle) of kaitiakitanga.

72. Kaitiakitanga is defined in s 2 (1) of the Fisheries Act as,

> "The exercise of guardianship; and, in relation to any fisheries resources, includes the ethic of stewardship based on the nature of the resources, as exercised by the appropriate tangata whenua in accordance with tikanga Maori."

73. The centuries-old tikanga of kaitiakitanga is, by its very nature, flexible management allowing for a variation in harvesting seasons based on prevailing conditions.

74. MFish describe customary tools as:

> "A range of fisheries management tools may contribute to the MPA network, including customary fisheries management tools like mataitai reserves and taiapure. However, these tools provide for customary Maori use and management practices rather than protection of biodiversity at the habitat and ecosystem level.[5]"

75. This:

    - Assumes that the *MPA Draft Classification* process is the preferred approach towards marine protection to which other mechanisms may contribute while ignoring the significant contribution to be made by customary fisheries management tools such as mataitai reserves and taiapure;

[5] http://www.fish.govt.nz/en-nz/Environmental/Seabed+Protection+and+Research/MPA/QandA.htm#16

- Assumes that customary and community management and biodiversity protection are mutually exclusive;
- Downplays the role of customary tools and mechanisms, mataitai reserves, taiapure and rahui as community-based means of marine protection, where local communities and tangata whenua work together in protecting our fisheries, marine habitats and our communities.

76. As mentioned, the practice of kaitiakitanga is absent from the *MPA Draft Classification*. More particularly there is no recognition or explanation of the Crown's obligation to have *particular* regard to kaitiakitanga, as the Minister of Fisheries must do when considering a sustainability measure[6].

77. In the context of fisheries management the Crown has specific obligations to tangata whenua as contained in section 10 of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992, the Fisheries (Kaimoana Customary Fishing) Regulations 1998, the Fisheries (South Island Customary Fishing) Regulations 1999 and sections 5 and 12 of the Fisheries Act 1996.

78. The customary management tools are the only mechanisms available to tangata whenua to manage areas on a scale of interest to hapu and local coastal communities. The wider community enjoys the benefits derived from implementing customary tools yet both MFish and DoC to date have done little to educate the public about these customary tools.

79. Neither government agency has made any substantive effort to increase public understanding and awareness of customary management so that people can support these area management tools in preference to a complete confiscation in the form of no-take forever marine reserves.

80. The Crown has clearly failed in its obligations to provide for tangata whenua's customary aspirations.

81. A national seminar to discuss local area management tools and issues would be of great assistance to tangata whenua and communities who are presently struggling (both in time and resources) to protect their local marine environment. An annual event supported by both MFish and DoC would go some way to achieving greater awareness, allow for information sharing and would also contribute to the development of support networks so that each proposal does not have to start from scratch.

82. An annual national seminar would also be an opportunity for tangata whenua and local community representatives to measure the performance of both MFish and DoC on a countrywide scale.

83. Local area management is more than just managing fisheries on a local scale; it is about supporting tangata whenua and coastal communities to work with government agencies to create better management outcomes.

84. Tangata whenua and local communities are closer to the issues than government and are more likely to find effective, workable solutions through their relationships with various interest groups.

[6] Fisheries Act 1996, section 12 (1).

85. Maintaining marine biodiversity is an accepted and important component for all marine management plans. Customary management tools such as taiapure, mataitai and rahui, which express kaitiakitanga, can assist to achieve marine biodiversity goals. Biodiversity does not need a virgin or pristine marine environment in order to exist.

86. Further comment on the Crown's obligations to Maori are included in Appendix One.

Existing fisheries and environmental management

87. DoC and MFish have suggested that the *MPA Draft Classification* proposals be implemented using current legislation and existing tools and mechanisms.

88. The *MPA Draft Classification* explains how MFish manage fishing but fails to inform the reader that MFish has been entrusted by Parliament to administer our fisheries according to the purpose and principles of the Fisheries Act 1996. The purpose of the Act is the sustainable utilisation of our fisheries to enable people to provide for their social, economic and cultural wellbeing.

89. So there is a dual challenge:

    - Environmental – protection of our fisheries and marine environment - balanced against
    - All New Zealander's access to our fisheries to provide for their social, economic and cultural wellbeing.

90. This challenge has been highlighted by both MFish' long-term struggle to meet the purpose of the Fisheries Act and the recent example of the High Court finding in the kahawai decision, where the Court found that the Minister of Fisheries had failed to 'allow for' people to provide for their wellbeing and exercise their common law right to fish for food.

91. Rather than addressing these shortcomings the government appears to be suggesting that because MFish cannot manage the fisheries to provide for utilisation whilst ensuring sustainability, then both DoC and MFish will impose area and method restrictions by various means but principally marine reserves.

92. A marine reserve is not a fisheries management tool. However DoC's open intention of more marine reserves will cause greater tension by imposing competition for marine space. This tension is between unsustainable fishing and the perceived need by DoC for closures of parts of our coastal waters. It is ironic this is happening in the face of arguably MFish' absentee or laissez faire approach to fisheries management.

93. An example of fisheries management and marine protection working against people's interests can be found in the Area 3 crayfish fishery (CRA3), which extends from East Cape south to the Nuhaka River, including Gisborne.

94. This coming summer represents the third year non-commercial fishers (both amateur and customary) targeting crayfish around the Gisborne area will be denied access to legal size crayfish. Two developments have contributed to this scenario, which runs contrary to the purpose of the Fisheries Act – sustainable utilisation of fisheries to enable people to provide for their wellbeing.

95. Commercial fishers have been granted a concession by MFish to harvest crayfish smaller than the standard legal size i.e. 52mm males as opposed to 54mm males. While the merits of this concession are still being debated, the creation of a marine reserve close to Gisborne has exacerbated the problem, as there is now less fishing area.

96. Commercial fishing effort for crayfish has now moved closer to town and the most popular boat ramps used by non-commercial fishers. As a consequence it is a common occurrence to have up to 1000 commercial craypots within a three-mile radius of the Port of Gisborne. It is not surprising then that non-commercial fishers have strenuously opposed CRA3 management for a number of years.

97. The absence of any corresponding reduction in quota to take into account the smaller fishing area has had an adverse impact on non-commercial fishers and now they struggle to harvest more than one or two crayfish where they were previously catching enough to fulfill their needs.

98. One solution would be for the Minister of Fisheries to take into account the March 2007 High Court ruling during a CRA3 review. Justice Harrison said, *"that a TACC cannot be set without the Minister first allowing for non-commercial fishing interests in the stock. It would be open for him or her to set the total allowable commercial catch (TACC) at zero but not the allowance for recreational fishers. In that sense non-commercial interests, both Maori and recreational, must be provided for where they exist. The same does not apply for commercial interests"*[7].

99. An integrated, coordinated approach to both fisheries management and marine protection while taking into account current statutory requirements will be needed if we are to achieve good outcomes from the MPA Strategy and to also avoid creating new grievances.

100. Although the *MPA Draft Classification* document mentions the impact of activities such as mining on the seabed, there is no reference to the possible impacts on the adjacent coastline through the increased force of wave action due to a deepening of the protective sand seabed shelf.

101. The subsequent effect on shellfish and inter-tidal species is difficult to quantify without further research. However, any depletion would mostly likely have a detrimental effect on finfish species that feed within the inter-tidal zone.

Marine reserves

102. Currently the Marine Reserves Act 1971 only provides for the setting apart of unique areas of our coastal waters for scientific study in the national interest. This is to be contrasted with the approach taken by DoC and some environmental interests to establish marine reserves to save our fisheries and marine environment from harm by us. Conflict arises when different interest groups want the same space for different purposes.

103. The Marine Reserves Act 1971 (MRA) section 3 (1) states as its purpose,

> " It is hereby declared that the provisions of this Act shall have effect for the purpose of preserving, as marine reserves for the scientific study of marine life, areas of New

[7] NZ RECREATIONAL FISHING COUNCIL INC AND ANOR V MINISTER OF FISHERIES And Ors High Court AK CIV-2005-404-4495 [21 March 2007], para 24.

> Zealand that contain underwater scenery, natural features, or marine life, of such distinctive quality, or so typical, or beautiful, or unique, that their continued preservation is in the national interest."

104. The *MPA Draft Classification* proposals appear more aligned with the purpose of the MRA, this suggests the intention is to concentrate on marine reserves as the major tool to be used to achieve the goals of the MPA Strategy, notwithstanding the narrow focus of marine reserves for unique areas of our coastline to be set apart for scientific study in the national interest.

105. If MFish gives particular regard to kaitiakitanga, as required, the increase of abundance in our fisheries that ought to follow will mean that any call to use marine reserves as a drastic fisheries management tool (even though as mentioned marine reserves are not fisheries management tools) will subside.

106. The recent proliferation of marine reserve proposals is considered as an unnecessary confiscation of traditional rohe.

107. There is also considerable debate whether marine reserves will achieve stated claims and that the aims are not in the overall interest of tangata whenua or local communities.

108. Marine reserves focus on prime marine habitat and concentrate current fishing effort into other regions within the rohe thus causing unnecessary conflict, restrictions and sometimes safety issues for vessels fishing in more exposed waters. Most marine reserves in the North Island are located around offshore islands or rocky headlands. A potentially good outcome for divers but it also removes a very limited resource for fishers – deep water, sheltered fishing locations.

109. The Crown has an obligation to better provide for the recognition of Maori interests in fisheries secured by Article II of the Treaty of Waitangi. Unless tangata whenua expressly agree to a marine reserve, the net effect is that tangata whenua would be alienated from their rohe moana and their most fundamental rights and obligations as rangatiratanga and kaitiaki.

110. Marine reserves require community and tangata whenua support in order to succeed. Reclassifying an area to achieve marine protection is meaningless without this support, particularly in more remote areas.

111. As we have witnessed, the ad-hoc approach of applying marine reserves has caused unnecessary conflict within some communities and wasted precious resources. A nationally integrated approach including input from both tangata whenua and affected communities is more likely to succeed.

112. While the fisheries management principles are clear, as is the right to fish, access is the key. Preservation concepts ought not be confused with the statutory requirements of fisheries and marine reserve legislation.

113. Sustainable fisheries should be managed to provide for current and future needs and marine reserves for scientific study.

114. Fundamental marine management issues are not addressed by marine reserves nor do they:

- Address problems associated with unsustainable fishing
- Change people's attitudes to what, how much and how they take life from the sea
- Address water quality issues such as land run-off, sewerage discharge and sedimentation.

Displacement of fishing effort

115. If fishing restrictions including no-take forever marine reserves are implemented as suggested, it is inevitable that a widespread loss of access will occur, both for non-commercial and commercial fishers.

116. This loss of access will displace existing fishing effort into surrounding waters. This puts pressure on the fisheries within the areas that remain open, threatening the viability of those fisheries.

117. Sedentary species such as crayfish, paua and shellfish would be particularly vulnerable to localised depletion issues.

118. There is no mention in the *MPA Draft Classification* of how both MFish and DoC propose to address this issue yet this is fundamental to any changes in access to the marine environment.

119. Given the scale of this project there could widespread depletion, which is contrary to the objectives of this project and also the sustainability provisions of current legislation.

120. Depending on the area and restrictions, cuts in harvest levels will need to be considered. This has not been discussed in the *MPA Draft Classification*. Neither has there been any conversation regarding how and who will take the necessary reductions.

Compensation

121. It is ironic we are again discussing compensation so soon after responding in February 2007 to MFish' *Shared Fisheries* discussion paper on compensation.

122. It would be untenable to consider that widespread closures or restrictions would occur without some consideration of compensation. The difficulty arises when determining who requires compensating for loss of access.

123. Under the QMS commercial fishers have an individual right to harvest fish within the total allowable commercial catch (TACC). This is defined as individual transferable quota (ITQ).

124. Non-commercial fishing rights are not quota under the fisheries legislation and are not 'allocated' like commercial quota.

125. As Justice Harrison ruled in the Kahawai Legal Challenge decision, it is open to the Fisheries Minister to set the TACC at zero but not the allowance for recreational fishers.

126. That is because section 21 of the Fisheries Act 1996 directs the Minister to 'allow for' non-commercial fishing interests, both customary and amateur (recreational) before setting or varying the TACC.

127. This raises the following questions:

- If there are to be widespread closures or restrictions will commercial fishers be first to lose access to our fisheries?
- If so, what, how and when will they be compensated?
- If non-commercial fishers are to be displaced, how will that work?
- Will customary fishers have priority over amateur fishers or vice versa?

128. These concerns cause tension in and alienate coastal communities, and do nothing for enhancing protection of our fisheries and marine environment. An essential pre-requisite to successful marine protection is tangata whenua and local communities working together for a common cause – more fish in the water.

129. And further questions:

- What right has DoC and MFish to tell tangata whenua not to fish within their own rohe?
- If compensation is to be given to non-commercial fishers, how will that process operate?
- Will customary fishers have priority to compensation? If so, how?
- Will amateur fishers take precedence when deciding on compensation? If so, how?
- How do DoC and MFish propose to compensate non-commercial fishers given the collective nature of our harvesting rights?

130. Because of the individual nature of commercial harvesting rights in quota, the issue of compensation to commercial fishers is not as complex as for non-commercial fishers.

131. Any conversations or proposals about limiting access must be preceded with answers to these and other questions surrounding loss of access and compensation.

Resourcing

132. There is no acknowledgement in the *MPA Draft Classification* of the mismatch of resourcing for different fisheries management and marine protection mechanisms.

133. To date most biodiversity dollars have been spent on marine reserve initiatives with little or no resourcing for public education, awareness and support to implement customary management tools. Evidence of this can be seen when comparing the budgets of both DoC and MFish with the well-intentioned voluntary local groups striving to implement measures that will address localised depletion and habitat degradation issues.

134. In 2006 the Government set aside $2 million for the implementation of the MPA Strategy over the following four years[8].

[8] New funding to plan fisheries management, pre-budget announcement, Jim Anderton, 15th May 2006.

135. DoC has spent millions of dollars on no-take forever marine reserves and there is very little evidence of the $12 million appropriated for Maori over the past few years, in the fisheries budget. The MFish funds were to provide for the input and participation of tangata whenua into fisheries management, as per section 12 (1) (b) obligations of the Fisheries Act 1996.

136. As already mentioned, the Crown has a statutory obligation to provide for the input and participation of tangata whenua into fisheries management sustainability measures and to assist Maori to initiate customary management tools. There has been inadequate resourcing and encouragement given to date to tangata whenua to explain how the customary management tools can be put into effect, and how they work in practice.

137. This in turn leads to a 'race for space', namely the first applicant in the queue gets to be the kaitiaki (guardian) of the best part of the coastline or rohe moana, and the most resourcing. The outright winner in this race has tended to be DoC forcing through marine reserve proposals, not mataitai or taiapure applications by iwi and hapu.

138. On the one hand MFish talks with tangata whenua about gazetting rohe moana as a precursor to implementing customary area management, whereas on the other hand DoC may be seeking a marine reserve for the same rohe. All this while both departments are pursuing the *MPA Draft Classification*.

139. The consequences of this fragmented approach is the lack of recognition of rangatiratanga and the subsequent inability of tangata whenua to exercise their rights as kaitaiki and also disaffected coastal communities. An example of the struggle to implement customary management is available in Appendix Two.

Classification process

140. The submitters recognise the *MPA Draft Classification* is an attempt by government to address long-standing objections to the ad-hoc approach taken to marine protection in the past. However, the Classification aspects were developed by an 'expert' workshop and did not include other interest groups such as non-commercial fishing interests.

141. It is also our understanding that modifications were made to the workshop's findings by government officials prior to the release of the *MPA Draft Classification* document. The draft document does not fully explain why there is an inshore/offshore delineation, how the 13 bioregions were agreed upon and whether the habitats identified are appropriate.

142. The type of investigation suggested in the *MPA Draft Classification* document seems endless and vague and this a major concern for under-resourced non-commercial fishing interest groups.

143. Identifying the species, the interrelatedness and interconnectedness of the fish, marine creatures, organisms and plants in our marine environment will go a long way to addressing the concerns and the appropriate steps to be taken.

144. However a more holistic approach needs to be taken to address the 'gaps' in current marine protection. Just as fisheries cannot be considered in isolation from the environment in which they live, so too area management cannot be considered in a vacuum.

145. An all-encompassing approach expressed in kaitiakitanga is required to both meet the Crown's statutory obligations and to ensure the 'religious parts' of the Fisheries Act are fully satisfied. Of the tools suggested to achieve MPAs, only one has a Maori kaupapa (theme) and that is rahui.

Selection process for MPAs

146. The *MPA Draft Classification* proposes that once the classification process is completed for the nearshore area and the 'gaps' in the protection network are identified, regional forums will decide which areas warrant protection, the appropriate marine protection tool and the priority of implementation of the tool or mechanism selected.

147. MFish and DoC will jointly resource and provide information to regional forums. Offshore areas will be planned at a national level with tangata whenua and other interest groups.

148. Composition of the regional forums will be tangata whenua, other marine users and representatives of diving, fishing and environmental groups and selection is likely to be keenly watched.

149. Our understanding of the only operational forum – the South Island West Coast Forum – is that the process has been haphazard, is controlled by DoC and the Forum's decisions are not binding. This has not proved to be a good recipe for successful decision-making. A scenario of this nature has the potential to marginalise or exclude non-commercial interest groups who are often under-resourced and have limited advocacy capacity.

150. Amateur fishers will need to keep up with the issues and information on all proposals and be wary of being asked to give approvals with limited mandate (especially for marine reserves) on behalf of communities.

151. Without a national, integrated approach to marine protection regional forums could become involved in endless debate about aspects of the classification approach rather than mechanisms that need to be applied to different areas to achieve the desired outcomes.

152. This fragmented approach would just perpetuate the current situation where conflict increases, relationships are strained and little is achieved. The potential would then exist for DoC and MFish personnel to direct the outcome, which is contrary to a more inclusive process.

153. Inconsistent application of the MPA Standards and Classification Standards may occur, as regional forums develop at different rates around the country, hence it is important to have clear guidelines and adequate information available to the forums. The submitters do not consider the *MPA Draft Classification* document provides that clarity.

154. Another example of the inconsistent approach is the experience of the Hokianga Accord. At the August 2007 hui held at Whakamaharatanga marae, Hokianga, a presentation was given describing the *MPA Draft Classification and Protection Standards* process. There was some debate regarding the comprehensive list of tools that may be used to achieve an MPA, as presented to the hui, compared to the limited list found in the public discussion document[9].

[9] http://www.option4.co.nz/Fish_Forums/documents/har807.pdf, pg 45.

155. The vagueness surrounding selection of MPAs is also reflected in the lack of detail about what monitoring programmes will be undertaken. There is no clarity about what actions will be taken if it is found that a particular MPA is not achieving the original management objectives or how that will be addressed.

156. There ought to be clear guidelines describing the MPA review process and if not meeting its objectives how management measures are modified or removed based on the monitoring programme.

Summary and conclusions

157. The *MPA Draft Classification and Protection Standards* document contains significant technical and 'industry' language making it difficult to follow and understand without considerable background knowledge of fisheries management and marine protection issues.

158. For this reason alone the three-month submission period on the fundamental issues of sustainability, and future access rights has proven inadequate. This *MPA Draft Classification* process is not a statutory process therefore it is only reasonable that DoC and MFish ought to have allowed more time for interest groups to discuss, consider and incorporate feedback into our submissions in order to achieve good process with those we represent.

159. The submitters strongly object to being given insufficient time considering the wide-ranging effects of implementation of the MPA Strategy.

160. The *MPA Draft Classification* makes a number of assumptions on fisheries management and marine protection including that:

- MFish will manage our fisheries sustainably;
- Our fisheries and marine environment need further protection from the effects of fishing; and
- DoC will attend to protecting marine biodiversity; and
- The existing legislative MPA tools are adequate and will be implemented successfully; and
- The MPA tools will be selected from a multiple-choice list provided by MFish and DoC but it appears principally to be marine reserves.

161. This without explaining:

- The Crown's statutory obligations to both tangata whenua and the public in fisheries management processes;
- The well settled common law right of all New Zealander to fish to provide for their needs; and
- The property rights regime of commercial fishing.

162. Utilisation of our fisheries whilst ensuring sustainability and kaitiakitanga of our fisheries and marine environment requires a like-minded approach from fisheries managers and users. Hand in hand with this is adequate resourcing for tangata whenua and amateur fishers to ensure robust decisions that achieve the purpose of current legislation.

163. The omission in the *MPA Draft Classification* to recognise the value and contribution that customary management can make to the marine environment is, in the submitters view, a serious oversight in the MPA strategy.

164. The customary management tools are now the only mechanisms available to tangata whenua to manage areas on a scale of interest to hapu and local coastal communities. The wider community often benefit from the implementation of these customary tools yet both MFish and DoC have done little to educate the public about them. Both departments' approach must change if we are to implement effective long-term solutions to protect our marine environment and rebuild the fisheries sustained within them.

165. Maintaining marine biodiversity is accepted as an important management aim. Kaitiakitanga expressed in existing measures such as taiapure, mataitai and rahui are able to address marine biodiversity goals, as biodiversity does not need a virgin or pristine marine environment in order to exist.

166. Given the inability of MFish to implement the Fisheries Act 1996 as intended over the past twenty-one years and the purpose of marine reserves, which is to set aside specific areas for scientific study, this multi-agency project seems an ambitious attempt to confiscate traditional fishing areas and displace that fishing effort into open access areas, without acknowledging the impact of increased fishing effort in surrounding areas.

167. If implemented as suggested, the MPA process could be used to deny New Zealanders access to a food source of social, economic and cultural value. With increasing obesity amongst the population, access to traditional sources of kai moana must be maintained. Tangata whenua and local communities want DoC and MFish to assist them to replenish the fisheries not confiscate traditional sources of food from New Zealanders.

168. The need for no-take forever marine reserves is minimal and should be considered as the most extreme form of marine management. Marine reserves will never succeed as a 'holy decree' therefore community agreement has to be achieved for them to be successful.

169. It would be untenable to consider that widespread closures or restrictions would occur without some consideration of compensation. The difficulty arises when determining who requires compensating for loss of access. The nature of the rights belonging to the different fishing sectors adds a complexity which has not been discussed in the *MPA Draft Classification* document.

170. The majority of biodiversity funding has been spent on marine reserve initiatives with little or no resourcing for customary management tools enabling community involvement. This imbalance needs to be addressed if long-term solutions to marine protection are sought.

171. All those involved in the MPA process, including DoC and MFish, will need to ensure that local communities appreciate and understand the rationale for marine reserves – for scientific study - and other forms of marine protection, how they work and how they fit into the overall fisheries management jigsaw puzzle.

172. The submitters desire is for healthy and abundant fisheries and a marine environment producing "more fish in the water/ kia maha atu nga ika i roto i te wai" in order to provide for all New Zealander's wellbeing and for tomorrow's mokopuna (grandchildren).

173. Over the past few years the submitters have actively promoted kaitiakitanga as a uniquely Aoteoroa/New Zealand way to provide abundance for present and future generations of all New Zealanders in the form of the customary tools and mechanisms.

174. The *MPA Draft Classification* process appears to be a long-winded way to try and justify huge marine reserve networks and is not necessary to achieve protection of representative habitats.

The joint submitters appreciate the opportunity to make comment on the MPA Draft Classification and Protection Standards document and wish to be kept informed of future developments.

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Appendix One - Crown's Obligations to Maori

Introduction

In June 2007, the Ministry of Fisheries (MFish) and the Department of Conservation (DoC) released the MPA Draft Classification and Standards document (MPA Draft Classification).

MFish and DoC propose to use current legislation to implement the Marine Protected Areas policy (MPA policy). The *MPA Draft Classification* document refers to the Resource Management Act 1991, the Marine Reserves Act 1971 and the Fisheries Act 1996.

It is not clear how the proposed policy fits within the relevant legislation.

Resource Management Act 1991 (RMA)
Purpose - to promote the sustainable management of natural and physical resources.

Marine Reserves Act 1971 (MRA)
Purpose - to set apart and manage areas of the sea and foreshore as marine reserves for the purpose of preserving them in their natural state as the habitat of marine life for scientific study in the national interest.

This purpose is more aligned with the MPA Strategy and is possibly an indicator of the major tool to be used to achieve the project's goals.

Fisheries Act 1996 (Fisheries Act)
Purpose - to provide for the utilisation of fisheries resources while ensuring sustainability.

The *MPA Draft Classification* document explains how MFish manage fishing. Predictably there is no discussion of MFish' failure of to implement the Fisheries Act to fulfill its purpose of sustainable utilisation to enable people to provide for their social, economic and cultural wellbeing.

Discussion of the role of the practice of kaitiakitanga (guardianship) in fisheries management and marine protection is also absent from the *MPA Draft Classification*.

More particularly there is no recognition or explanation of the Crown's obligation to have particular regard to kaitiakitanga, as the Minister of Fisheries must do when considering a sustainability measure[10].

As a consequence, the *MPA Draft Classification* gives little regard to the rights of guardianship conferred by statute on tangata whenua as kaitiaki of their rohe moana (marine area), which is expressed in the tikanga (principle) of kaitiakitanga.

There is only a brief mention in the *MPA Draft Classification* document of customary fishing and traditional area management tools, which are all legitimate mechanisms designed to achieve the sustainable utilisation purpose of the Fisheries Act.

Any limitation of access to kai moana as a consequence of the implementation of the MPA Strategy will have a significant and detrimental impact on Maori non-commercial fishing interests for this and

[10] Fisheries Act 1996, section 12 (1).

future generations. Therefore tangata whenua must have a key role in the *MPA Draft Classification* discussions.

Most importantly, the Ministers of Fisheries and Conservation need to develop mechanisms that enable the legislation regarding tangata whenua's interest in fisheries and their rohe moana (marine area) to be given full effect. Any delays in providing for these interests will mean new grievances are likely to emerge and any redress will be expensive.

National and International Obligations

Section 4 of the Conservation Act 1987 states the Act "should be so interpreted and administered as to give effect to the principles of the Treaty of Waitangi". Therefore the Crown must act in accordance with the principles of partnership, of active protection and the principle of redress.

In the context of fisheries management the Crown has specific obligations to tangata whenua as contained in section 10 of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992, the Fisheries (Kaimoana Customary Fishing) Regulations 1998, the Fisheries (South Island Customary Fishing) Regulations 1999 and sections five and twelve of the Fisheries Act 1996.

Fisheries Act 1996

Section 5 of the Fisheries Act directs any person making decisions under the Act to act in a manner consistent with the provisions of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992, and New Zealand's international obligations relating to fishing.

Under section 21, contained in Part 4 of the Act relating to the quota management system (QMS), the Minister is directed to 'allow for' Maori customary non-commercial fishing interests, recreational interests and all fishing related mortality when setting or varying a total allowable commercial catch (TACC).

The purpose of the Act is contained in section 8, and the principles in sections 9 (environmental principles) and 10 (information principles).

Purpose - section 8

The purpose of the Act is to provide for:

- The **utilisation** of fisheries resources
  conserving, using, enhancing and developing fisheries resources to enable people to provide for their social, economic and cultural wellbeing,

While

- **Ensuring sustainability**
  - maintaining the potential of fisheries resources to meet the reasonably foreseeable needs of future generations;
  - avoiding, remedying, or mitigating any adverse effects of fishing on the aquatic environment.

In March 2007 the High Court described wellbeing as "the state of people's health or physical welfare".

'Ensuring sustainability' is not just a short-term issue but goes well beyond our lifetimes.

Environmental principles – section 9

This section requires decision makers to take into account:

- Associated or dependent species should be maintained above a level the ensures their long-term viability;
- Maintenance of biological diversity;
- Protection of habitat of particular significance for fisheries management.

Information principles – section 10

This section requires decision makers to take into account:

- The best available information;
- Uncertainty in the available information;
- Be cautious when information is uncertain, unreliable or inadequate;
- The absence of, or any uncertainty in, any information not to be used as a reason for postponing or failing to take any measure to achieve the purpose of the Fisheries Act.

Sustainability measures – section 13

Setting or varying the total allowable catch (TAC) is a sustainability measure under section 13 of the Fisheries Act.

What the Departments omit to explain in the *MPA Draft Classification* document is that the Fisheries Act specifically provides for the:

- 'Input and participation' of tangata whenua into fisheries management processes – sustainability measures, in particular contained in Part 3 of the Act; and
- Statutory obligation of the Minister of Fisheries to have particular regard to kaitiakitanga when making decisions on sustainability measures.

Sustainability measures are those fisheries management decisions that relate to setting or varying catch limits for fisheries to ensure their long-term viability to achieve the Act's purpose.

Generally MFish conduct two 'sustainability rounds' per annum and carry out ongoing management processes and research functions throughout the year.

The goal of sustainable utilisation was confirmed in the March 2007 High Court ruling on kahawai. At the conclusion of the judicial review of the Minister's 2004 and 2005 kahawai decisions Justice Rhys Harrison stated that on plain reading of s8 the bottom line is sustainability. That must be the Minister's ultimate objective. Without it, there will eventually be no utilisation[11].

[11] CIV-2005-404-44495 heard on 6, 7 and 9 November, and 11 December 2006, para. 17.

Section 12 of the Fisheries Act 1996

Meaningful input

Section 12 provides that, before giving any approval or carrying out any functions in relation to sustainability measures the Minister shall - there is no discretion - provide for the input and participation of tangata whenua and consult widely.

"(1) Before doing anything under any of (the sustainability measures sections) the Minister shall:

a. **Consult** with such persons or organisations as the Minister considers are representative of those classes of persons having an interest in the stock or the effects of fishing on the aquatic environment in the area concerned, including Maori, environmental, commercial, and recreational interests; and

b. Provide for the **input and participation of tangata whenua** having—

i. a non-commercial interest in the stock concerned; or

ii. an interest in the effects of fishing on the aquatic environment in the area concerned—

and **have particular regard to kaitiakitanga.**

The obligations to both consult and provide for the input and participation put in place a two-layered requirement on the Minister regarding the proposed sustainability measures, namely, the Minister must:

- Consult and engage with a wide group of interests;
- Make the necessary arrangements, including adequate resourcing, to provide for the input and participation of tangata whenua; and

Have particular regard to kaitiakitanga.

Consultation – section 12

The courts have considered the term "consultation[12]" and although not defined in the Fisheries Act it is defined in at least one other statute (the Local Government Act). In broad terms 'consultation' has to be a meaningful engagement with an open mind, not merely an offer of a proposal and disregarding people's responses.

In 2001 MFish published a paper entitled "Section 12: Consultation[13]" (MFish' section 12 paper) where this meaning of 'consultation' was referred to.

Interestingly, at various Hokianga Accord hui held since mid-2005 Ngapuhi, the largest iwi in the country, and Ngati Whatua have both confirmed that neither iwi has been:

- Consulted on proposed sustainability measures at the formative stage of a proposal; or,
- Offered any (let alone adequate) resourcing to enable proper and meaningful input and participation in the development of fisheries management sustainability measures[14],

[12] Wellington International Airport Limited and others v Air New Zealand (CA 23/92, 73/92[1993] 1 NZLR 671)
[13] Section 12: Consultation, October 2001. http://www.option4.co.nz/pdf/s12%20MOF.pdf
[14] http://www.HokiangaAccord.co.nz

- as the Minister is obliged by section 12 to do.

For financial reasons, MFish has sought to make provision for input and participation on some sustainability proposals on a collective basis – more than one iwi and/or hapu – by helping to establish regional iwi customary forums. However, MFish has not clarified its criteria for iwi and/or hapu to qualify for MFish recognition as a regional iwi customary forum.

At this stage, actions taken by MFish in relation to sustainability measures appear to fall well short of:

- Any statement by MFish to iwi/hapu on a proposed sustainability measure that MFish will enable the provision of input and participation on that proposed sustainability measure - on all aspects of their non-commercial interests being customary, recreational and environmental;
- Including the necessary resourcing to do so.

Input and Participation – section 12

Provide for

This suggests:

- Positive steps or actions that need to be taken;
- Adequate resourcing.

Input and participation

This must include:

- The contribution of tangata whenua in formulating the sustainability proposal;
- The act of taking part or being involved in the process to which the proposal relates.

Contrasted with consultation after the issues have been identified, discussed and confirmed, input and participation means being involved in the formulation of a proposal.

Apart from statements made in various MFish plans (the five-year and ten-year plan) of the need to involve tangata whenua in decision-making processes, to date it appears that MFish has not yet developed a substantive policy on what MFish considers input and participation means.

The Hokianga Accord, the mid-north – Te Tai Tokerau - regional iwi fisheries forum established by Ngapuhi and Ngati Whatua in 2005 has experienced this lack of clarity first hand despite efforts in dialogue with MFish to ascertain just how MFish would provide for input and participation – whether in money or other resources - on proposed sustainability measures.

Tangata whenua having a non-commercial interest – section 12

All things on our earth are interconnected and environmental issues play a big role in the success of customary and recreational fishing. By Tikanga Maori (Maori principles or custom) and the practice of kaitiakitanga (guardianship/stewardship) tangata whenua have for centuries developed ways of people living as one and in harmony with the land and sea to provide and ensure abundance for the ongoing health of the people.

The lack of input and participation of tangata whenua, consultation and consideration of kaitiakitanga has meant there is very little evidence of Tikanga Maori in fisheries management processes.

Kaitiakitanga as best practice

The tikanga of kaitiakitanga and term rohe moana are conspicuous by their absence in the *MPA Draft Classification.*

Maori have a long association with the sea which is a very important part of their spiritual and cultural history. Most importantly it is an ongoing source of kai moana (seafood) which Maori have traditionally had reliably available to them to use for special gathering on the marae or feeding their whanau (families). The importance is such that Maori have ensured, since the signing of the Treaty of Waitangi, that kaitiakitanga has been built into numerous regulations concerning the sea and coastal areas.

Kaitiakitanga, the legislation and regulations that currently support it, is seen as delivering a very important component of the Treaty of Waitangi that enables Maori to have the ability to manage the marine resources in localised regions to enable them to achieve, as a minimum, their customary rights and traditional ability to successfully gather food for sustenance.

Kaitiakitanga is defined in s 2 (1) of the Fisheries Act as,

> "The exercise of guardianship; and, in relation to any fisheries resources, includes the ethic of stewardship based on the nature of the resources, as exercised by the appropriate tangata whenua in accordance with tikanga Maori."

The Reverend Maori Marsden explains kaitiakitanga as:

> "The word used by Maori to define conservation customs and traditions, including its purpose and means, through rahui".

Kaitiakitanga means and implies far more than just fisheries management. Kaitiakitanga is a way of life and an expression of what mother earth means to tangata whenua. For this reason alone the apparent reluctance by MFish to date to provide for the input and participation by tangata whenua, as required by section 12, is of concern.

Most of the options available to give effect to achieving kaitiakitanga have been eroded in effectiveness by the lack of resources available to tangata whenua to implement Maori customary management tools and also the priority given to competing legislation that affects the same water space.

Tangata whenua and local communities need to be given the opportunity to prove that kaitiakitanga can be best practice.

Customary management and marine reserves

The centuries-old tikanga of kaitiakitanga is, by its very nature, flexible management allowing for a variation in harvesting seasons based on prevailing conditions.

'Kaitiakitanga' involving mana, tradition, the passing down of knowledge and community involvement associated with customary and traditional fishing to provide abundance, whilst nurturing the land and sea that feeds people.

Mataitai, taiapure and rahui involve tangata whenua and local communities and are designed to achieve the purpose of the Fisheries Act, which is sustainable utilisation of the fisheries and marine environment to enable people to provide for their wellbeing.

Rahui was designed to prohibit the exploitation, depletion or degeneration of a resource and the pollution of the environment[15].

MPA Draft Classification describe customary tools as:

> "A range of fisheries management tools may contribute to the MPA network, including customary fisheries management tools like mataitai reserves and taiapure. However, these tools provide for customary Maori use and management practices rather than protection of biodiversity at the habitat and ecosystem level.[16]"

This:

- Assumes that the *MPA Draft Classification* process is the preferred approach towards marine protection to which other mechanisms may contribute;
- Assumes that customary and community management and biodiversity protection are mutually exclusive;
- Down plays the role of customary tools and mechanisms, mataitai reserves, taiapure and rahui as community-based means of marine protection, where local communities and tangata whenua work together in protecting our fisheries, marine habitats and our communities.

Essentially both DoC and MFish have disregarded kaitiakitanga in lieu of permanent closures in the form of marine reserves and by doing so they are denying any extractive fishing whether that is controlled customary or amateur fishing.

Without support from tangata whenua and the community marine reserves are an inappropriate tool to achieve the sustainable utilisation purpose of the Fisheries Act to enable people to provide for their social, economic and cultural wellbeing.

Moreover, unless tangata whenua expressly agree to a marine reserve, the net effect is that tangata whenua would be alienated from their rohe moana and their most fundamental rights and obligations as rangatiratanga and kaitiaki.

Summary

The intention of ensuring sustainability is to have "more fish in the water/ kia maha atu nga ika i roto i te wai" in order to provide for people's wellbeing and for tomorrow's mokopuna.

The Treaty of Waitangi 1840, the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992, the Fisheries Act 1996 and the Conservation Act 1987 all confer specific rights and privileges to tangata whenua in relation to non-commercial fishing interests.

Section 12 specifically requires the Fisheries Minister to consult with and provide for tangata whenua's non-commercial interest in sustainability measures and the aquatic environment. Clearly successive Ministers have failed to deliver on this statutory obligation.

In omitting any reference to kaitiakitanga in the *MPA Draft Classification* both MFish and DoC have demonstrated poor judgment and given little regard to Tikanga Maori.

[15] Kaitiakitanga: A Definitive Introduction to the Holistic World View of the Maori, Rev. Maori Marsden, November 1992, page 19.
[16] http://www.fish.govt.nz/en-nz/Environmental/Seabed+Protection+and+Research/MPA/QandA.htm#16

Any limitation of access to kai moana as a consequence of the implementation of the MPA Strategy will have a significant and detrimental impact on Maori non-commercial fishing interests for this and future generations; therefore tangata whenua must have a key role in the *MPA Draft Classification* discussions.

Most importantly, the Ministers of Fisheries and Conservation must develop mechanisms that enable the legislation regarding tangata whenua's interest in fisheries to be given full effect. Any delays in providing for these interests will mean new grievances are likely to emerge and any redress will be expensive.

Appendix Two – Marangai Taiamai management plan

Ngati Rehia, tangata whenua of the northern Bay of Islands, have been trying to implement local marine management measures since the 1990's, with little success. Bay of Islands kaitiaki led by Judah Heihei have been deeply affected by the inability of government agencies, both the Ministry of Fisheries and Department of Conservation, to empower tangata whenua to implement the Marangai Taiamai Management Plan. Indifference to the Crown's statutory obligations to tangata whenua seems to be a common denominator when the MFish and DoC's historical patterns of behaviour are examined in more detail.

Background

Inside the Bay of Islands the Te Puna and Kerikeri Inlets historically had good supplies of oysters, pipi, flounder, mullet, john dory and snapper. Kina and mussels were also a common harvest in the area. Over the past ten to twenty years shellfish abundance has been variable and finfish numbers have declined.

There was a lack of funding to conduct any research into the causes of this depletion but the kaitiaki suspected most of the decline was attributable to farm run-off, sedimentation and discharges into local waterways. The lack of research makes these assertions hard to prove but there is no doubt about the lack of kai moana in these inlets.

Problem Identification

By the late 1990's Bay of Islands locals decided they needed to address the depletion and ongoing absence of MFish enforcement to encourage compliance with the fisheries rules. Ngati Rehia were very frustrated by MFish' slow response to reports of offences being committed. This lack of enforcement has allowed people to abuse the resource by taking more than what was required to feed their whanau.

In 1998 MFish suggested either a taiapure or mahinga mataitai would be a way to address Ngati Rehia's concerns.

The Challenge

There are thirteen hapu and ten marae within the Ngati Rehia rohe moana. It was a challenge to achieve agreement from all thirteen hapu but they eventually agreed to a mataitai plan for their rohe. The next challenge was trying to follow the interim MFish guidelines for mataitai establishment.

It was disappointing for Ngati Rehia, after going through the establishment process, to reach the stage of requiring resources for public consultation to find that MFish "disappeared".

The group's understanding is that MFish realised it was going to cost much more than what they envisaged to complete the plan so MFish decided they did not want to continue supporting the project. MFish never explained the reasons why they withdrew from the process but Ngati Rehia were left feeling "stranded".

Public Education

Since the late 1990's there has been little support from MFish to assist the implementation of the Marangai Taiamai Management Plan and no resourcing to increase public awareness or understanding of the benefits that kaitiakitanga (guardianship) can bring for the whole community.

Ngati Rehia's biggest challenge now is to educate the public, both Maori and non-Maori, about the benefits of customary management tools such as a mataitai. The realisation that this is necessary before trying to implement their mataitai plan has made them very conscious of what their next moves will be.

Ngati Rehia Aspirations

Sadly many of the original Ngati Rehia kaitiaki have lost hope of ever achieving active, local management for their rohe. However, Judah Heihei, Aro and Hugh Rahiri, Alan Munro, Joe Bristowe and their team are committed to achieving a better outcome for the northern Bay of Islands.

Ngati Rehia's rohe moana extends over the northern Bay of Islands so their management plan does not apply to the entire Bay. Ngati Kuta is still completing their rohe moana gazetting process for the southern area. Ngati Rehia hoped all Maori from the Bay would work together to protect the moana (sea) and enhance the fisheries for future generations.

Local Input

A highlight for Ngati Rehia had been their participation in Hokianga Accord hui. Being part of the mid north iwi fisheries forum was a unique opportunity to talk, debate and formulate plans with like-minded people of Maori and non-Maori descent.

Their management committee welcomed the support of the Hokianga Accord and in particular the boating and fishing representatives from the Bay of Islands area, to assist in the task of educating the public on the benefits of a mataitai and what could be achieved through Maori and non-Maori working together.

Ngati Rehia realised it was important for Maori to give the local community an opportunity to have some input into the mataitai, so they would feel they were part of it. The big selling points would be the ability to exclude commercial fishing and also that it would be a counter to DoC's marine reserve strategy.

It was clear that some non-Maori were beginning to understand tangata whenua's needs and the potential of working together to achieve good outcomes for all. The Department of Conservation had helped in this regard with their persistence of imposing marine reserves on coastal communities.

Many people were now more aware that other management tools could protect the marine environment without limiting tangata whenua's ability to exercise their customary rights. It was up to tangata whenua, local communities and groups such as the Hokianga Accord to educate the public, as the Ministry of Fisheries or Department of Conservation did not seem to have any intention of fulfilling that need despite the Crown's statutory obligations being confirmed in numerous pieces of legislation.