Marine Reserves Protocol

Department of Conservation

and

Ministry of Fisheries

August 2003

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1. INTRODUCTION

1 The Department of Conservation ("the Department") and the Ministry of Fisheries ("the Ministry") have developed this protocol ("the Protocol") to assist with interactions between the Department and the Ministry (together "the Agencies") in the consideration of applications for the creation of a marine reserve. The Protocol relates to proposals which progress to applications under s 5 of the Marine Reserves Act 1971 ("the Act").

2 The Protocol outlines the process the Agencies will follow to process marine reserve applications. The collaborative efforts of the Agencies are not intended to be a substitute for the requirement for each Agency to provide independent advice to its Minister.

3 The Protocol has been devised to meet the process requirements of the Marine Reserves Act 1971 and will, from time to time, need to be modified to the extent required to give effect to any new legislative or policy requirements. In particular the implementation of an oceans policy and marine protected area strategy may require the protocol to be modified.

4 This Protocol conforms to the August 1997 Protocol Agreement between the Agencies. This new Protocol, as with the 1997 protocol, is designed to promote open and honest communication, integrity, and professionalism in each agency's dealing with the other. It is designed for good faith and positive joint efforts to achieve the goals of the Government in marine protected areas.

2. MATTERS COVERED BY THE PROTOCOL

5 The matters covered by the Protocol are:

- the basis for interaction and communication between the Agencies
- a description of the planning process to be adopted by the Agencies for marine reserve applications
- a description of the applicable legal tests
- standards that will apply to relationships with tangata whenua, assessment and use of information, effects on fishing and assessment of site values
- an agreed process for considering marine reserve applications (attached as appendix)

3. INTERACTION BETWEEN THE AGENCIES

6 The Agencies agree to maintain open and clear lines of communication, and to work in a collaborative manner, adopting a "no surprises" policy - that there should be full and frank exchange of relevant information at all times.

7 Progress reports on any current applications are to be completed by the appropriate office staff of each Agency and communicated to designated head office/regional office officials of each Agency as agreed.

8 Staff will attempt to find a solution to differences in approaches and views by direct discussion and inter-agency meetings.

9 If there is uncertainty about of any part of the process developed to deal with marine reserve applications that uncertainty should be clarified as soon as possible. If agreement cannot be reached by any other means, the matter in dispute should be referred as soon as possible to the Ministry of Fisheries/Department of Conservation Officials Committee.

10 The Agencies acknowledge that resource and time constraints applicable to each Agency need to be taken into account when considering marine reserve applications.

11 The agencies will make a joint approach to Crown Law to resolve any critical legal issues that are not mutually agreed.

12 The Agencies retain their respective abilities to provide independent advice to their Ministers, keeping the other Agency informed of such advice.

4. PLANNING PROCESS

13 A project plan for each marine reserve application, where the Department is the proponent/applicant ("the Project Plan") must be developed by one official from each Agency when each potential site is selected.

14 The Project Plan must include:

- the timeframe for undertaking the steps in the process
- the designated officials from the Agencies who will be responsible for the implementation of the Project Plans

15 The Agencies agree to establish a combined national planning forum to look at current and future resourcing requirements on a six-monthly basis, to be convened by the Department.

16 A six-monthly plan which identifies progress and upcoming work on current applications and the potential number and location of future Departmental and known external applications within the next six months will be presented at the planning forum.

17 To the extent possible, the Agencies shall agree to the level of resources that each Agency shall direct to each marine reserve proposal or application.

5. AGREEMENT TO LEGAL TESTS

18 The Agencies agree to apply a common understanding of the legal tests used to assess marine reserve applications, based on statutory requirements and judicial comment on:

- decision-making process for Ministers
- meaning of "undue"
- relevance of threats and risk to the proposed area

5.1 Decision-making Process

19 Under the Act the Minister of Conservation must:

- make a decision on the objections raised in terms of s 5(6) of the Act, and then, if he decides not to uphold any objection, consider the merits of the application in terms of s 5(9) of the Act
- if no objections are upheld and the Minister considers the application has merit, request the concurrence of the Minister of Fisheries
- once concurrence is requested the Minister of Fisheries must make a decision whether or not to concur with the recommendation of the Minister of Conservation to the Governor General that the area be declared a marine reserve

20 The Minister of Fisheries is required to undertake an independent analysis of the same statutory criteria that the Minister of Conservation considers in assessment of the application. The Minister should consider any objections raised in terms of s 5(6) of the Act, and the merits of the application in terms of s 5(9) of the Act.

21 Section 5(6) of the Act requires each Minister to satisfy him or herself that declaring the area a marine reserve would not interfere unduly with: any estate or interest in land in or adjoining the proposed reserve; any existing right of navigation; commercial fishing; or adversely affect any existing usage of the area for recreational purposes; or that the marine reserve would not otherwise be contrary to the public interest.

22 The agencies acknowledge that the Minister of Fisheries is primarily concerned with fishing matters.

5.2 Meaning of "undue"

23 The meaning of "undue" can be defined in the following ways:

- "Undue" implies "without due cause or justification ... more than is warranted".
- "Undue" also means "unjustified" in a qualitative sense, a sense of impropriety.

- "Undue" does not mean significant.
- The test requires a balancing of the effect against the other values involved.
- Whether interference will be "undue" requires a value judgment. It is a value judgment which is both quantitative (how much) and qualitative (is the degree of interference worthwhile) (CRA 3, High Court judgment para 23).

5.3 Relevance of Threats and Risk to the Proposed Area

24 Whether or not the marine area that is the subject of an application is under threat or at risk of destruction is not a consideration relevant to s 3 of the Act. Threat or risk may be important in determining priority for action in progressing applications.

6. AGREED STANDARDS

25 The Agencies have agreed to adopt common standards in respect of:

- relationship with tangata whenua
- consultation
- information
- undue interference with fishing interests
- assessment of values associated with site

6.1 Relationship with Tangata Whenua

26 The Act is to be interpreted and administered in such a way as to give effect to the principles of the Treaty of Waitangi.

27 Tangata whenua should be given the opportunity to participate and be fully informed throughout the process.

28 The Agencies will work together to identify interested tangata whenua and also be guided by relevant iwi authorities.

29 Consultations are to occur with the recognised representatives of relevant iwi and hapu.

30 The Crown will consult with, and give serious consideration and weight to the views of tangata whenua who claim mana whenua over, and Maori who retain a fishing or other interest in, the area of the proposed marine reserve.

31 The Agencies agree that informing and obtaining the views of Maori about an application is distinct from seeking the support of tangata whenua to an application.

6.2 Consultation

32 The project plan for proposals or applications will identify the scheduling of any planned public meetings.

33 The Agencies shall, where possible, ensure that officials from each agency shall attend any public meeting or hui with tangata whenua to discuss marine protection.

34 If conditions likely to be attached to the Order in Council creating the marine reserve are identified prior to notification of the application, then those conditions should be included in the notified application as notice of later recommendations to the Minister.

35 Any substantial changes made to the notified application, or proposed conditions, shall be devised with the involvement of tangata whenua and any other interested groups.

36 Neither Agency will release draft reports to interest groups without first consulting the other Agency.

6.3 Technical Information Principles

37 The principles below are accepted as being best practice in relation to marine reserve applications.

38 The Agencies accept that appropriate principles to be taken into account by decision makers, include:

- decisions should be based on the best available information in the particular circumstances, without unreasonable cost, effort or time
- decision-makers should consider any uncertainty in the information available in any case and be cautious where information is uncertain, unreliable or inadequate
- the absence of, or any uncertainty in, any information should not be used as a reason for postponing or failing to make a decision unless one or other Minister determines that further information is legally necessary in order to make an informed decision under the Act

39 Technical information should be drawn from suitably qualified and experienced sources including marine geomorphology, biology, bathymetry, oceanography and coastal processes, with costs normally borne by the applicants.

40 The Agencies shall whenever possible seek to reach agreement about the nature and extent of information and research to be obtained, and how such research should be commissioned, conducted and peer reviewed to an agreed process.

41 Each Agency is able to make such relevant enquiries as it deems fit, taking into account whether the information is indispensable for proper decisions and would not cause appreciable delay.

42 Additional surveys and assessments may be undertaken that are deemed warranted and practicable by the particular Agency, which would meet the costs involved, unless otherwise agreed.

43 The Agencies should share all information obtained, unless there are reasons for commercial or cultural confidentiality.

44 All notified applications should be supported by a site survey and investigation appropriate to the site circumstances, derived using personnel with appropriate training and experience, and with a summary of information made available to the public.

45 The Department will promote these information principles to external applicants, and will advise against proceeding with a formal application that is not based on a scientific appraisal of the merits of the site sufficient to satisfy the requirements of s 3 of the Act.

46 In the absence of a site survey and investigation having been undertaken by the applicant and the Department agrees that the application may have merit, it will arrange to have a site investigation undertaken.

47 Where a significant delay has occurred in the process, updated information, may be sought.

6.4 Undue Interference on Fishing Interests

48 Factors to be taken into account by Ministers when assessing the extent of any interference on fishing interests should include, where available:

- the importance of the area to tangata whenua
- the species fished within the area and the quantity caught
- the extent of catch taken by sector
- the number of people by sector who fish in the area
- the availability and accessibility of similar fisheries in the vicinity of the proposed reserve
- the likely social, economic, and cultural costs and benefits of closing an area

49 An assessment of the likely benefits versus the potential interference is required in terms of the meaning of 'undue' as outlined previously. The effect on fishers is to be weighed against the overall public benefit of the proposed reserve. The interference may not be warranted, even though the effect is small, if the reserve has little public benefit or scientific merit. Conversely, the interference may be warranted, even though severe in its effects if the benefits are high.

50 Customary fishing rights do not act as a veto over any decision to establish a marine reserve.

51 The process may result in customary fishing rights being:

- preserved by way of conditions applicable to the area declared a reserve
- preserved by significant customary fishing areas being excluded from the area of the reserve or other measures being considered such as the creation of a mātaitai
- excluded from the area of the reserve where conservation requirements are so significant that no customary fishing is warranted

6.5 Assessment of Habitat and Biodiversity Values

52 The marine area that is the subject of the application must contain underwater scenery, natural features, or marine life, of such distinctive quality, or so typical, or beautiful, or unique its continued preservation is in the national interest, and these natural features need to be determined.

53 Information should, where available, cover:

- bathymetry
- habitat description
- geomorphology
- biology
- current flows
- exposure
- system dynamism
- erosion and sedimentation
- pollution

54 The proposed area may be compared with other existing marine reserves in order to better define replication and uniqueness.

55 The characteristics of the site need to be compared to the surrounding area.

7. AGREED PROCESS

56 The Agencies agree to adopt the process attached to this document as an appendix for consideration of marine reserve applications.

APPENDIX: MARINE RESERVE PROCESS

Outline of Steps

The process outlined below is applicable to a situation where the Department of Conservation is the applicant*. It will be made specific to individual proposals in the project plan.

Part A: Developing a proposal (non-statutory)

Step A1: Identify potential sites and gather information.

Step A2: Discussions held with tangata whenua and other interested parties; preliminary assessment of site suitability.

Step A3: Commission site survey and investigation, and review of site information.

Step A4: Draft proposal released for public comment.

Step A5: Prepare a formal application.

Part B: Making a formal application (statutory)

Step B1: Notification of application.

Step B2: Consultation with interested parties.

Step B3: Answer to objections.

Step B4: Consideration of application and objections by Department.

Step B5: Minister of Conservation considers objections (s 5(6)), then substantive case (s 5(9)).

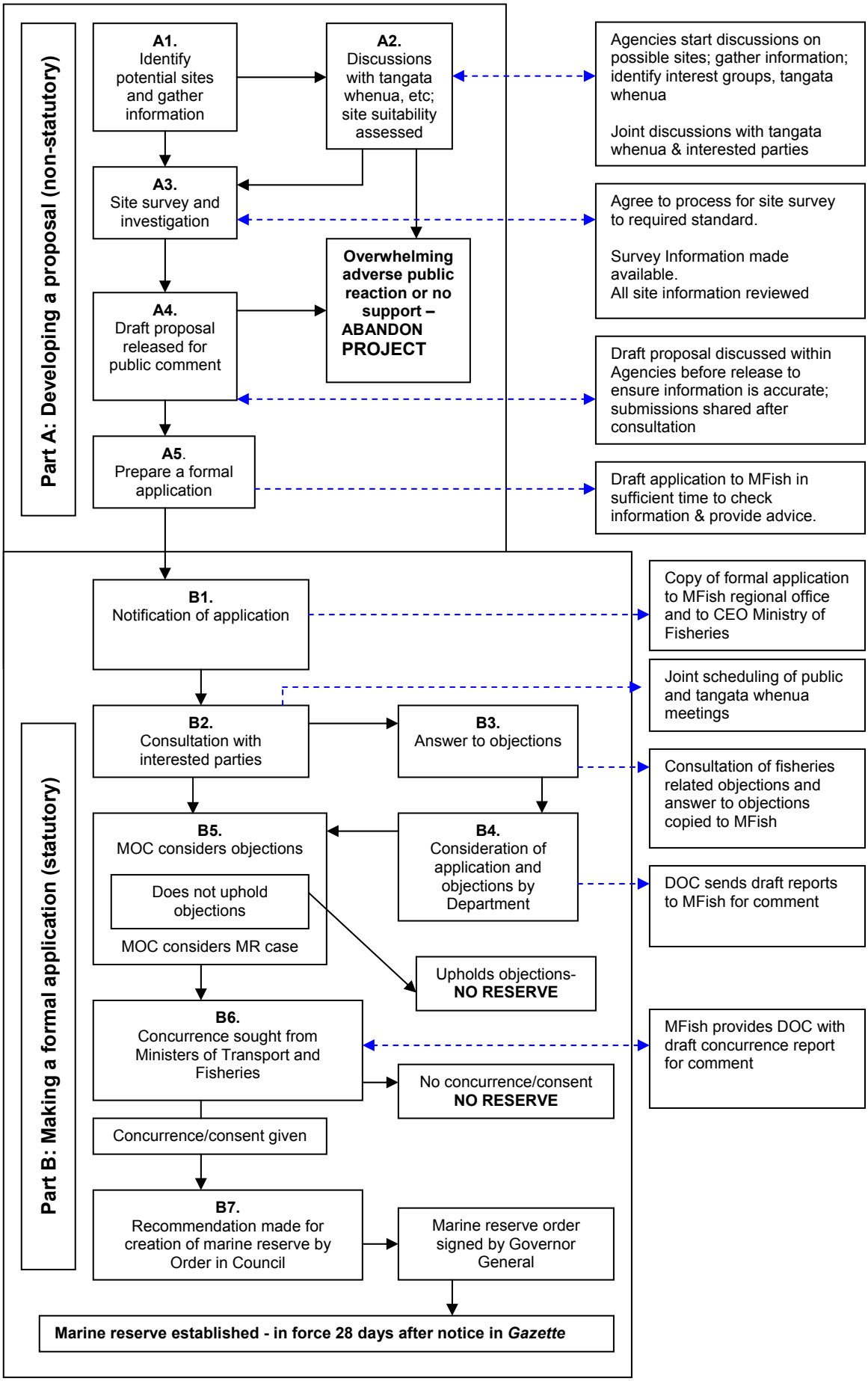
Step B6: Concurrence sought from Ministers of Transport and Fisheries.

Step B7: Recommendation made for creation of marine reserve by Order in Council.

* Where external bodies qualify as applicants, and pursue proposals to develop formal applications, both Agencies should encourage such applicants to follow the standards and process as set out in this protocol.

Diagram: THE MARINE RESERVE PROCESS

Department of Conservation is Applicant: Key Protocol Actions:



PART A: DEVELOPING A PROPOSAL (NON-STATUTORY)

Step A1: Identify potential sites and gather information

Standards

a) Agencies are informed of potential sites identified by the proponent/applicant, or through joint departmental processes.

b) Best available preliminary information to be provided by the Department to other agencies:

- description of area – must be clearly identifiable
- description of different activities and known parties likely to be affected by a reserve
- information that support preliminary identification of area as likely to be suitable for scientific study
- relevant habitat classification of candidate site
- information about other marine reserves in same habitat category
- any preliminary views of local community

c) Extent of enquiry: "reasonable steps" are to be taken to collect information from available sources without commissioning of further information.

d) Information about a site (including existing activities and regulatory measures and other controls applicable) is to be collected from available sources (e.g. NIWA, Ministry of Fisheries, Transport, Crown Minerals, Local Government bodies etc).

e) The Department is to coordinate the collection of the information.

f) Government agencies should provide the Department with details from existing databases. The Ministry is to provide information about fishing activity that is available from databases and a summary of information about area based on knowledge of the Ministry's staff.

g) Initial information should be provided according to an agreed timetable.

Step A2: Discussions held with tangata whenua and other interested parties; preliminary assessment of site suitability

Standards

a) Agencies should meet to:

- identify candidate sites and clarify any selections
- identify tangata whenua ad other groups with known interests
- discuss, identify and schedule meetings

- ensure, where possible, that representatives from each agency can attend meetings
- share information of potential applications from external applicants
- have early regard for s 5(6) implications
- consider and review preliminary information and stakeholder input about a candidate site
- discuss whether a firm proposal should proceed
- identify any existing statutory right which may legally preclude a reserve

b) The purpose of public communications/discussions at this point is to inform people of Government policy about protection of biodiversity, the purpose of marine reserves, and the identified site, and to discuss views about the site and the extent of effect on tangata whenua and other interested parties.

c) The purpose of interaction with tangata whenua is to obtain information; any support to an application obtained at this stage does not alleviate the need for agencies to continue to involve tangata whenua at subsequent steps in the process.

d) Tangata whenua are to have input into any decision made by Agencies at this stage.

e) Tangata whenua are to be provided an opportunity to attend the meetings between Agencies and are to be provided with information about any decision made at any such meeting in their absence.

Legal Requirements

a) Requirement to provide for input and participation of tangata whenua to meet obligations under s 4 of the Conservation Act 1987, for and under s 10 of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992, and to kaitiakitanga (s 12(1)(b) Fisheries Act 1996).

Step A3. Commission site survey and investigation, and review of site information.

Standards

a) Refer to section 6.3 ‘Information Principles’ in the main text of this Protocol.

b) If it is assessed that the area does not meet the requirements of s 3(1) of the Marine Reserves Act then the application will not proceed.

c) The requirements of administration and maintenance of the area are to be considered. Potential conditions that would need to, or could apply should be identified as soon as possible.

d) Tangata whenua should be provided an opportunity to be involved in a review of the site information, potential boundaries and any considerations by Agencies about any conditions that could apply.

Legal Requirements

a) Refer to s 3(1) of the Act.

Commentary on purpose of Act

a) An area can qualify on grounds of "distinctive quality", "so typical", "beautiful", or "unique" alone or in any combination.

b) An ordinary usage meaning is to apply to the terms "distinctive quality", "so typical", "beautiful", and "unique".

c) There is no requirement that the establishment of a reserve must be in the national interest. The "national interest" exists when an area is "of distinctive quality", "so typical", "beautiful", or "unique".

d) Preservation for scientific study does not require that any study is proposed at any given time.

e) The nature and extent of the relevant habitat may mean that it should be protected even though it has been heavily modified.

f) Once established, a marine reserve must, as far as possible, be preserved in a natural state, therefore consideration of factors that may affect ability to maintain in a natural state may be relevant.

Step A4: Draft proposal released for public comment

Standards

a) The Department may publish a draft report about the proposed area as a way of informing the public and gauging public support or opposition prior to the formal application.

b) Standards observed here are to be the same as for steps A2 and A3 above.

c) Submissions and feedback will be shared with the Ministry and any consideration of location of sites and their boundaries should be discussed. Every effort should be made to reconcile differences of view on the values of the site and any adverse effects of a marine reserve.

d) At any point in the process up to this one, a decision may be taken that, because of overwhelming adverse public opinion or effect of the marine reserve a proposal should not proceed. If there are important habitat and biodiversity values associated with the site that warrant some protection, consideration should be given to other tools available to achieve this. These are outside the scope of this Protocol.

Step A5: Prepare a formal application

Standards

a) The applicant should ensure that the report which accompanies the formal application notice (the Notice of Intention) provides full information for tangata whenua, interest groups and parties and the public, including:

- location, name and boundaries
- relevant background to the application
- site information derived from survey, addressing s 3 criteria
- implications for tangata whenua, current users and other interested parties
- proposed management and any suggested conditions
- justification for the proposed marine reserve, in terms of s 3 values, including information about other marine reserves in the area or habitat classification

b) The Department, when it is the applicant, will refer the draft application to the Ministry with sufficient time to allow the Ministry to check information relevant to fisheries and provide advice back to the Department within an agreed timeframe.

PART B: MAKING A FORMAL APPLICATION (STATUTORY)

Step B1: Notification of application

Standards

a) The Department will send a copy of the Notice of Intention and formal application to the Ministry to the appropriate regional and local offices of the Ministry for public viewing, and to the CEO of the Ministry.

b) Notice will also be released to parties identified by Government agencies.

c) Government agencies will assist with identification of appropriate parties.

Status of Applicant

a) The status of any external applicant in terms of s 5(1)(a) of the Act will be checked by the Department.

Public Notification Procedure

a) The application must be notified in accordance with the requirements of s 5 of the Act.

Step B2: Consultation with Interested Parties

Standards

a) Consultation with interested parties is not a statutory requirement but may assist public understanding of applications. The process under the Act provides only two months to lodge objections. Consultations should be held or arranged prior to formal notification of applications, where that is possible, and scheduled in the project plan.

a) The Agencies are to consult on the scheduling of any meetings with tangata whenua, interest groups and the public and if possible provide representatives to attend.

b) The Agencies agree to advise tangata whenua of the consultation and objection process and meet with representatives if requested to do so.

c) The timing of meetings is to occur prior to conclusion of the objection period (to allow sufficient time for persons to submit objection following any meeting).

Step B3: Answer to Objections

Standards

a) All objections may be answered by the applicant.

b) The applicant should consult with the Ministry before answering specific objections raised in respect of fisheries issues.

c) Objections are to be answered within three months of notification of the application.

d) The Department will provide the Ministry with a copy of all answers to objections.

Legal Requirements

a) Refer to s 5(4) of the Act.

b) The word "may" in this section means that the applicant is not required to answer the objections. If the applicant chooses to do so, the objections must be answered within three months and the Director General must send those answers to the Minister for consideration.

Step B4: Consideration of application and objections by Department

Standards

a) Copies of all objections and responses (together with a summary) are to be provided to the Ministries of Fisheries and Transport by the Department.

b) The agencies agree to meet to discuss and clarify issues raised in objections.

c) Consideration should be given by the agencies as to whether meetings with tangata whenua should be held to discuss matters raised in objections.

d) Advice to the Minister about the status of any external applicant is to be made. Note this will have been checked at step B1 to ensure applicants comply.

e) The agencies are to undertake a gap analysis of the application in relation to the matters contained in the protocol and legal tests.

f) The agencies should seek to obtain further information before submitting advice to the Minister of Conservation if the information is critical to the Minister's decision.

g) If the agencies disagree that the information is critical to the Minister's decision, then the Department may elect to submit advice to the Minister of Conservation.

Legal Requirements

a) Refer to s 5(6) of the Act.

Commentary

a) Recreational purposes are wider than recreational fishing.

b) Public interest includes customary rights and Treaty negotiations.

c) Navigational issues include safety/shelter for vessels (although s 23(1) – (2) of the Act expressly provide freedom of passage and anchoring in emergency).

d) Public interest is wider than effects on an individual unless they are likely to be representative of effects on others.

e) Matters "otherwise ... contrary to the public interest" must be something other than the matters referred to in the other four criteria of s 5(6)(a) – (d).

f) The overall public advantages associated with the establishment of the reserve are to be considered, as well as any adverse impacts.

Step B5: Minister of Conservation considers objections (s 5(6)) and then the substantive case (s 5(9))

Standards

a) The Department's advice to the Minister should include:

- the process followed for the application
- the information available about the site
- gaps in the process or information

- any divergent views of Agencies about the gaps in the process or information
- potential options, time and cost of addressing those gaps
- whether the information is indispensable for proper decision and/or would cause appreciable delay
- objections (and responses) in terms of criteria in s 5(6)
- benefits to the public in declaring the area a reserve
- potential conditions that could apply
- requirements about the administration and maintenance of the area

b) An assessment is to be provided of the benefits that might be achievable against the potential interference that will result.

c) Draft advice prepared by the Department is to be forwarded to the Ministry of Fisheries and the Ministry of Transport for comment.

d) The Minister of Conservation may elect to obtain an independent report (for a Departmental application – see s 5(6) of the Act), to seek further information (and/or request further consultation with relevant parties) prior to making any decision.

e) The Minister is not bound to follow any process in obtaining other information. With leave from the Minister, however, the Department shall:

- inform other Departments about the nature of the information sought by the Minister of Conservation
- seek the information from other agencies and discuss the method and likely time frame for obtaining that information
- consult with tangata whenua if the further information may impact on their interests
- ensure that the information obtained is subject to the information principles of this Protocol and any agreed peer review process

f) The Minister of Conservation's decision in relation to the objections and grounds for the decision are to be notified to all objectors and the applicant (s 5(8) of the Act).

g) The Minister should identify the conditions he proposes should apply to any area declared to be a marine reserve (s 5(9) of the Act).

h) Communication of the Minister's approval should note that concurrence of the Ministers of Transport and Fisheries has been sought.

Legal Requirements

a) Refer to s 5(6), (8), and (9) of the Act.

Commentary on matters to be considered

a) A matter "otherwise contrary to the public interest" is something different to that specified in s 5(6)(a)-(d).

b) The overall public advantages that will flow from the interference to fisheries created by the reserve are to be considered (CRA 3 case, High Court judgment, para 36).

c) In s 5(9), whether declaring an area to be a reserve will be in the best interests of scientific study is a scientific question.

d) The term "for the benefit of the public" means that the declaration itself will be for the benefit of the public. That determination is additional to the issue of benefits from scientific study.

e) The term "expedient" involves "achieving a particular purpose". That "it is expedient" for the area to be declared a reserve must relate to the purpose of the Act.

Step B6: Concurrence sought from Minister of Fisheries

Standards

a) The Minister of Conservation is to advise the Ministers of Fisheries of his/her decision (including any proposed conditions) and the reasons for that decision when requesting concurrence.

b) The Ministry's draft concurrence report is to be provided to the Department for comment.

c) A concurrence report is to be provided to the Minister within an agreed time frame.

d) The advice should report on:

- the process followed for the application
- the information available about the site
- gaps in the process or information on fisheries issues
- any divergent views of Agencies about the gaps in the process or fisheries information
- potential options, time and cost of addressing those gaps
- whether the information is indispensable for proper decision and/or would cause appreciable delay
- objections (and responses) in terms of criteria in s 5(6)
- relative benefits to the public in declaring the area a reserve
- potential conditions that could apply

- requirements about the administration and maintenance of the area
- the Minister of Fisheries obligations and function under the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 and the Fisheries Act 1996
- the assessment by the Minister of Conservation of the desirability of creating the reserve

e) The Minister of Fisheries may be informed that he/she is entitled to place reliance on the views of the Minister of Conservation provided he/she turns his/her own mind to the issues and having regard to any advice on fisheries issues available from the Ministry or from other relevant sources.

f) The Minister of Fisheries is required to take into account his/her statutory obligations under the Fisheries Act and Treaty of Waitangi (Fisheries Claims) Settlement Act, including obligations in respect of Maori customary fishing, as well as give effect to the provisions of the Marine Reserves Act 1971.

g) The Minister of Fisheries should advise the Minister of Conservation in writing of the concurrence decision (including potential conditions that would apply) and give reasons for that decision.

Legal Requirements

a) Refer to s 5(6) and (9) of the Act.

Step B7: Recommendation made for creation of marine reserve by Order in Council

Standards

a) Agencies will act on the decisions of Ministers to approve/concur with marine reserve applications, with or without conditions, and prepare an appropriate draft Order in Council to reflect these decisions, sharing the draft prior to submission for checking that legal and policy requirements have been fully met.

b) In the event that decisions are taken not to concur or proceed with an Order in Council, the Department will notify the applicant and interested parties accordingly.

Legal requirements

a) Refer to s 5(9) of the Act.

b) The Minister of Fisheries may give concurrence subject to conditions. The Minister of Conservation may or may not accept any of those conditions. If the Minister of Conservation declines any conditions, concurrence may be withheld and the application is declined.