

RESOURCE MANAGEMENT ACT 1991**Decision of Marlborough District Council**

RESOURCE CONSENT: U200434

APPLICANT: Duncan Bay Residents Association
Incorporated

LOCATION: Duncan Bay, Tennyson Inlet

THIS IS THE DECISION ON THE APPLICATION FOR RESOURCE CONSENT:

To stockpile up to 150 cubic metres of green waste from Duncan Bay residents and to discharge to air up to ten times per annum from burning of dried green waste on Lot 12 DP 333319

DECISION: **Refused**

Pursuant to section 34A(1) and after having regard to Part 2 matters and sections 104 and 104B of the Resource Management Act 1991 (the Act), I **refuse** to grant consent on behalf of Marlborough District Council pursuant to my appointment by the Council as an Independent Hearings Commissioner.

Reasons

Proposal

1. The Applicant, the Duncan Bay Residents Association (**DBRA**), proposes to create two stockpiles of vegetation trimmings (green waste) with a combined maximum volume of 150 m³ for the purpose of drying this waste before burning up to 10 times per year.
2. It is intended that this activity operates as a community facility for the benefit of Duncan Bay residents. The stockpiling and the burning of the vegetation trimmings will be managed by the DBRA.
3. The proposed site is located in Duncan Bay on a flat area of land adjoining the coastal marine area (**CMA**). It is approximately 130 metres from the edge of the CMA, approximately 40 metres from a stand of native bush, 130 metres to the south of a significant wetland located between the pasture area and the CMA and a close distance (approximately 20 metres) from the edge of an unnamed river to the west.
4. The Applicant has stated that it is prepared to move the proposed site further eastwards (into the existing pasture area) if it is considered that the proposed site is located in a riverbed.¹

Background

5. Consent is sought in order to authorise an activity which has been undertaken in the past since the mid-1980s. The DBRA have used an area on the foreshore reserve as a burn pile location and has burnt green waste on a regular basis at this location until a complaint was received in 2019 and enforcement action was taken by Council.
6. The proposed site differs from the past unauthorised stockpiling and burning activity in that the proposed site is further inland. The application was amended prior to public notification in relation to concerns raised by Ngāti Kuia to bring it closer to the river and further away from the CMA.²
7. The application for consent was lodged with Council on 20 May 2020. The application was publicly notified.
8. The application has been amended to create two stockpiles of green waste to provide for the drying of the green waste prior to burning to reduce the volume of smoke.³ The initial application was for one stockpile.

¹ Right of Reply at para 51.

² Section 42A Report, paras 16 and 94.

³ Applicant's Response dated 12 March 2021 at para 8 and attached diagram.

9. The Section 42A Report (**the Report**) dated 26 January 2021 was prepared by Ms Adrienne Gravatt and Mr Peter Johnson, the Council's Environmental Planners (**Reporting Officers**). A supplementary report (**Supplementary Report**) was prepared by the Reporting Officers and issued to the parties on 6 April 2021. The Supplementary Report was prepared to address 11 questions I had of the Reporting Officers and to include a recommendation regarding whether consent to the application should be refused or granted. In the Supplementary Report, the officers recommended that consent be refused and revised their conclusions. There were four additional matters that required information or clarification and these were addressed by the Reporting Officers in the Second Supplementary Report dated 23 April 2021 (**Second Supplementary Report**). The Applicant's Right of Reply was filed on 16 April 2021.

The Hearing and Appearances

10. A public hearing was held on Monday 22 February 2021 at the Marlborough District Council Chambers:

Commissioner:	Ms Antoinette Besier
Applicant:	Mr Richard Smedley (Applicant) Linda Booth (Applicant)
Submitters:	Greg & June Harney Phil Green Herrie ten Oever John & Karen Walker Helen & Alistair Scott Helen Palmers
Reporting Officer:	Ms Adrienne Gravatt Mr Peter Johnson (Environmental Planner, MDC)
In Attendance:	Ms Sue Bulfield-Johnston (Hearings Facilitator, MDC)

Procedural Matters

11. There are no procedural matters which now require consideration or a ruling.

Principal Issues of Contention

12. In summary, the principal issues of contention were:
- a) The proposed location for the proposed burn piles, particularly the appropriateness of the location;
 - b) The relevance of the site's esplanade strip and Memorandum of Encumbrance to the decision;
 - c) The likely and potential adverse effects of the proposed activity;
 - d) How the proposed activity is to be managed (fencing, drying of green waste, preventing non green waste entering the piles, etc);
 - e) Permitted baseline (residents are permitted to burn their own green waste); and
 - f) Whether the proposal is supported by the relevant planning provisions.

Planning Provisions

13. There are two plans which provide the decision making framework: The proposed Marlborough Environment Plan (**PMEP**) and the operative Marlborough Sounds Resource Management Plan (**MSRMP**). The application was submitted after the Decisions Version of the PMEP was released on 21 February 2020.
14. The Reporting Officers advise that all rules in the PMEP have had legal effect since 21 February 2020 prior to the lodgement of the application and that the rules 'triggered' by the application are operative. For this reason, the rules of the operative plan were not applied by the Officers in the Report however, the policies and objectives of the MSRMP were applied as there are a number of outstanding appeals in relation to relevant provisions of the PMEP.
15. The proposal is a discretionary activity under the PMEP. The relevant planning provisions are set out in the table below. I address the relevant objectives and policies in more detail in the Relevant Statutory and Plan Provisions section.

<i>Zoning</i>	PMEP: Coastal Environment
<i>Relevant Overlays</i>	Level 2 Flood Hazard Marlborough Sounds High Amenity Landscape Outstanding Natural Landscape (appealed)
<i>Relevant rules</i>	<p><u>Discharge to air</u> <u>4.1 Permitted activities:</u> Rule 4.1.35 discharge of contaminants into air arising from burning in the open. <u>4.2 Standards that apply to all permitted activities:</u> 4.2.6 Smoke, standard 4.2.6.1 The smoke must not be objectional or offensive, as detected at or beyond the legal boundary of the site. <u>Rule 4.3 Standards that apply to specific permitted activities:</u> Standard 4.3.35.1 Only material generated on the same property or a property under the same ownership must be burned. <u>Land use consent: storage/stockpiling of community green waste</u> Rule 4.6.12 (activity not provided for in Rule 4.1)</p>
<i>Relevant sections of the RMA</i>	Part 2, sections 104, 104B and 108
<i>National Environmental Standards and other regulations</i>	New Zealand Coastal Policy Statement
<i>Activity Status</i>	Discretionary

Notification and Affected Parties

16. The application was publicly notified on 17 August 2020 and six submissions were received (four in opposition and two in support). It is noted that one submission in support is from the Penzance and Tuna Bay Property Owners Association. It is also noted that many members of the Duncan Bay community attended the hearing in support of the application by DBRA.

17. The Report sets out a summary of the issues raised by the submitters in support and opposition at paragraph 42 and I adopt this summary.

Environmental Effects

18. I consider the following matters comprise the actual or potential effects of allowing the application:
- a) Impact on the landscape values of the wider area through the generation of smoke and the presence of burn piles and fencing;
 - b) Impact on the amenity values of the area particularly the natural character of the immediate area through the presence of composting waste, fencing and regular fires;
 - c) Temporary loss of public access during the time the burn pile is burning and when people are driving to the burn piles to unload waste;
 - d) Potential impact on water quality of the nearby unnamed stream, coastal waters and wetland due to the migration of ash, leachate and debris from the composting stockpiles;
 - e) Potential impact on habitat values and bio-diversity due to the potential for contamination of water bodies and the wetland;
 - f) Potential fire risk, particularly to the adjacent native forest;
 - g) Impact on air quality of Duncan Bay and the wider area and the potential for this to impact on human health;
 - h) Potential traffic hazard.
19. Submitters have also raised the following potential effects which I do not consider to be relevant:
- a) Contribution to climate change;⁴
 - b) Impact of sea level rise and climate change;
 - c) Green waste dumping being less likely if consent is granted;
 - d) Seed dispersal of pest plants being less likely if consent is granted.

Landscape

20. The site is located in the Outstanding Natural Landscape (**ONL**) overlay which has been appealed.⁵ The burn piles, fencing and smoke from burning (up to 10 times per year) has the potential to impact on the landscape values of the area.
21. The application sets out that the duration of the fire in the past was for 2-3 hours⁶ when the burn pile was approximately 75m³. The proposal will allow for a burn pile to be up to 150m³ in volume so it is very likely that the burn time will be greater, but that all material will be extinguished prior to nightfall.

⁴ This potential impact is not presently relevant but will become relevant when section 104 E is repealed on 31 December 2021.

⁵ The Report, at paras 31 and 36.

⁶ Response to request for further information at [63].

22. The Reporting Officers conclude that if the burning of well dried vegetation is undertaken during appropriate weather conditions and the fire is well managed, that it is likely that there would be a rapid dissipation of a limited quantity of visible smoke.⁷ The Officers conclude that the burning will have a minor or transitory effect. However at paragraph 114 (revised version), the Reporting Officers conclude that there is a level of uncertainty regarding the quantity of smoke resulting from the burning and that any smoke which is not dispersed rapidly would diminish the values of the ONL and the very high coastal natural character of the surrounding area. I agree with this conclusion.
23. I agree for two key reasons:
- a) *Visual significance*: evidence provided of the smoke from the (unauthorised) burn pile demonstrates that the smoke has a significant visual effect. This evidence is provided by way of a photograph taken on 31 August 2019 (**Photograph**). I address this further below.
 - b) *Volume and regularity*: The Applicant says it is necessary to burn the pile up to ten times per year because there is an abundance of vegetation at the Bay that requires regular clearance. There will be regular (almost monthly) burning of significant amounts of green waste.
24. At the hearing, Mr Smedley for the Applicant explained that the smoke from the burn pile would not be visible from adjoining bays given the steep topography of the area. However, the Photograph demonstrates that the smoke from the burn pile may at times be significant and is likely to be viewed from adjoining bays and from Tennyson Inlet.
25. The Photograph of the controlled burn shows a very large cloud of smoke. This burn was addressed in the Applicant's right of reply which explained that the burn was controlled, was lit when there was "virtually no wind", smoke was emitted for approximately one hour, none of the smoke blew into Duncan Bay, the smoke "would not be visible from Tuna or Penzance Bays" and the fire was extinguished before nightfall.⁸
26. The Right of Reply also contains a Stuff article containing "another picture of Duncan Bay burn off, taken on 1 September 2019".⁹ The Applicant considers that this date is incorrect and it is likely that the photo is from the 31 August 2019 fire. It is not necessary for me to determine this point, however, what is clear from the photographs is that the controlled burn of the green waste is likely to be readily visible from a range of locations.
27. Mr Smedley in his Right of Reply stated that smoke from the controlled burns would not be visible from Tuna and Penzance Bays¹⁰ and that it would be unlikely to be visible from Opouri Saddle.¹¹ These statements are derived from Mr Smedley's own assessment of the topography and also rely on the fact that submitters in opposition have not raised this as something which has occurred in the past. However, Mr Smedley is not qualified to produce evidence on this matter and, importantly, there is no evidence provided of reported occasions where people have been stationed in these places and have not observed smoke when a burn off was taking place.

⁷ The Report, at para 57.

⁸ Right of reply dated 16 April 2021, at paras 11 i) and 20.

⁹ Right of reply dated 16 April 2021, at para 9 and at page 216.

¹⁰ Right of reply dated 16 April 2021, at para 20. Also noting that submitters did not provide evidence of smoke entering Tuna and Penzance Bays at para 21.

¹¹ Ibid at para 16.

28. There is no evidential basis for the conclusion that the effect of smoke from the burning on the landscape values would be minor. Such a cloud of smoke would be readily visible from a range of vantage points and affect people's appreciation of the landscape values of the area. I consider that the smoke generated by the large volume of green waste is likely to have adverse effects on the landscape values of the area.
29. However, this adverse effect is transitory in nature as the smoke will dissipate. It is unclear how long it will take for smoke to dissipate as much depends on the quantity of vegetation burnt, the condition of the vegetation (particularly its level of dryness¹²) and weather conditions (particularly wind). A conservative estimate would have the smoke lasting for the duration of daylight hours during one burn event. This would occur up to 10 times per year.
30. The volume of smoke generated by the fire would not be visually disruptive in a rural environment linked to primary production activities where fires burning green waste are commonplace. However, this particular environment is sensitive to such an intrusion given its high landscape values. For this reason, I consider that the impact of a burn event on the landscape values in this area is likely to be significant during the burn event when smoke is being emitted in large volumes. However, for the reason that this effect is transitory in nature, for the most part, lasting for one day (and often large volumes of smoke are only emitted at the early stage of a fire), I consider that it is appropriate to characterise this adverse effect as more than minor.
31. The regularity of the burning means that there will be repeated occurrences of relatively large quantities of smoke in Duncan Bay which could detract from the landscape values of the area. The cumulative impact of ten burn events over the duration of one year is relevant to assess but difficult to gauge. However ten days a year is a relatively low level of repetition; I consider that this adverse effect can also be characterised as moderate.
32. I address precedent later in my decision. Precedent is relevant to the assessment of the effect on landscape values in that granting this consent could create an expectation of like treatment from other communities wishing to stockpile and burn their green waste.
33. Overall I consider that the potential adverse effect on landscape values arising from the regular generation of smoke is moderate.
34. I agree with the Reporting Officers' conclusion regarding the impact of the burn piles itself and the proposed vegetation screening mitigating the potential impact on the appearance of the piles *from afar*: I consider that the impact of the burn pile, fencing and vegetation screening is unlikely to have more than a minor impact on the wider landscape values of the area. However I consider that the adverse impact of the proposal in the immediate surrounds is relatively significant, as I address below.

Amenity Values

35. I adopt the Reporting Officers' description of Duncan Bay at paragraphs 50 and 51 of the Report.

¹² I note that the Applicant in the Right of Reply at 12 e. sets out that the green waste will be 90% tree waste and likely to emit less smoke.

36. I also note the amendment to the proposal which reduces the height of the burn pile but increases its area of coverage.¹³ Further, the amendment has resulted in two piles being proposed at the location to enable the drying of the vegetation before it is burnt.
37. In relation to the impact of the presence of the burn piles, fencing and vegetation screening, I consider that the proposal will have an adverse effect on the amenity values of the area surrounding the proposed site. The proposal involves the storage of a large volume of green waste and fencing around the stockpiles. It will involve people making regular trips to this area with loads of green waste. The green waste will be decomposing on site. There will be an area of land used for burning, and given the quantities of waste proposed to be burned, a noticeable scorched area with ash.
38. The Applicant considers that the site has a low level of natural values given the modification that has taken place in this area. I accept that the proposed site is located in an area adjacent to a river which has been modified and also is adjacent to an area of pasture. However this description overlooks the presence of a significant area of native bush (approximately 40 metres to the east) and the proximity of the coastal environment and adjacent wetland. When viewing the locality from the approximate location of the proposed site, my overall impression was that the area had high natural character values.
39. The presence of two large stockpiles with green waste and a burning area will have a visual impact which is likely to detract from the attractiveness of the area. The proposed vegetation screening will mitigate the impact of this effect to a certain level but I consider that it will still detract from the amenity values of this area, particularly for people walking in this area. This area is a popular walking area being one of the main areas in Duncan Bay where the coastline is accessible.
40. The extent of this adverse effect will rest to a large degree on how the burn piles are managed. The Applicant impressed me with their efforts to manage the burn pile in the past as evidenced in the DBRA newsletters and their sincerity in wanting to manage this activity appropriately in the future. However, the difficulty is that the site will be used by the whole community and this may prove difficult with respect to ensuring that no rubbish is deposited there and the burn pile height is kept at a certain level. Evidence supporting the difficulty in managing the burn pile in the past is contained in the DBRA newsletters dating from February 2000 to 2018. These extracts were provided by Mr and Mrs Harney at the hearing and set out the issues with vegetation being blown into the river, the burning pile getting too large, people depositing rubbish and unsuitable green waste material (grass clippings) and the like.
41. Despite the proposed mitigation measures, I consider that the activity will contrast with high natural values of the area and I consider that this adverse effect can be characterised as moderate, particularly because of the sensitivity of the location.
42. When a compost pile is being burnt, I consider that the adverse effect on the amenity values of this area will be significant. As noted above, this is to occur on a relevantly regular basis but is transitory in nature.

¹³ Second Supplementary Report at para 24.

Public Access

43. The Reporting Officers consider that public access to the CMA beyond the burn pile will be improved given that the burn pile will necessitate the provision of the vehicle access to the burn pile. The Officers also consider that there will be a loss of existing pedestrian access and the vehicles access adjacent to the river (during burn off time) but that this loss would not be continuous but would occur for an undetermined length of time and repetitively during the year. I agree with the latter conclusion but not the former.
44. I do not consider that the proposal will have any positive effect on public access. Public access to the CMA is provided for by way of an existing encumbrance and there is very little to be gained in terms of accessing the CMA by people either parking close to the road reserve or driving a further distance towards the wetland and CMA.
45. However, I consider the impact of the proposal on public access to be minor as people are able to pass through the area despite the presence of the burn pile. At the times when the fire is lit it is difficult to determine what if any impacts this will have on pedestrian access. There may be a temporary halt in people using the area or people may be able to continue to walk through this area, depending on how large the fire is. I have no information from which to make an assessment in this regard. However, I consider the impact on public access to the CMA to be no more than minor.

Water Quality

46. The burning of large volumes of vegetation on a regular basis at the proposed site has the potential to cause the deposition of ash on waterbodies (the adjacent river and wetland) and the CMA given their close proximity (refer to paragraph 3 above).
47. Furthermore, that ash and vegetation could enter the waterbodies and the CMA when the burn pile area is flooded or during periods of high wind.
48. The Applicant relied on three reports at the hearing to demonstrate that the previous burning of vegetation did not have an adverse effect on the estuarine area or the CMA generally.¹⁴ I do not consider that these reports are a sufficient basis from which I can conclude that the proposal will not have an adverse effect on the water quality. The authors of these reports were not directed to address the impact of the burning in this location.
49. The Reporting Officers conclude that the effects of ash settling on the wetland are unknown.¹⁵ Further it is concluded that the proposal has the potential to harm the significant wetland at the head of Duncan Bay. I agree.
50. At the hearing, Mrs Harney produced photos showing dark brown liquid pooling near to the green waste piles. She used the photos as evidence to argue that the green waste piles has produced leachate in the past and she highlighted the potential for leachate to contaminate the area and surrounding water bodies. The Applicant's response to this was that it was tannin from the bark of the vegetation (kanuka).

¹⁴ Applicant's submissions dated 17 February 2021, at para 45 onwards.

¹⁵ The Report, at [66].

51. I am unable to determine whether the photos show leachate or tannin stained water based on the evidence before me. Nor am I able to determine whether the green waste piles will produce leachate in the future. I note that the rules of the PMEP regulate the discharge of compost or solid agricultural waste into or onto land and the stockpiling of agricultural waste by applying standards related to management and location of stock piles. No such standards apply to this activity because a community green waste stockpile has not been anticipated by the PMEP.
52. Whether or not leachate is generated will depend on the material brought to the piles and careful management of the green waste piles. The Applicant stated that most of the material is tree waste¹⁶ but I note from extracts provided in evidence of the DBRA newsletter that there has been problems with grass clippings, agapanthus bulb and roots and these items are capable of producing leachate.
53. In conclusion, there is no evidence on the matter of water quality to determine the impact of the proposal on water quality. I note that while this potential impact is unlikely to be significant, the proximity of sensitive receiving environments is of concern given they constitute a nationally significant wetland, a river and the CMA.

Impact on Biodiversity (life supporting capacity of air, water, soil and ecosystems)

54. The proposed site is located close to a nationally significant wetland (W1003). This wetland will be valuable in terms of indigenous biological diversity (given the application of Policies 8.1.1 and 8.1.2 of the PMEP which require its designation and protection). As set out above, it is unclear whether or not the proposal will have an adverse effect on the wetland's water quality. I agree with the Reporting Officers' assessment that there is a high level of uncertainty regarding whether the proposal would be consistent with Policy 11 of the NZCPS.¹⁷ Given the importance of this wetland this aspect of the application is of concern.
55. Similarly, I have no evidence before me in order to make a conclusion regarding the potential for the proposed burn pile to impact of the bio-diversity values in the surrounding area.

Fire Risk

56. At the hearing, I was concerned to address the potential for fire risk. This concern was based on my observation that the burn pile was located close to an area of native forest. Further, the material provided by the Applicant contained information from Fire & Emergency NZ (**FENZ**) which set out the distance that fire embers are able to travel (up to 2 kilometres). The fire risk to the households at Duncan Bay would appear to be less given their distance from the proposed site (and the presence of grassed barrier between).
57. The application contains the following measures to address fire risk:
- a) A fire permit is always obtained (this point was made at the hearing although not specifically addressed in the application as the application referred to permits being obtained in the past);
 - b) The community has invested heavily in its own emergency fire services (equipment and trained personnel);
 - c) The fire will be overseen by DBRA "Fire Burn Controllers" with a minimum of two people attending;

¹⁶ Mr Smedley at the hearing stated it was mainly kanuka and tree fern. The Right of Reply at para 12 quotes from Mr Wilkes (current chairperson of the DBRA) saying that the waste was 90% "tree waste".

¹⁷ Second Supplementary Report dated 23 April 2021 at p 4.

d) A fire pump, water and hoses are available to be used in emergency.

58. At the hearing, the Applicant stressed that the fire risk from the burn pile would be managed through the issue of fire permits. Simply put, a fire permit would not be issued in conditions where the adjoining vegetation was dry enough to make the receipt of an ember a potential fire risk.
59. The Principal Rural Fire Officer supports the application from a fire safety perspective stating that it is safer having one fire rather than residents having their own burn piles.¹⁸
60. The Supplementary Report provided that the distance from the western edge of the proposed burn pile and the native bush line is 41 metres and also set out FENZ's assessment of the risk of fire spreading as low.
61. I observe that the mitigation of this risk rests heavily on the competence and diligence of people issuing fire permits and managing the burn pile. In this regard I note that DBRA has worked sensibly in the past to manage the burn pile. This is evident in the regular notes about the burn pile in the DBRA newsletter which demonstrate a diligent approach to managing the burn pile.
62. Based on the assessment of FENZ and the comments of the Principal Rural Fire Officer, I consider that the risk to the adjoining native vegetation and Duncan Bay community as a whole is low. While it is properly characterised as an effect of low probability and high potential impact, I do not consider this potential adverse effect is relevant to my decision.

Air Quality

63. I adopt the Reporting Officer's assessment of the human health effects set out at paragraph 77 to 81 of the report. The conclusion of the Officers is that the potential impact is significant but if the burning is undertaken in suitable weather conditions with well dried vegetation, the negative impact on human health can be avoided. My assessment slightly differs in that I consider that the impact cannot be completely avoided as it is possible to foresee a situation where the wind changes and smoke is blown into the residential area of Duncan Bay. However, I consider this potential adverse impact to be minor.
64. I also note that in general terms the proposal will have an impact on air quality of the surrounding area but I do not have sufficient evidence to draw any substantive conclusions on this point.

Nuisance – smoke odour and ash

65. Regular burning of the green waste has the potential to create nuisance because of the smell of smoke and deposition of ash to the residents of Duncan Bay if smoke enters the residential area. Through careful management of the burn it is likely that this effect can be avoided to a greater extent though not completely. I consider this potential adverse impact to be minor.

Traffic Safety

66. Submitters have highlighted the presence of the road into Duncan Bay being located close to the burn pile and the potential for drivers to be distracted by a burn event. I do not have any evidence before me to make a conclusion on this point and this potential adverse effect has not influenced my decision.

¹⁸ Hearing bundle, at page 134.

Relevant Statutory and Plan Provisions

Section 104 Resource Management Act 1991

67. My decision-making framework is provided by section 104(1) of the Act. This section provides that I “must”, subject to Part 2, have regard to –
- a) Any actual and potential effects on the environment of allowing the activity; and
 - ab) Any measure proposed or agreed to by the applicant for the purpose of ensuring positive effects on the environment to offset or compensate for any adverse effects on the environment that will or may result from allowing that activity; and
 - b) Any relevant provisions of -
 - (i) a national environmental standard:
 - (ii) other regulations:
 - (iii) a national policy statement:
 - (iv) a New Zealand coastal statement:
 - (v) a regional policy statement or proposed regional policy statement:
 - (vi) a plan or proposed plan; and
 - c) Any other matter the consent authority considers relevant and reasonably necessary to determine the application.
68. Section 104B provides that after considering an application for a resource consent for discretionary activity, I may grant or refuse the application, and if I grant the application, I may impose conditions under section 108.
69. Section 107 is not relevant to this decision as I consider that the criteria in section 107(1)(c) to (g) are very unlikely to apply.
70. As set out above, Part 2 of the Act is relevant. This means I must also have regard to the relevant principles set out in sections 6, 7 and 8 as well as the overall purpose of sustainable management as provided by section 5 of the Act.

New Zealand Coastal Policy Statement - section 104(1)(b)(iv)

71. As required by section 104(1)(b)(iv), I need to have regard to the New Zealand Coastal Policy Statement 2010 (**NZCPS**). The site is contained within the coastal environment (as defined by Policy 1 of the NZCPS) as an area where coastal processes are significant. This is recognised in the PMEP by the application of Coastal Environment zoning.
72. My assessment of the proposal against the NZCPS is as follows:
- a) Objective 1: In summary, this objective aims to maintain or enhance natural biological and physical processes, protect significant natural ecosystems and sites of biological importance and maintain coastal water quality. I agree with the Reporting Officers’ assessment that there is a high level of uncertainty regarding whether the proposal would be consistent with this Objective.¹⁹

¹⁹ Second Supplementary Report at p 4.

- b) Objective 2: Sets the preservation of the natural character of the coastal environment and protection of natural features and landscape values as a goal. This goal can be achieved through this decision recognising these matters.
- c) Objective 4: Refers to maintaining and enhancing public walking access to and along the CMA. I consider that the proposal does not enable this Objective but it is not inconsistent given the minor adverse impact it will have on public walking access.
- d) Objective 6: This objective sets out a number of matters which require consideration in order to determine whether use and development in the coastal environment is appropriate. The proposal is not enabled by any of these measures (particularly in that it is not dependent on being located in the coastal environment) however the proposal is not inconsistent with other objectives (for example historic heritage and potential to develop the resources of the CMA).
- e) Policy 3 Precautionary approach: “adopt a precautionary approach towards proposed activities whose effects on the coastal environment are uncertain, unknown, or little understood, but potentially significantly adverse.” As set out in paragraphs 53, 55 and 64 above, the effects of the proposal on air, water, soil and ecosystems are not known.
- f) Policy 6 Activities in the coastal environment: Policy 6 has some relevance in terms of “recognising the need to maintain and enhance the public open space and recreational qualities of the coastal marine area” (clause 6.2.b). The proposal will have some impact on the recreational qualities of the CMA, however as set out above this impact is considered to be minor. The remainder of Policy 6 does not apply as these clauses relate to ‘development’. Development is not defined in the RMA or the NZCPS however I do not consider that the fence, stockpiling of compost and occasional burn event comprises development.
- g) Policy 11 Indigenous biological diversity: “To protect indigenous biological diversity in the coastal environment: avoid significant adverse effects and avoid remedy or mitigate other adverse effects of activities on indigenous ecosystems and habitats that are only found in the coastal environment and are particularly vulnerable to modification including estuaries, lagoons, coastal wetlands...”. The proposed site is located close to a nationally significant wetland (refer to Policies 8.1.1 and 8.1.2 of the PMEP). As set out above at paragraphs 54 and 55, it is unclear whether or not the proposal will have an adverse effect on the wetland in terms of flora and fauna, water quality and its habitat values generally.
- h) Policy 15 Natural features and natural landscapes: Policy 15 requires decision makers to “avoid adverse effects on outstanding natural features and outstanding natural landscapes in the coastal environment”. This is an ‘environmental bottom line’ (Supreme Court in *Environmental Defence Soc Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593). The proposed site is located in an ONL and this Policy directs the decision maker to avoid any adverse effects whether significant or not, on an ONL. My assessment is that the proposal will have an adverse effect on the ONL in the coastal environment. Policy 15 therefore requires consent to be refused unless the adverse effects on the ONL can be avoided. The Reporting Officers conclude that the adverse effects cannot be avoided.²⁰ I agree with this assessment.

²⁰ Supplementary Report at paras 25 and 28 and revised para 114 set out in the Supplementary Report at para 31.

- i) Policy 18 Public open space: This policy contains a number of goals which are unlikely to be undermined by the proposal given the limited impact on public space.
- j) Policy 19 Walking access: Similarly the proposal is unlikely to offend against this policy, particularly as this policy provides that walking access can be restricted on a temporary basis.

73. Overall, the proposal is not supported by the NZCPS and is contrary to Policy 15 given my earlier conclusion that the proposal will have an adverse effect on the ONL to a moderate degree.

Plan or proposed plan – section 104(1)(b)(vi)

74. As required by section 104(1)(b)(vi), I need to have regard to the relevant plans, the Proposed Marlborough Environment Plan (**PMEP**) (Appeals Version) and the Marlborough Sounds Resource Management Plan (**MSRMP**).

Proposed Marlborough Environment Plan (the Decisions Version)

75. The following paragraphs apply the objectives and policies of the PMEP to the application.

Chapter 3: Marlborough's Tangata Whenua Iwi

76. Te Rūnanga o Ngāti Kuia Trust have advised that they have no issues which are required to be addressed in the amended application.²¹ No submissions were received from Marlborough's other Tangata Whenua Iwi.

77. Through the consultation and the amendment to the proposal the Applicant has taken into account Ngāti Kuia's role as kaitiaki for this area and Objectives 3.3, 3.4 and 3.6 and Policy 3.1.2 are satisfied.

78. Policy 3.1.3 requires that when considering an application for resource consent decision makers shall consider the maintenance (or improvement in some cases) of mauri in relation to fresh and coastal waters, land and air and the special relationship between tangata whenua and ngā wai (among other matters). As noted above, the proposed activity has the potential to affect the water quality. However, there is very little information to make an assessment regarding the nature of this impact and for this reason I am unable conclude that there is support for the proposal in relation to the objectives and policies of Chapter 3. I conclude that the proposal is neutral to the objectives and policies of Chapter 3.

Chapters 4 and 5: Sustainable Management of Natural and Physical Resources and Allocation of Freshwater Resources

79. Chapter 4 contains policies directed towards the sustainable management of natural and physical resources. I have reviewed these objectives and policies and consider that none of these objectives and policies are particularly relevant to my decision. Similarly, Chapter 5 which addresses the allocation of freshwater resources is not relevant to my assessment.

Chapter 6: Natural Character

80. Chapter 6 contains objectives and policies directed towards natural character; a term used to describe the degree of naturalness in an area. The proposed site is surrounded by an area which has an overlay of very high Coastal Natural Character.

²¹ Section 42A Report, para 17.

81. I do not consider it necessary to address the objectives and policies of this Chapter in my decision as the impact on natural character is considered above in terms of locational effects and also considered in relation to the provisions of the Landscape Chapter which require an assessment of how the proposed activity will affect landscape values (including the potential impact on naturalness).

Chapter 7: Landscape

82. I agree with the Reporting Officers that Objective 7.2 and Policies 7.2.4 and 7.2.5 are the relevant provisions of this chapter to apply to this application. An assessment is required (as directed by Policy 7.2.1) of the values that contribute to the ONL and how the proposal will have an impact on these values. The Reporting Officers and the Applicant have undertaken this assessment.
83. Tennyson Inlet Landscape Values are set out in Appendix 6 of the Report. The Reporting Officers address landscape values and conclude that the values that contribute to the Outstanding Natural Feature²² will not be adversely affected by this activity and that the proposal is consistent with [the] Objective [7.2] and Policies [7.2.4 and 7.2.5].²³ However this assessment was expanded upon in the Supplementary Report and the main conclusions from this assessment of the proposal on the landscape values are as follows:
- a) Effect on bird habitat is unknown;
 - b) Unlikely to impact on nationally threatened plants on Tennyson Inlet Islands;
 - c) “Unquantified potential for damage” to the nationally significant intertidal and subtidal areas which support important wetland habitat”;
 - d) Presence of smoke will change the perceptual experience of the area but this is “acceptable in this particular landscape”, but would however detract from the perceptual experience of the surrounding very high Coastal Natural Character areas”;
 - e) Presence of green waste piles (if well maintained) on the perceptual values of this location would be “acceptable”;
 - f) Presence of smoke would detract from the associative values of the area;
 - g) Finally, it is concluded that the adverse effects on ONL cannot be avoided.
84. The Reporting Officers have not however concluded that the proposal is contrary to Objective 7.2 and Policies 7.2.4 and 7.2.5.
85. The Applicant’s Right of Reply provides an assessment taking into account the Tennyson Inlet Landscape Values set out in Appendix 6 of the Report. Relevant sections of the Applicant’s assessment are summarised as follows:
- a) Biophysical values
 - i) There will be no impact on the intertidal and subtidal areas as the burn site is not located in this area, ash will be collected from the fire and there is no evidence of ash ever making its way into sea when the burn pile was operated in the past;

²² I have taken this to mean the ONL based on para 31 of the Report which states that the subject area is in an ONL.

²³ The Report at para 108.

- ii) The proposed site cannot affect the forest or bird habitat as it does not contain this habitat;
- iii) The site is not contained within the overlay description or the character description of the Outstanding Natural Character and therefore the values set out relating to this can be disregarded;
- iv) The proposal does not affect lowland coastal forest as the site is pasture or regenerating forest;
- v) Similarly, the proposal does not impact on unmodified indigenous forest from ridgetops to sea floor.

b) Perceptual values:

- i) It is not relevant to consider specific values where the proposed site is not located near to or within the areas to which the values apply (Nydia Saddle to Mt McLaren, integrity of bush, scenic road journey over Opouri Saddle, high experiential values due to unmodified vegetation cover).
- ii) The site and general area are modified and the proposal will have an insignificant effect on the relevant values identified (attractive deep enclosed bay with bush shoreline and frequent intimate bays with sheltered waters).

c) Associative values:

- i) It is not relevant to consider associative values as the proposed site is not within DOC land and while a visitor may see a burn it would be for a limited period and this visitor would be likely to see “more rural activities” at other areas of the Nydia Bay Track.

86. The PMEP’s Appendix 1 (Landscape Schedule of Values) at H notes the “high levels of naturalness” of this landscape “considered to be sufficient to be considered outstanding”. Correctly, the Applicant notes that the proposed site is not with the Coastal Natural Character Overlay or included in the description at 6A in Appendix 2 of the PMEP. However the proposed activity may have an impact on the land immediately adjacent which is included in the Coastal Natural Character Overlay. Further, because the proposed site is within an ONL, which records the high degree of naturalness of the area as a whole, it is important to consider the impact of the activity on the naturalness of the area.

87. I consider that the Applicant’s assessment has:

- a) Minimised the potential impact of the activity on the surrounding area by focussing on what is present at the site itself;
- b) Drawn conclusions not based on evidence (impact of the wetland, bird habitat, rural activities in Kaiuma Bay); and
- c) Without evidence, compared other rural activities and suggested that the effects of the proposal are less.

88. I adopt the Reporting Officers’ assessment of the impact of the proposal on the landscape values set out at paragraph 84 above with the following qualifications:

- a) I agree that presence of smoke would change the perceptual experience but in this particular landscape, I am not satisfied that this effect would be “acceptable”.
- b) I consider that the presence of a large volume of smoke will be in stark contrast to the high levels of naturalness of the area surrounding Duncan Bay and that this is unlikely to be acceptable to most people in and around this area.

89. Overall, I consider that the environment potentially affected by the proposal is sensitive to change and the proposal will have an adverse effect on the values that contribute to the ONL. However, the tension in applying Policy 7.2.4 in determining whether the effects of the proposed activity are “minor or transitory” and as such these adverse effects “may not need to be avoided”. As set out above, I consider that the adverse effects are moderate but transitory and as such the proposal may be consistent with this Policy. However when Policy 7.2.5 is applied a different conclusion is reached.
90. Policy 7.2.5 requires that adverse effects on the values that contribute to ONLs are avoided in the “first instance” (reflecting the Policy 15 of NZCPS). My conclusion with respect to this matter is that the proposal does not avoid adverse effects on the values that contribute to the ONL.
91. Policy 7.2.7 is also relevant to consider as the proposal involves structures (fencing). The proposal is consistent with this Policy in particular item (a) (iv) as the scale, height and placement of the fence along with the planting of screening vegetation is likely to minimise the intrusion of the built form into the landscape.
92. In conclusion, I consider that granting the consent to the proposal would be contrary to Policy 7.2.5 and generally inconsistent with the objectives and policies of Chapter 7.
93. As noted above at paragraphs 15 and 20, the proposed site is subject to the ONL Overlay which has been appealed. The Reporting Officers record that the appeals and relief sought by the appellants do not impact on their assessment of the application.²⁴

Chapter 8: Indigenous Biodiversity

94. Potentially the objectives and policies of Chapter 8 are relevant in relation to the impact of the proposal on freshwater and seawater quality. However, the application provides very little information on this matter in order to be able to make an assessment of this potential effect. Similarly, the compiled technical comments contained in Appendix 8 of the report do not provide sufficient information to make a robust assessment of this impact; rather comments from the Council officers note the potential for this to occur.
95. At the hearing, Mr Smedley addressed this point and noted that if there was any flood event which washed away the ash from the burn pile and collected green waste, this effect would be negligible relative to the runoff from other areas entering the sea. Mr Smedley is not qualified to provide evidence on this matter but I accept the point made as a matter of common sense. However this argument does not provide the basis on which an additional source of contamination can be generated. I also note that ash entering these water bodies may have a different impact than debris itself.
96. Given the uncertainty regarding this potential effect I am unable to draw any conclusions that the proposal is consistent or contrary to the objectives and policies in Chapter 8; the only conclusion that is capable of being drawn is that there is no support for granting consent to the application from the provisions of this Chapter.

Chapter 9: Public Access & Open Space

97. Chapter 9 sets out objectives and policies with respect to public access and open space and I agree with the Reporting Officers’ identification of relevant objectives and policies.

²⁴ Second Supplementary Report, at page 2.

98. Policy 9.1.13 is the most relevant policy and the Reporting Officers consider that the proposal is generally consistent with this Policy. My assessment differs to a limited extent. I do not consider that the proposal has the potential to benefit public access through the maintenance of the vehicle track. I consider that maintenance of a walkway to this area of Duncan Bay is likely to take place regardless of whether or not the proposed activity takes place as people use this area at present to access the CMA. I consider that the proposal has the ability to affect public access to this area by the regular burning, but I consider that this adverse effect is likely to be minor. However, on this basis I conclude that the proposal is neutral with respect to these objectives and policies as opposed to being “generally consistent”.

Chapter 10: Heritage Resources

99. This chapter is not relevant to my assessment.

Chapter 11: Natural Hazards

100. I agree with the Reporting Officers’ assessment at paragraph 112 that the proposed activity is not consistent with Objective 11.2 as the activity increases the consequences of natural hazard events (damage to fencing, disposal of vegetation or ash pile into the river, sea and wetland and damage to the ecology of those areas). The proposal is not supported by the objectives and policies of Chapter 11.

Chapter 12: Urban Environments

101. This chapter is not relevant to my assessment.

Chapter 13: Use of the Coastal Environment

102. The Reporting Officers have concluded that overall, the proposal is consistent or neutral in relation to Policies 13.2.1, 13.2.2, 13.2.3 and 13.2.4. This conclusion is based on the assessment of the effect on landscape to be “minor and transitory”.²⁵ However, the Supplementary Report states:²⁶

[There] remains considerable uncertainty regarding whether it would be possible to manage the activity in a manner that results in acceptable effects.

Reflecting on evidence heard from the applicant and submitters we do not consider that adverse effects on Outstanding Natural Features and Outstanding Natural Landscapes (including seascapes) would be avoided.

103. The Second Supplementary Report states that the proposal is “not appropriately located when considering PMEP Objective 13.2 and Policies 13.2.1(g), 13.2.2(i) and 13.2.4.”²⁷ I agree with this conclusion: the proposal cannot completely avoid adverse effects on coastal amenity values (such as naturalness) and there is no functional need for the proposal to be located on land adjacent to the CMA.
104. Policy 13.1.1 directs decision makers to avoid adverse effects on the characteristics and values identified as having outstanding natural features and/or outstanding natural landscapes and also to avoid significant adverse effects on marine biodiversity, cultural values and/or a significant wetland. I consider that the proposal is contrary to Policy 13.1.1 because the proposal does not avoid adverse effects on an ONL and it is not clear as to whether or not the proposal will generate significant adverse effects on marine biodiversity, cultural values and the significant wetland adjoining the site.

²⁵ The Report, at para 101.

²⁶ Supplementary Report, at para 27 and 28.

²⁷ The Second Supplementary Report at p 3.

105. Policy 13.2.1 is relevant as set out by the Reporting Officers. This Policy requires an assessment to be made as to whether the location is appropriate by reference to the host environment and whether the activity recognises and provides for the characteristics and qualities that contribute to the values and if not, that the proposal otherwise avoids remedies or mitigates adverse effects on those values. It is not clear whether the proposal provides for these values and that the presence of two burn piles and regular smoke from this pile does not contribute in a positive way to the outstanding landscape of the area. The proposal may result in ash from the burn pile entering the nearby stream, wetland or CMA. To that extent it does not contribute to the values set out at (b), (e) and (f) of Policy 13.2.1 which relate to water quality. Further, the visual impact of the activity will not contribute to the community's expectations regarding coastal amenity values (Policy 13.2.1(g)). I consider that the proposal is inconsistent with this Policy.
106. Policy 13.2.2 provides support for certain activities in the coastal environment. The proposed activities do not fit within the criteria set out in this policy.
107. Policy 13.2.4 directs the decision-maker to consider the effect of the proposal on coastal amenity values in a particular location including natural character, biodiversity, public access, visual quality, high water quality, recreational opportunities, structure and activities, open space, tranquillity and peacefulness. The proposal has the potential to diminish the natural character, biodiversity and visual quality and high water quality of the locality. Insufficient information has been provided on these matters, particularly with respect to impact on water quality. While I note above that this impact is not likely, it cannot be discounted completely. The proposal may result in ash building up over time and through flooding or wind events this ash may enter the river, the adjacent wetland and the sea. The Applicant states that the ash will be removed after each fire but there is the potential for some ash to remain or there to be a delay in removing ash and wind/water enabling its movement during the intervening period. This potential impact may not be significant and could be mitigated through the imposition of a condition which requires the removal of ash as soon as it is sufficiently cool enough to enable it to be collected and transported away. However generally I find that the proposal is not consistent with Policy 13.2.4.
108. Policy 13.2.6 directs me to consider the individual and community values regarding the area subject to the application, the amenity related attributes of the area and the extent to which amenity values could no longer be maintained or enhanced in this area. This is a difficult policy to apply in this situation. It is clear that the community is divided regarding this application. There is a large body of support for the application – clearly people see it as a beneficial community resource which assists in controlling vegetation growth in Duncan Bay. This support is based on the operation of the burn pile in the past. There are no recorded complaints to the Council prior to the complaint being made in 2019. It is also clear that there is opposition within the community (based on the submissions the application has received).
109. I consider that the proposal will have an impact on the recreational use of the area given the presence of the fire on at least ten occasions per year but that this impact is not likely to be more than minor and the proposal is consistent with Policy 13.3.6.
110. Overall, I consider that the proposal is contrary to Policy 13.1.1 and is not consistent with the objectives and policies of Chapter 13.

Chapter 14: Use of the Rural Environment

111. The Reporting Officers consider that the proposal is consistent or neutral with Policy 14.3.2 with respect to the use of the rural environment. I do not consider that this policy is relevant to my assessment because the site is not within a rural zone.

Chapter 15: Resource Quality (Water, Air, Soil)

112. The Reporting Officers consider that the proposal is consistent with the policies in Chapter 15 which apply to resource quality (water, air, soil) in particular those objectives and policies which apply to air. I do not agree with this assessment.
113. Objective 15.1a refers to activities maintaining, and where necessary, enhancing the water quality of Marlborough coastal waters. I do not consider that the proposal will achieve this objective as it is not clear as to whether the water quality will be impacted by the proposal.
114. Objective 15.3 directs me to consider whether the activity will reduce the potential for adverse effects from the discharge of contaminants into air. I do not consider that the proposal meets this objective, however I do not have sufficient information to determine whether the proposal will be contrary to this objective. The same conclusion I have made with respect to Objective 15.1a applies here.
115. The technical advice from the Council officers set out at Appendix 8, (particularly the comments of Environmental Scientist Dr Sarah Brand) are relevant:

The Council has not carried out any monitoring in this locality to enable an informed assessment of whether the ambient standards may or may not be breached by this activity in this locality. As such a judgment call has to be made. The exceedance of standards [is] unlikely in cases where emissions are infrequent, of short duration and done in appropriate weather conditions that do not push smoke towards populations, nor traps smoke under inversion layers.

As noted in the application, residents and visitors are those likely to be exposed, so undertaking the burning at times when there are reduced residents and visitors would be appropriate. This may take the form of no burning during certain times of the year or on certain days of the week such as the weekends when there are likely to be more visitors and temporary residents in the bay. Doing this as a community would certainly reduce the number of days that burning is happening as individuals won't be burning at different times.

116. No overall conclusion is reached by Dr Brand but a number of matters are listed for the Reporting Officers to consider.
117. I do not have sufficient information to conclude that the proposal will not result in adverse effects including health effects from the discharge of contaminants into air. Therefore, I cannot conclude that the proposal is consistent with this Objective which requires the management of resources in order to reduce potential for such adverse effects. Overall, I conclude that this proposal is inconsistent with Objective 15.
118. Policy 15.3.2 requires discharges to air to be managed so ambient air quality is consistent with the National Environmental Standard for air quality. I do not have sufficient information to make this assessment. For this reason, I disagree with the Reporting Officers' conclusion that the proposal is consistent with this objective and these policies.
119. Overall I consider that the proposal is inconsistent with the objectives and policies of Chapter 15.

Chapter 16 – Waste

120. The Reporting Officers consider that the application is consistent with Policy 16.27 which seeks to manage the disposal of waste and control in a safe manner. It is noted that FENZ prefers a community burn pile rather than individuals burning vegetation waste on their own properties.
121. I note that the commentary for Policy 16.27 provides assistance in determining what is responsible disposal. It states that the policy seeks to ensure that disposal is undertaken in a manner that avoids adverse environment effects. As discussed above, it is considered that the proposal has the potential to create adverse environmental effects. There is a lack of information with respect to the potential adverse environmental effects resulting from the activity in terms of these potential impacts. However, the Reporting Officers have concluded that the visual effects of the burn are unlikely to be able to be avoided. On the basis of these conclusions, I cannot conclude that the proposal is consistent with Policy 16.27. I conclude that the proposal is neutral with respect to the objectives and policies of Chapter 16.

Marlborough Sounds Resource Management Plan

122. I agree with the Reporting Officers that the objectives and policies of the MSRMP are relevant to the consideration of this application given its operative status. However given the progress of the PMEP through the appeals process, I place greater weight on the provisions of the PMEP.
123. I adopt the assessment of the Reporting Officers at paragraphs 92 and 93 with respect to waste management and paragraph 95 with respect to natural hazards. I also agree with the Reporting Officers with respect to the objectives and policies regarding public access.
124. I do not agree with the Reporting Officers' conclusion with respect to the proposal being consistent with the relevant objectives and policies of Chapter 6 which addresses landscape values. However, it is likely that this conclusion paragraph (refer to paragraph 98) may have been revised given the amendment to paragraph 114 set out in the Supplementary Report at page 8. The proposal is not consistent with Policy 1.1 as it has a potential to impact on the visual quality of outstanding natural features and landscapes.

Conclusion

125. Granting consent to the application is not supported by the objectives and policies of the PMEP and MSRMP. Relevantly, the proposal is contrary to the objectives and policies of Chapters 7 and 13 of the PMEP.

Regional Policy Statement - section 104(1)(b)(v)

126. Objective 5.1.10 relates to maintaining and enhancing the integrity of freshwater habitats. As set out above, the application does not contain any information which can support the conclusion that it will maintain freshwater quality of the adjacent stream and wetland.
127. Objective 5.3.10 refers to maintaining or enhancing the natural species diversity and integrity of marine habitats. Similarly there is insufficient information to determine that the proposal will be consistent with this Objective and will not have an impact on the marine habitat of the CMA and the wetland. Policy 5.3.11 regarding habitat disruption is not relevant as the proposal does not take place within a wetland.

128. Policy 5.1.14 directs decision makers to preserve the natural character of wetlands and their margins. I consider that this Policy is relevant given the very close proximity of the wetland. The presence of the large burn piles and relatively frequent burn events is likely to have an adverse impact on the natural character of this area which I consider to be more than minor. I agree with the Reporting Officers' assessment that the proposal is contrary to this Policy.²⁸
129. Policy 7.1.13 relates to air quality management and a "key concept" in achieving this is avoiding, remedying or mitigating adverse effects of activities on the air resource. The impact of the discharge to air of smoke can to a certain extent be avoided in terms of its impact on people by avoiding conditions which could lead to smoke drift into Duncan Bay and by ensuring only dry material is burnt. However the regular burns will have an adverse impact on the quality of air generally given the regular discharge of smoke into air, acknowledging however that this impact will be temporary in the source location. But as a whole I consider that the proposal is contrary to Policy 7.1.13 in that the regular and significant burn events will not avoid adverse effects on the air resource.
130. The above paragraphs set out that the proposal is contrary to certain policies (natural character of wetlands, air quality) and unable to be supported by other policies given the uncertainty regarding impact on the adjacent stream and wetland, marine habitat, and freshwater quality.

Section 104(1)(c) – other relevant matters

Precedent effect

131. If this consent was granted, I consider that it may create an expectation for like treatment by other similar communities in the Marlborough Sounds. It is unlikely that the Duncan Bay community is in a unique situation – there are likely to be other small settlements in the Sounds who may be grappling with green waste disposal issues. I note that Okiwi Bay Ratepayers Association has a consent to burn community green waste and that this consent expires on 1 January 2025.²⁹
132. As noted earlier, the impact of significant fires at regular intervals on the landscape values of the Sounds could present itself as a significant adverse effect but I do not have any information before me in order to address this point further. For this reason, any concern regarding precedent effect cannot be decisive to my decision but it is a factor that weighs against the grant of consent.

Alternatives and functional need for coastal location

133. I accept that the community working together to dispose of green waste is a positive goal. The difficulty with the proposal is that the proposed location is particularly sensitive due to the proximity of the CMA, a river and a wetland, and its location in an ONL. It appears that the location has been chosen based on past unauthorised use, distance from houses and the willingness of the property owner to allow this activity to take place on his land. However there is no functional need for the community burn pile to be located in this area. Further, there are alternative methods of disposing green waste that could be utilised.

²⁸ Second Supplementary Report dated 23 April 2021 at p 4.

²⁹ Applicant's Bundle accompanying submissions at page 22.

Memorandum of encumbrance

134. I agree with the Applicant that the memorandum of encumbrance is not relevant to this decision.³⁰

Whether the proposed site is on the riverbed

135. The Applicant maintains that the proposed location of the burn piles is not on a riverbed as contended by Mr Green and that it is also not located in the esplanade strip. The Councils' expert Mr Wadsworth has prepared a detailed report (Appendix A to the Supplementary Report) which concludes that the proposed site is not within the riverbed at this point in time but that it is within the esplanade strip. As noted above, the Applicant records that it is prepared to move the site further east to avoid the strip.

136. I do not consider that this matter is relevant to my decision.

Permitted Baseline s 104(2)

137. The permitted baseline is a relevant consideration as Duncan Bay residents are permitted to burn their own green waste and there could be multiple fires burning green waste as a permitted activity.

138. Application of the permitted baseline affords discretion to a decision maker to disregard an adverse effect of an activity if the plan permits an activity with that effect (section 104(2)).

139. As a permitted activity, green waste could be burnt:

- a) By property owners in the adjacent Coastal Living Zone (containing the settlement of Duncan Bay) provided that the green waste is from that property under the same ownership and does not exceed 2m³ in volume (Rule 7.1.16 and Standard 7.3.14.). There is no limit in terms of the number of occasions waste can be burnt but a limit is applied in terms Standard 7.2.5.1 regarding the smoke not being offensive or objectionable beyond the boundary.
- b) By the property owner of the proposed site in the Coastal Environment Zone provided the green waste is produced by the property owner or that property. There is no limit on the volume that can be burnt but it is also subject to the same standard regarding the smoke not being offensive and objectionable.

140. There is no permitted baseline to apply to the creation of a community stockpile of green waste. I note however that similar activities have standards which relate to how waste is stored on site (coverage, distance from water bodies, management of leachate etc).

141. It is difficult to apply the permitted baseline to the proposal for the following reasons:

- a) Household smoke: It is not clear whether individual households within Duncan Bay would in fact burn their green waste, however if they did, the volume of smoke generated from a fire in the Coastal Living Zone is likely to be considerably less given the 2m³ limit on volume compared with the volume sought in the application of 150m³. The PMEP does not anticipate burning of green waste at this volume and this adverse effect cannot be disregarded.

³⁰ Right of Reply at para 35.

- b) Fire safety: FENZ have stated that the proposal has less of a potential adverse effect in terms of fire safety than the permitted activity of each household burning their own waste. This matter is not decisive as I have already concluded based on FENZ's advice this potential adverse effect should not be taken into account in my decision.
- c) Subject site: With respect to the burn which could take place on the subject site as of right if the waste generated was from the same property (or a property under similar ownership), it is unclear how much material would be burnt. If the owner was burning waste "generated on the same property", the volume is likely to be significantly less than the proposed burning of 150m³ ten times per year. If the owner has other land he/she may be able to bring other waste to be burnt at the subject site. However I consider that a reasonable assumption is that significantly less waste would be burnt as a permitted activity on the subject site.
- d) Stockpile: The permitted baseline does not apply to the activity of the community stockpile and the adverse effects of this activity cannot be disregarded as a result.

142. After applying the permitted baseline to this application, I consider that potential adverse effects of the application cannot be disregarded on the basis of the burning and stockpiling activity contemplated in the Coastal Environment and Coastal Living Zones.

Part 2 Resource Management Act 1991

143. Pursuant to the Davidson appeal (*RJ Davidson Family Trust v Marlborough District Council* [2018] NZCA 316), I consider that the provisions of the MSRMP and the PMEP have been prepared having regard Part 2 of the Act. Therefore I do not need to have recourse to Part 2 in my decision.

Conclusion

144. The following factors are decisive to my assessment:

- a) The proposed activity is likely to result in moderate adverse effects to the environment due to the sensitivity of the receiving environment;
- b) Policy 15 of the NZCPS is directive, and after having found that the proposal is likely to generate adverse effects on an ONL, consent must be refused;
- c) There is no support for the proposed activity in this location from the objectives and policies of the PMEP or MSRMP, in particular the proposal is contrary to the objectives and policies of the Coastal Environment and Landscapes Chapters of the PMEP; and
- d) The potential adverse effects of the activity cannot be disregarded through the application of the permitted baseline test.

145. For the above reasons, it is my decision, pursuant to section 104B of the Act, to **REFUSE** the application lodged by the Duncan Bay Residents Association to stockpile and burn green waste.



.....
Independent Commissioner, Marlborough District Council

14 May 2021

Additional Important Information

The following information provided in this information sheet is a guide to the legal rights of applicants and submitters.

If you want to discuss matters raised in this information sheet you are welcome to contact Council. However, if you require specific advice you should contact an independent professional and refer to the relevant sections of the Resource Management Act 1991.

Objections

Refer to section 357 of the Resource Management Act 1991

- In certain circumstances the applicant has the right to object to the Council's decision.
- Any objection shall be made in **writing** and will need to outline the reasons for the objection.
- An objection needs to be lodged with the Council within **15 working days** of the Council's decision being received by you or your agent.

Appeals

Refer to Form 16 and sections 120 and 121 of the Resource Management Act 1991

- The applicant and any submitters have the right to appeal the whole or any part of the Council's decision, however there is no right of appeal against the whole or any part of the decision to the extent that the decision relates to one or more of the following, but no other, activities:
 - a) a boundary activity, unless the boundary activity is a non-complying activity;
 - b) a subdivision, unless the subdivision is a non-complying activity;
 - c) a residential activity as defined in section 95A(6), unless the residential activity is a non-complying activity.
- A submitter can only appeal to the Environment Court if their appeal is related to a matter raised in their submission and their submission, or the part of their submission to which the appeal relates, has not been struck out under section 41D of the Resource Management Act 1991.
- A notice of appeal must be lodged with the Environment Court and the Council, within **15 working days** of the Council's decision being received (or received by your agent on your behalf). A copy also needs to be served on the applicant and submitters to the application within 5 working days of the notice being lodged with the Environment Court.

Before lodging an objection or an appeal it is recommended that you seek professional advice.