

BEFORE THE ENVIRONMENT COURT
I MUA I TE KOOTI TAIAO O AOTEAROA

Decision No. [2018] NZEnvC

046

IN THE MATTER of the Resource Management Act 1991
AND of an inquiry under clauses 14(1) and 15(3) of
Schedule 1 to the Act
BETWEEN FRIENDS OF NELSON HAVEN AND
TASMAN BAY INCORPORATED
(ENV-2017-WLG-000010)
Appellant
AND TASMAN DISTRICT COUNCIL
Respondent
AND WAINUI SPAT CATCHING GROUP
Applicant
AND JILLIAN RUTH FOXWELL
FRIENDS OF GOLDEN BAY SOCIETY
(INCORPORATED)
JAMES BEARD ENVIRONMENTAL TRUST
ROYAL FOREST AND BIRD PROTECTION
SOCIETY OF NEW ZEALAND
INCORPORATED
s274 Parties

Court: Environment Judge D A Kirkpatrick
Environment Commissioner I Buchanan
Environment Commissioner K Edmonds

Hearing: 31 October – 3 November 2017 at Nelson

Appearances: K Mitchell for the Appellant
C Thomsen for the Respondent
Q Davies and A Hills for the Applicant
J Foxwell in person
D Kaye for James Beard Environmental Trust
P Anderson for Royal Forest and Bird Protection Society Inc

Date of Decision: 16 April 2018

Date of Issue: 16 April 2018



FINDINGS AND DIRECTIONS OF THE ENVIRONMENT COURT

- A: The appeal is allowed in part and refused in part, as set out in the draft directions in paragraph [137].
- B: The Respondent is directed to prepare and consult with the other parties on the final form of the provisions of the Tasman Resource Management Plan which are the subject of the Court's directions, and particularly on any consequential amendments that may be necessary and which the Court has not identified, and to lodge these with the Court within 20 working days after which the Court will make a final determination on its findings and directions.
- C: There is no order as to costs.

REASONS

Introduction

[1] An application by the Wainui Spat Catching Group (**the Applicant**) for a private Plan Change (**PC61**) to the Tasman Resource Management Plan (**TRMP**) was lodged with Tasman District Council (**the Respondent**) in October 2015. The application was for a specific aquaculture management area (**AMA**) and a specific policy and rule framework for mussel spat catching and spat holding farms located in a defined area of the coastal marine area in Wainui Bay, at the eastern end of Golden Bay/Mohua in Tasman region. The application was accepted by the Respondent under clause 25(2)(b) of Schedule 1 to the Resource Management Act 1991 (**Act** or **RMA**) and publicly notified in March 2016.

[2] PC61 seeks to change the activity status of mussel spat catching and spat holding at Wainui Bay on the sites of coastal permits or marine farming licences that existed on 25 May 1996 from discretionary to controlled, defaulting to a restricted discretionary activity if the thresholds for controlled activity were not met. Following consideration by a Hearings Panel, the Respondent made and notified its decision to approve PC61 with modifications in December 2016.



[3] Friends of Nelson Haven and Tasman Bay (**Friends**) appealed the Respondent's decision on the primary grounds that the Respondent had failed to adequately assess the natural character and landscape values of Wainui Bay and the adverse effects of the proposed plan change on those values, therefore failing to give effect to Policies 7, 13, 14, 15 and 17 of the New Zealand Coastal Policy Statement 2010 (**NZCPS**). The decision was also alleged to be inconsistent with relevant provisions in the TRMP. The relief sought in the appeal was that PC 61 be declined in total and the Respondent's decision set aside.

[4] As PC61 proposes to change provisions in the TRMP that form part of the Respondent's regional coastal plan, this appeal is an inquiry under clause 15(3) of Schedule 1 to the Act and our decision consists of findings to be reported to the parties and to the Minister of Conservation. Such findings may (and in this case do) include directions to the Respondent under s 293(1) of the Act to make modifications to, deletions from, or additions to, the TRMP under clause 16(1). After the Respondent has done that, it must adopt the amended TRMP under clause 18 for reference to the Minister of Conservation for her approval in terms of clause 19.

The parties

[5] The Applicant represents all of the commercial entities that have an ownership interest in the six coastal permits for aquaculture currently operating in Wainui Bay. These are:

- (a) Sealord Marine Farms.
- (b) MacLab NZ Ltd.
- (c) Talley's Group Ltd.
- (d) PH Redwood & Co Ltd.
- (e) Clearwater Mussels Ltd.
- (f) Ngāi Tahu Seafood Resources Ltd.
- (g) Wakatu Seafood Resources.

[6] The Appellant, Friends of Nelson Haven and Tasman Bay Incorporated (**FNHTB**),



was formed in 1973 as an environmental advocacy group for the Nelson-Tasman and Marlborough regions.

[7] Four parties filed notices under s 274 RMA supporting the appeal:

- (a) Friends of Golden Bay Incorporated;
- (b) Royal Forest and Bird Protection Society Incorporated;
- (c) James Beard Environmental Trust; and
- (d) Jillian Foxwell.

[8] Friends of Golden Bay Incorporated (**FGB**) was formed in 1995 to foster sustainability and conservation in Golden Bay/Mohua with a focus on the coastal marine area. FNHTB and FGB presented a combined case and are referred to collectively as **the Friends**.

[9] Royal Forest and Bird Protection Society Incorporated (**RFAB**) is a well-known conservation organisation with objectives of protecting and restoring wildlife and wild places.

[10] The James Beard Environmental Trust (**JBET**) is the immediate terrestrial neighbour of the marine area involved in PC61, with land owned by JBET on Abel Tasman Point containing a dwelling overlooking Wainui Bay and a dwelling on the north end of the Point. David Kaye gave evidence on behalf of the James Beard Environmental Trust, including on the environmental impact of the existing spat farms. Mr Kaye is a trustee, Secretary of the trust, caretaker of Trust land at Abel Tasman Point since 1985, and mostly resident at Abel Tasman Point since 1990.

[11] Jillian Foxwell lives in one of a cluster of houses at the bottom of Wainui Hill and represented herself and the Anatimo Trust. As a resident of Wainui for 22 years she said she had a vast range of experience of the evolution of the mussel spat collecting operation, including effects associated with noise, rubbish, and light.

Background

[12] Wainui Bay is located at the eastern end of Golden Bay/Mohua adjacent to Abel Tasman National Park. The Bay is around 3 km wide, enclosed between prominent



coastal headlands (Abel Tasman Point on the west and Taupo Point on the east) and includes a 215ha tidal inlet behind a sand spit extending from the eastern edge of the Bay. Within Wainui Bay six currently consented marine farms used for spat catching and spat holding are located east of Abel Tasman Point adjacent to but separate from the rocks and reef that extend out from the Point. The farms are grouped together and cover two rectangle-shaped marine areas totalling about 16ha.

[13] Marine farming licences were first issued in 1980 for four of the Wainui Bay marine farm sites. The original licences were for 14 years, later extended a further 14 years to 2008. Aquaculture Management Areas (**AMA**) were introduced by the Aquaculture Reform (Repeals and Transitions) Act 2004 (**ARA**) and the marine farming licences in Wainui Bay became deemed coastal permits under the ARA, expiring in 2024. A further two coastal permits were issued for marine farms at the outer edge of the site in 1992. These were renewed in 1994 and again in 2008 and now also expire in 2024.

[14] Through a mixture of ownership and leasing arrangements, Clearwater Mussels Ltd operate around 60 percent of spat lines within the farmed area and the balance is operated by Wakatu Seafood Resources and Ngāi Tahu Seafood Ltd. The Wainui Spat Catching Group represents all ownership interests in the Wainui Bay site.

[15] Spat catching at Wainui Bay and the importance of this site to the mussel farming industry are described in the assessment of environment effects (**AEE**) accompanying the Plan Change application¹ and referred to by Mr M Holland, Operations Manager for Clearwater Mussels Ltd, in his evidence.

[16] Greenshell mussels (*Perna canaliculus*) are endemic to New Zealand. Mussel larvae released to the sea along the South Island's west coast find their way north along that coast, around Farewell Spit and into Golden Bay/Mohua, Tasman Bay and the Marlborough Sounds where they metamorphose into spat. These spat seek a substrate to attach to and grow as adult mussels.

[17] At catching sites, spat of around 250 microns in length (invisible to the naked eye) attach to ropes specifically designed for the purpose and suspended in the water column. The spat catching ropes are attached to surface backbone ropes connected to lines of

¹ Assessment of Environmental Effects for the private Plan Change request by the Wainui Bay Spat Catching Group prepared by RD Sutherland, PALMS Ltd, undated.



buoys anchored at each end to the sea floor. Spat attached to the catching ropes is seeded out to mussel farms when it is at an optimal size of around 40 millimetres, although for operational efficiency reasons some spat is held on at the catching site until it grows to around 60 millimetres in length before being seeded out.

Development of the aquaculture planning framework in the TRMP

[18] The TRMP was publicly notified in May 1996 and the aquaculture provisions of the proposed plan were appealed to the Environment Court. Following a lengthy hearing in 2000, the Court issued a series of four substantial reports to the Minister of Conservation on its inquiry on the aquaculture references to the proposed TRMP addressing the establishment of a new aquaculture planning framework in the region.²

[19] Aquaculture is provided for in Chapter 22 – Aquaculture of the TRMP, which sets out the objective and policies. The relevant rules form part of Chapter 25 – Coastal Marine Area Rules. The objective for Aquaculture is at 22.1.2 and provides:

Aquaculture developed in a manner that maintains, enhances, or protects the natural and physical resources of the coastal environment, including the life-supporting capacity of marine ecosystems and the natural character, landscape, ecological, public access, recreational and amenity values, and the values important to the tangata whenua iwi, while avoiding, remedying or mitigating adverse effects.

[20] Mussel farming and spat catching are provided for within three AMAs, two in Golden Bay/Mohua and one in Tasman Bay, located at least 3 nautical miles from land in order to manage potential effects on navigation, natural character, landscapes, marine mammals and ecological values.

[21] Aquaculture is generally prohibited in the remainder of the coastal marine area of Golden Bay/Mohua, which is zoned as an Aquaculture Exclusion Area (**AEA**). Among the exceptions to that prohibition are the sites of the existing marine farms in Wainui Bay which are expressly excluded from the definition of the AEA.³ These sites are not in an AMA: instead, aquaculture in this area is provided for as a discretionary activity under Rule 25.1.4 of the TRMP and in accordance with Policy 22.1.3.2 which reads:

To provide for the continuation of aquaculture activities at Wainui Bay, for the duration of the existing

² *Golden Bay Marine Farmers & ors v Tasman District Council* W42/2001 (First Interim Report); W19/2003 (Second Interim Report); W10/2004 (Third Interim Report); and W89/2004 (Final Report); collectively, the **Golden Bay Marine Farmers reports**.

³ TRMP, Chapter 2 – Meanings of Words: **Aquaculture Exclusion Area** – means all parts of the coastal marine area of the District except: ... (b) the marine farming sites at Wainui Bay shown on the planning maps.



licences and permits at that location.

[22] Many of the parties to this appeal had been involved in the Environment Court proceedings resulting in the *Golden Bay Marine Farmers* reports and the aquaculture planning framework in the TRMP and so were very familiar with this background.

The Plan Change

[23] The purpose of the proposal was described in the Plan Change application as being:

- (a) To provide certainty of mussel spat supply in the future, in order to ensure the ongoing viability of the mussel farming and processing industry in the top of the South Island, and in New Zealand.
- (b) To recognise that Wainui Bay is first ranking in New Zealand in terms of the reliability and quality of spat fall, and similar to Ninety Mile Beach in terms of the quantity of spat fall. The entire mussel farming and processing industry is dependent upon a reliable source of spat, and Wainui Bay is the foundation stone of this industry.
- (c) To recognise the significant existing and potential contribution of aquaculture to the social, economic and cultural well-being of people and communities.
- (d) To do no more than what is currently being done at Wainui Bay, aside from ensuring mussel spat catching and holding can continue for the foreseeable future post-2024. No new water space is being sought.
- (e) To encourage use of the site for mussel spat catching and holding only, by making full mussel farming at the site a prohibited activity.
- (f) To acknowledge the impact that mussel spat catching at Wainui Bay has on the amenity of neighbours and visitors to the area, by placing additional environmental controls in the Plan to better manage these impacts.

[24] The purpose of the Plan Change was to be implemented by the following amendments to the TRMP (as approved by the Respondent after the hearing of submissions):

- (a) New Aquaculture Management Area (to be called **AMA 4 Wainui**) with



boundaries matching the currently consented boundaries for the marine farms in Wainui Bay;

- (b) Amendments to Chapter 22: Aquaculture – Introduction to refer to the creation of AMA 4 Wainui and to include the following statement:

Wainui Bay is recognised as a nationally important site for the collection of mussel spat, providing almost 50 percent of the spat used for mussel farming in the top of the south of New Zealand. The importance of this area to New Zealand aquaculture and the social and economic benefits arising from this site are recognised and provided for in the planning provisions.

- (c) Amendments to Policy 22.1.3.2 to contemplate AMA 4 Wainui, so that it reads:

To provide for a discrete AMA within Wainui Bay for mussel spat catching and spat holding in recognition of the national importance of Wainui Bay for this activity.

- (d) Minor amendments to Method 22.1.20.1(a) and the first section of Principal Reasons and Explanation 22.1.30;

- (e) New paragraph in the second section of Principal Reasons and Explanation 22.1.30 as follows:

Mussel Spat catching and holding in Wainui Bay is provided for as a controlled activity and a restricted discretionary activity where any application does not meet the controlled activity conditions. The site is nationally important for the collection of mussel spat. However, in recognition of the unique and special character of the Bay, specific conditions have been included in the conditions of the controlled activity rule. All other aquaculture is prohibited in Wainui Bay.

- (f) New definition for *mussel spat holding* to mean:

*the retention of Green-lipped mussel (*Perna canaliculus*) spat between 40 to 60 millimetres in length, on spat catching structures*

- (g) New activity in Rule 25.1.3.1(b) of mussel spat catching within AMA 4 Wainui as a controlled activity subject to conditions in new Rules 25.1.3.1(ga) and (i) to address effects on amenity values (including the effects of discharge of refuse, hours of operation, and noise and light from fishing vessels) or a restricted discretionary activity where those conditions are not met.

- (h) New activity in Rule 25.1.3.1A of mussel spat holding within AMA 4 Wainui as a controlled activity subject to the same conditions as for spat catching; and



- (i) Prohibition of aquaculture activities other than mussel spat catching and spat holding in AMA 4 Wainui in Rule 25.1.3.3.

The positions of the parties

[25] The Applicant's position was that establishment of a discrete AMA for the sites was appropriate given the national significance of the sites for the supply of mussel spat to the mussel farming industry, consistent with provisions in the TRMP and higher order planning instruments.

[26] The Respondent defended its decision that relied on the expert and industry evidence of the Applicant to be satisfied that spat catching and holding was an appropriate activity in Wainui Bay.

[27] The position of the Friends was that AMA was not an appropriate zoning for the Wainui Bay area containing the existing spat farms and that the current discretionary activity status for mussel farming at the Wainui Bay location should be retained. Their primary submission was that PC61 will not give effect to Policy 7(1) of the NZCPS because the Respondent has not undertaken the necessary strategic planning exercise to identify outstanding natural features and landscapes and areas of outstanding natural character and to provide for their protection and preservation in the TRMP.

[28] If that submission were not accepted, then the Friends submitted that the PC61 will not give effect to Policies 13(1)(a) and 15(a) of the NZCPS because Wainui Bay is an outstanding natural feature and an outstanding area of natural character and the spat catching farms have significant adverse effects on these values. They also submitted that PC61 does not give effect to Policy 14 of the NZCPS because it does not promote the restoration and rehabilitation of the natural character of the coastal environment at Wainui Bay. In addition, the Friends argued the proposal would be inconsistent with the provisions of the TRMP as they interpret the findings of the Environment Court in the *Golden Bay Marine Farmers* reports.

[29] The position of RFAB was that Wainui Bay is an outstanding natural feature and potentially has outstanding natural character, although there is not enough information to determine the latter question. RFAB submitted there were adverse effects of the spat catching activity (some of them significant) such that PC61 would not give effect to Policies 13 or 15 of the NZCPS. Additionally, RFAB considered PC61 demonstrated an approach to coastal planning that was at odds with the strategic approach indicated by



the NZCPS and anticipated by the *Golden Bay Marine Farmers* reports.

[30] JBET's position was that PC61 should be reversed in its entirety thereby restoring public input into decision making processes on the existence of marine farming activities in Wainui Bay. Mr Kaye advised that due to ill health Mr Beard was unable to prepare rebuttal evidence or to attend the hearing and asked the Court to consider the published essays as an appendix to Mr Kaye's evidence. Sadly, Mr Beard died a few days after the hearing commenced.

[31] Jillian Foxwell sought retention of the status quo. While she acknowledged that there had been an improvement in the effects of the activities over time, she considered the activity to still be very much in an evolutionary stage and that mussel spat catching and holding needs to remain a discretionary activity.

Statutory framework

[32] A regional plan is to be changed in accordance with the procedure in Schedule 1 to the RMA for the purpose of assisting the regional council to carry out any of its functions under s30 in order to achieve the purpose of the Act and in accordance with the provisions of Part 2 and its obligation in terms of evaluation under s32.⁴ In addition, rules may be included in a regional plan for the purpose of carrying out a regional council's functions under the RMA (other than for exceptions which do not apply here) and achieving the objectives and policies of the plan.⁵ In making a rule, the regional council must have regard to the actual or potential effect on the environment of activities, including, in particular, any adverse effect.⁶ In addition, a regional plan must give effect to any relevant national or regional policy statement, with the NZCPS assuming particular importance in this case.⁷

[33] The relevant parts of the applicable version of s32 (as the notification of the Plan Change predated the commencement of the 2017 Amendment Act) provide:

Requirements for preparing and publishing evaluation reports

(1) *An evaluation report required under this Act must—*

- (a) *examine the extent to which the objectives of the proposal being evaluated are the most appropriate way to achieve the purpose of this Act; and*
- (b) *examine whether the provisions in the proposal are the most appropriate way to*

⁴ RMA, s 66(1).

⁵ RMA, s 68(1).

⁶ RMA, s 68(3).

⁷ RMA, s 67(3).



- achieve the objectives by—
- (i) identifying other reasonably practicable options for achieving the objectives; and
 - (ii) assessing the efficiency and effectiveness of the provisions in achieving the objectives; and
 - (iii) summarising the reasons for deciding on the provisions; and
- (c) contain a level of detail that corresponds to the scale and significance of the environmental, economic, social, and cultural effects that are anticipated from the implementation of the proposal.
- (2) An assessment under subsection (1)(b)(ii) must—
- (a) identify and assess the benefits and costs of the environmental, economic, social, and cultural effects that are anticipated from the implementation of the provisions, including the opportunities for—
 - (i) economic growth that are anticipated to be provided or reduced; and
 - (ii) employment that are anticipated to be provided or reduced; and
 - (b) if practicable, quantify the benefits and costs referred to in paragraph (a); and
 - (c) assess the risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the provisions.
- ...
- (6) In this section,—
- objectives** means,—
- (a) for a proposal that contains or states objectives, those objectives;
 - (b) for all other proposals, the purpose of the proposal
- proposal** means a proposed standard, statement, regulation, plan, or change for which an evaluation report must be prepared under this Act
- provisions** means,—
- (a) for a proposed plan or change, the policies, rules, or other methods that implement, or give effect to, the objectives of the proposed plan or change;
 - (b) for all other proposals, the policies or provisions of the proposal that implement, or give effect to, the objectives of the proposal.

[34] Section 32(1)(a) RMA requires us to examine the extent to which the objectives of the proposal are the most appropriate way to achieve the purpose of the Act in Part 2, while s32(1)(b) requires examination of “whether the provisions of the proposal are the most appropriate way to achieve the objectives” of the Plan Change. The specific reference to Part 2 RMA must now be read in light of the decision of the Supreme Court in the *King Salmon* case.⁸ As the NZCPS gives substance to Part 2’s provisions in relation to the coastal environment, a regional council is necessarily acting “in accordance with” Part 2 and there is no need to refer back to that part when determining a Plan Change, absent any finding of incompleteness, uncertainty or invalidity.

[35] In terms of s32 the proposal does not involve any new or amended objective for the TRMP, and therefore we need to consider the purpose of the proposal (as set out earlier in paragraph [22]).

⁸ *Environmental Defence Society Incorporated v New Zealand King Salmon Co Ltd* [2014] NZSC 38 [*King Salmon*].



[36] The relevant planning documents for this case are the NZCPS (especially Policies 7, 13, 14 and 15⁹), the Tasman Regional Policy Statement (TRPS) and the TRMP. The TRPS and TRMP predate the NZCPS and have not been amended to give effect to it. It was apparent that the objective for aquaculture in the TRMP did not give effect to the NZCPS¹⁰ given its lack of direction in addressing relevant objectives and policies in the NZCPS. It was not in dispute that the principal analysis for PC61 should therefore be against the relevant provisions of the NZCPS.

[37] For completeness, we note that the s32 report identified and evaluated three “reasonably practicable options”, as follows:

- (i) Option 1: Retain the status quo, with Wainui Bay being an exception to the prohibition against marine farming in the coastal marine area of the District that is not zoned under an AMA until 2024, with both mussel spat catching and full mussel farming retaining discretionary status.
- (ii) Option 2: Wainui Bay remains an exception to the prohibition against marine farming in the coastal marine area of the District that is not zoned under an AMA, with mussel spat catching becoming a controlled activity, mussel farming between 40-60mm remaining a discretionary activity and full mussel farming becoming a non-complying activity (until the TRMP is reviewed, or another plan change changes the status of the activities).
- (iii) Option 3 (as proposed in PC61): Re-zone Wainui Bay under the name “AMA 4 Wainui”, making mussel spat catching and holding between 40-60mm controlled activities, and full mussel farming (or other forms of marine farming) a prohibited activity (until the Plan is reviewed, or another plan change changes the status of the activities). If the controlled activity standards are not met, mussel spat catching and holding become restricted discretionary activities.

⁹ Although Policy 17 – *Historic heritage identification and protection* was cited in the Notice of appeal, and some evidence was presented about Wainui Bay in the context of the ongoing debate about where exactly first contact occurred between Europeans (Abel Tasman and his crews) and Māori, this issue did not appear to be significantly relevant to the cases presented to us.

¹⁰ Objective 22.1.2 TRMP reads: *Aquaculture developed in a manner that maintains, enhances, or protects the natural and physical resources of the coastal environment, including the life-supporting capacity of marine ecosystems and the natural character, landscape, ecological, public access, recreational and amenity values, and the values important to the tangata whenua iwi, while avoiding, remedying or mitigating adverse effects.*



Issues

[38] While the parties have approached this as largely a case about landscape values and adverse effects on those values, we see the main issues as more fundamental than this:

- (a) Should the existing marine farms at Wainui Bay be identified as AMA 4 Wainui in the TRMP?
- (b) Should mussel spat catching and holding at Wainui Bay be a controlled activity?

[39] Before moving to the specifics of the issues it is necessary to address matters raised in evidence concerning the existing activity in the environment and the value of the area for spat catching.

The existing activity in the environment

[40] The Applicant and Respondent emphasised the proposed change as allowing no more than what is currently undertaken in Wainui Bay. Ms Tania Bray, Respondent's environmental policy planner, summarised the conditions for resource consents RM071049 and RM060292 in her Annexure TLB-1 as allowing "mussel spat to 40 or 60mm".

[41] The 60mm dimension was given as a reason for PC61 including specific provision for mussel spat holding in Wainui Bay. The TRMP contains the following definitions:

Mussel spat - means any stage of the lifecycle of Green-lipped mussel (*Perna canaliculus*) less than 40 millimetres in length.

Mussel spat catching - means spat catching that is limited to the obtaining or retention of mussel spat and the harvesting thereof from aquaculture structures.

[42] PC61 proposes to add a new definition:

Mussel spat holding – means the retention of Green-lipped mussel (*Perna canaliculus*) spat between 40 to 60 millimetres in length, on spat-catching structures.

[43] We note that there is no definition of "mussel farming" in the TRMP. We also note that the s32 evaluation refers to mussel spat catching, mussel farming between 40-60mm and full mussel farming.



[44] There was some debate about the consideration that should be given to the consented mussel spat catching farms as part of the environment. For completeness, we cover it here although we note that it is not determinative.

[45] The Applicant submitted that when describing the environment of Wainui Bay, the Court should consider the spat farms as part of that environment; but then, when assessing the effects on that environment, the comparison should be undertaken with the activity absent against the activity present. The Friends countered that the High Court's decision in the *Ngati Rangī Trust* case¹¹ establishes that for a resource consent application which is in effect a re-consenting application, the current permits should not be considered as part of the existing environment. In that case Collins J noted a principle that it should not be assumed that existing consents with finite terms will be renewed on the same terms or at all.¹² The Friends submitted that it would not be appropriate for a plan change, which has a far more wide-ranging effect, to apply a more lenient test as it is fundamental to the analysis in this case to identify the impact of the addition of the farms into the environment. Without this first step the Court may overlook important matters of assessment in considering the range of adverse effects on the environment. In addition, the Friends submitted that the Wainui farms have never been assessed under the RMA against a "blue seas" environment without the spat farms in it.¹³

[46] We agree with the submissions for the Friends. Under the current TRMP provisions the activity status of the spat farms is fully discretionary and there is no guarantee that in 2024 the existing consents for the farms will be renewed or that they will otherwise continue to form part of the environment. Accordingly, any analysis of PC61 should not treat the existing spat farms as part of the existing environment. Given that PC61 proposes controlled activity status for such farms, and that status requires such consent to be granted¹⁴ for a period, generally, of at least 20 years,¹⁵ it is particularly important that the environment is identified and the assessment of effects on it is assessed as if the spat farms were not already present.

[47] That is not to say that the existence of the spat farms may not be of some relevance in informing the evidence on effects and the treatment of them. We deal with the

¹¹ *Ngati Rangī Trust v Manawatu-Whanganui Regional Council* [2016] NZHC 2948, at [63].

¹² *Ibid.* at [65].

¹³ Appellant's Opening Submissions at [68] - [76].

¹⁴ Section 87A RMA.

¹⁵ Section 123A RMA.



evidence from the landscape architects on this matter later in the decision.

The significance of the site for aquaculture

[48] The AEE describes the Wainui Bay site as being of national significance for mussel spat catching. The site has provided a reliable and consistent source of spat since the early 1980s and currently provides around 50 percent of spat for mussel farms in the northern part of the South Island. Other sources of spat include the offshore AMAs in Golden Bay/Mohua and Tasman Bay, a small number of sites in the Marlborough Sounds and seaweed washed ashore along Ninety Mile Beach in Northland.

[49] Dr Kenneth Grange, consultant marine biologist for the Applicant, advised that mussel farmers in the top of the South Island use a mixture of Ninety Mile Beach, Wainui Bay and locally caught spat as there are seasonal differences in maturity allowing for year-round harvesting of mussels for domestic and international markets. Dr Grange also advised that attempts at hatchery production of mussel spat were ongoing but had yet to produce commercial quantities of spat with any reliability, although they may do so in future years. In his opinion, the need for collection of wild spat will remain in the longer term as hatchery spat is not forecast to provide for more than around one third of total mussel production.

[50] The Applicant relied on the evidence of Ms Andrea Strang, an aquaculture scientist specialising in mussel spat management, to establish the relative importance of the Wainui site in providing a consistent and reliable source of spat for the industry. Her evidence was that monitoring of the spat catch rate showed Wainui Bay as providing a substantially more reliable source of spat than other monitored sites in Tasman Bay and Golden Bay/Mohua. Ms Strang attributed this higher spat catch rate to the presence of an eddy current in Wainui Bay that holds spat at the catch site for an extended period. This provides for spat to be repeatedly exposed to catch ropes enhancing the opportunities for attachment and resulting in high catches per metre of rope deployed. By contrast the more open water sites in Golden Bay/Mohua have higher single direction water flows that are likely to provide only a single attachment opportunity resulting in the lower catch rates per metre of rope recorded in the monitoring at those sites.

[51] In answer to questions in cross-examination, Ms Strang could not translate the favourable catch rates at Wainui into comparable yearly spat production estimates from the various sites. We have been unable to find this in other evidence. There is a



statement in the AEE that around 50 percent of spat deployed in mussel farms in the top of the South Island is sourced from Wainui Bay. This 50 percent figure was obtained by the compiler of the AEE, Mr R Sutherland, in direct communication with the companies sourcing spat from Wainui Bay. While the quantity of spat caught and used remains confidential, the source of the spat used to grow harvested product was made available which, in sum, revealed that 50 percent of mussels farmed in Tasman Bay, Golden Bay/Mohua and the Marlborough Sounds are sourced from Wainui Bay spat. This was referred to by Dr Grange, Mr Holland and Ms Strang in evidence and was unchallenged at the hearing. We have no reason to question it and so accept it as being a credible estimate. It remained undisputed that the Wainui Bay site provides a highly productive, reliable and consistent source of spat that is highly valued by the mussel farming industry.

[52] Industry figures cited in the AEE show greenshell mussels as the single largest seafood export from New Zealand. Production from marine farms at the top of the South Island accounts for around 70 percent of New Zealand's annual production on average. The value of this for domestic and export markets was placed around \$250 million for 2015. Wainui contributes spat to support 50 percent of this value. The ability to produce market ready mussels year-round provided by access to a consistent and reliable source of spat at appropriate times from Wainui Bay has played a significant role in the development of markets for mussels.

[53] The Wainui site provides direct employment for 23 people, while the industry in the northern South Island, including farming and downstream processing, supports some 1020 fulltime jobs. This, together with the support provided to supply chains associated with mussel production and processing and the general economic flow-on effects from employment, establish the importance of the industry to the New Zealand economy and the significant role that access to spat from Wainui Bay plays in this.

[54] Following conferencing with the parties, Judge Dwyer, presiding judge at the time, issued a Minute dated 12 April 2017 that included the following:

I recorded that the case for the Friends of Golden Bay (as a section 274 party) was restricted by the case of the primary appellant, which has conceded the economic significance of the marine farm that is in question.

[55] This statement resulted from a request from counsel for the Applicant for direction as to whether economic evidence needed to be called. This was clarified in the Minute, in counsel's submission, and he took from this that no economic evidence was required.



Ms Mitchell for the Appellant took issue with that interpretation of the Minute: while not contesting that these marine farms generate employment and revenue in the district, she advised that the Appellant would be questioning the appropriateness of these farms in the context of the TRMP and in light of the alternatives available for the production of spat in existing AMAs. In the event, none of the Applicant's witnesses were challenged in relation to the economic and social significance of the site to the aquaculture industry. We accept the Applicant's submission that the economic and social benefits of the proposal are as outlined in the AEE and s 32 evaluation accompanying the application and briefly summarised above and are not in dispute in this appeal. On that basis we accept, on the evidence before us, that the economic significance of the existing marine farms at Wainui Bay is not in issue, but the question of whether that is a better use of the area than any other use is still open.

[56] We raised with Mr Turner and other witnesses, as well as counsel, questions on the appropriateness of a policy asserting the national importance of a matter not directly within the ambit of the matters of national importance listed in s6 of the Act. It may be that s6 should be read as an exclusive list of such matters for the purpose of the RMA and of plans made under it. In closing, counsel for the applicant confirmed that the applicant had no objection to deleting the reference to "national importance" in Policy 22.1.3.2, but wished to retain the reference to the same matter in the earlier explanatory text introduced through the plan change which reads:

Wainui Bay is recognised as a nationally important site for the collection of mussel spat, providing almost 50 percent of the spat used for mussel farming in the top of the south of New Zealand. The importance of this area to New Zealand aquaculture and the social and economic benefits arising from this site are recognised and provided for in the planning provisions.

In our minds, this does not really get around the problem. Explanatory text, if it is to be included in a plan at all, should accurately reflect the content of objectives, policies and other provisions in that plan. Preferably, the objectives and policies should be clear enough in their wording and intended effect to speak for themselves.

Should the existing marine farms at Wainui Bay be identified as AMA 4?

[57] As earlier noted, AMA provisions were introduced as a spatial planning tool in the Aquaculture Reform (Repeals and Transitions) Act 2004 (ARA). Under these provisions marine farmers could only set up new farms in AMAs established by Regional and Unitary Councils. Changes to the RMA, the ARA and the Fisheries Act 1996 were introduced in



2011¹⁶ simplifying the approval process for marine farms by removing the requirement for an AMA to exist prior to making an application for a marine farm. Applications for marine farms now follow the same process as resource consents (coastal permits) for any other activity in the coastal marine area. Coastal permits for aquaculture have a minimum term of 20 years unless a shorter term is requested or is required to manage effects.¹⁷

[58] The TRMP established AMA 1 Waikato and AMA 2 Puramakau in Golden Bay/Mohua and AMA 3 Te Kumara in Tasman Bay, all at least three nautical miles (about 5.6 km) offshore. The Golden Bay/Mohua AMAs cover some 3,500 ha of ocean surface. PC61 seeks to identify the area occupied by the six existing spat catching farms in Wainui Bay as an AMA with specific rules for spat catching and holding.

[59] AMAs are provided for in the TRMP through objectives and policies in Chapter 22 - *Aquaculture*. Rules for achieving the objectives and policies are found in Chapter 25 of the Plan. The majority of the aquaculture policy provisions in Chapter 22 relate to the substantive planning framework for AMAs. In broad terms they address issues that have been identified at the three large offshore sites where the long-term ecological effects may not be fully understood. The TRMP takes a cautious approach by establishing a comprehensive adaptive management framework for the establishment and monitoring of marine farms in these AMAs. The AMAs include a number of sub-zones where various aquaculture activities, including spat catching, are provided for.

[60] The Wainui Bay sites are not included within these AMA provisions, but are specifically covered by Policy 22.1.3.2 which reads:

To provide for the continuation of aquaculture activities at Wainui Bay, for the duration of the existing licences and permits at that location.

[61] As amended by counsel for the Applicant in closing in response to the questions we asked about "national" importance, this policy is proposed to be changed to read:

To provide for a discrete AMA within Wainui Bay for mussel spat catching and spat holding in recognition of the importance of Wainui Bay for this activity.

[62] Policy 22.1.3.2 seems to have been included in the TRMP in 2004 in response to

¹⁶ Resource Management Amendment Act (No 2) 2011.

¹⁷ Section 123A RMA.



the following observations or findings by the Environment Court in the first interim *Golden Bay Marine Farmers* report in 2001:

*Firstly we note that no party, either in submission or reference, sought the deletion of the Wainui spat catching site from the CMA of Golden Bay or its inclusion in an AEA. Therefore for the term of the proposed plan it remains at its present site unless its permit is not renewed by the TDC. We generally agree from our site visit that it is a significant adverse effect on the natural character of the CMA of Golden Bay. But we cannot take the matter any further on these references.*¹⁸

And:

- *The Wainui site has a major adverse effect on natural character and visual landscape amenity values but because no-one has sought its deletion in a submission or reference its right to remain in that location continues for the duration of the permit.*
- *The Wainui site is not to be located in an AMA but accorded discretionary status because of its sensitive location.*¹⁹

[63] The Environment Court at the time considered that Wainui Bay was unsuited for an AMA as aquaculture in this area would have significant adverse effects on landscape and natural character in the Bay. It is not clear from the Court's series of reports however, that the Environment Court at the time considered any expert evaluation of the particular characteristics and qualities associated with landscape and natural character in Wainui Bay or the effects of aquaculture (especially mussel spat catching) on these characteristics and qualities.

[64] Dr David Jackson, consultant planner for the appellant, contended that the establishment of an AMA with its associated rule framework as applied for would be incompatible with the principles established for aquaculture in Chapter 22 TRMP. He said that these principles derived from the Environment Court's reports in the *Golden Bay Marine Farmers* inquiry which contain findings that the sites chosen for AMAs were to be well offshore and sufficiently remote to contain and manage their likely bundle of effects to an acceptable degree. In his opinion establishing an AMA as a spot zone in an embayment would disrupt the planning approach taken for aquaculture in the TRMP and be at variance with that framework.

[65] Dr Jackson also considered that Policy 22.1.3.2 was clear and that it allowed only for the continuation of the activity at the Wainui Bay site until existing coastal permits expired in 2024. After that date the activity should cease. Dr Jackson did not resile from



¹⁸ *Golden Bay Marine Farmers* W42/2001 at [707] on p126.

¹⁹ *Golden Bay Marine Farmers* W42/2001 in the findings following [844] on page 150.

this position in cross-examination stating that, while the activity was not prohibited at the site, the policy acted "like a prohibition" in that it did not envisage the activity continuing at the site following the expiry of the current permits. He based this opinion on the Environment Court findings in the *Golden Bay Marine Farmers* reports that in his view clearly signalled the intent that the permits not be renewed. No guidance was provided in the policy as there was not supposed to be any guidance where the intent was clear that the permits were not to be renewed, in his opinion.

[66] Ms Bray, environmental policy planner for the Respondent, and Mr Turner, for the Applicant, noted that Rule 25.1.4.4 TRMP provided a pathway for discretionary activity consideration of a consent application to continue marine farming activity at Wainui Bay. That reads:

25.1.4.4 Discretionary Activities (Mussel Farming at Wainui Bay)

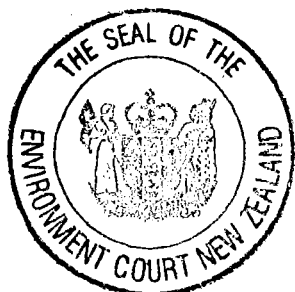
The occupation and disturbance of any site in the coastal marine area by structures, and the use of those structures, for mussel farming is a discretionary activity, if it complies with the following conditions:

- (a) *The activity is at Wainui Bay on the site of a coastal permit or marine farm licence that existed on 25 May 1996; and*
- (b) *The activity uses longline structures, incorporating surface buoys.*

[67] There was, however, no policy or other form of strategic planning guidance in Chapter 22 related to the circumstances where the continuation of this activity may be appropriate or not. In their opinion Policy 22.1.3.2 is simply a statement of fact that provides no guidance. They identified that this was where the uncertainty was created for the industry over the continued supply of wild caught spat from Wainui Bay and that PC61 was designed to address this policy vacuum.

[68] Ms Bray considered that it made strategic sense to treat Wainui Bay farms in the same way as aquaculture sites by establishing an AMA covering all of the existing farm sites in the Bay. In her opinion, providing for this site as an exception to the AEA was unnecessarily complicated and that having two planning frameworks for the same activity was not desirable.

[69] Mr Turner considered that the proposed zoning of the Wainui Bay site as an AMA represents a considered and logical planning response to determining the appropriate use of space within the coastal marine area at Wainui Bay. Mr Turner emphasised the desirability of recognising the importance to the mussel farming industry of the availability of wild caught spat from the site in terms of reliability, quality and quantity of spat collection and its subsequent social and economic contribution locally, regionally and



nationally.

[70] In Mr Turner's opinion the explanation in the TRMP for the AMA approach to zone certain areas for aquaculture and prohibit that activity elsewhere addressed the potential impact on natural landscapes and natural character, amongst other matters. Mr Turner's opinion was that the Wainui Bay site was not included in the AEA and that zoning it as an AMA would not be at odds with the aquaculture approach in the TRMP, as long as the opportunity to consider potential effects was available. In his opinion, this did not mean there could be no adverse effects before consent could be granted.

[71] Mr Turner's view, based on the definition of AEA in Chapter 2 of the TRMP, was that it was clear in the TRMP that the Wainui Bay site was not part of the aquaculture exclusion area in spite of the wording of Policy 21.1.4.7 that structures for aquaculture are a prohibited activity in the AEA, except for sites in Wainui Bay. He considered this to be a plan drafting issue rather than a policy question and that the intent was clear from the definition of AEA that Wainui Bay sites were not zoned as such. Establishment of an AMA at Wainui Bay would be an alteration to the approach previously undertaken in the TRMP of having AMAs well offshore, but would not be out of line with the TRMP as the proposed AMA 4 at Wainui would simply be a different approach in specific circumstances.

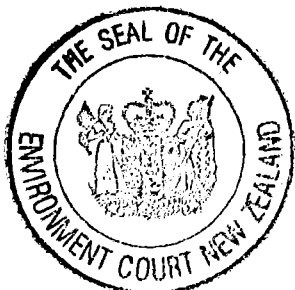
Should mussel spat catching and holding at Wainui Bay be a controlled activity?

[72] The application is for an AMA to be identified for the Wainui Bay site with mussel spat catching and spat holding being a controlled activity as it is in the AMA subzones identified as spat catching areas in the TRMP. Controlled activity status would be supported by inclusion of specific matters to be controlled by conditions.

[73] Controlled activity applications cannot be declined by a consent authority.²⁰ This legal position, together with the absence of any reference to natural landscape and character effects in the proposed matters for control, appears to have been the main reason that the parties approached this inquiry as being primarily concerned with landscape effects.

[74] The focus of much of the hearing, in legal submissions, statements of evidence and cross-examination, centred on natural landscape and character issues and the series of

²⁰ Section 87A(2)(a) RMA



the *Golden Bay Marine Farmers* reports. The central theme was that provision for aquaculture activity at the Wainui Bay site as a controlled activity would preclude examination of the effects of this activity on the Wainui Bay natural landscape and character when any applications for renewal of the permits was being considered at or prior to their expiry in 2024.

The NZCPS strategic planning arguments

[75] Policy 7 - *Strategic planning* in the NZCPS relevantly states:

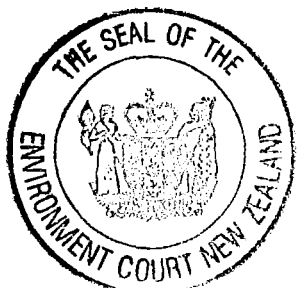
- (1) *In preparing Regional Policy Statements and Plans: ...*
 - (b) *Identify areas of the coastal environment where activities and forms of subdivision, use and development:*
 - i. *are inappropriate; and*
 - ii. *may be inappropriate without the consideration of effects through a resource consent application, notice of requirement for designation or Schedule 1 of the Act process*

and provide protection from inappropriate subdivision use and development in these areas through objectives, policies and plans.
- (2) *Identify in regional policy statements, and plans, coastal processes, resources or values that are under threat or at significant risk from adverse cumulative effects. Include provisions in plans to manage these effects. Where practicable, in plans, set thresholds (including zones, standards or targets), or specify acceptable limits to change, to assist in determining when activities causing adverse cumulative effects are to be avoided.*

[76] This strategic planning policy is reinforced in Policy 13 - *Preservation of natural character* requiring councils to assess the natural character of the district, map or otherwise identify at least areas of high natural character and ensure that regional policy statements and plans include appropriate objectives, policies and rules for the preservation of these areas. The same direction is included in Policy 15 - *Natural features and natural landscapes* in relation to protecting natural features and landscapes.

[77] It was the Applicant's position, supported by the Respondent, that PC61 could and should be evaluated notwithstanding the absence of strategic policy in the TRMP required to give effect to Policy 7 of the NZCPS. In their submission, Policies 13 and 15 of the NZCPS were directly in play and PC61 would give effect to these policies and was also the best way of achieving the objectives and policies of the TRMP.

[78] The Friends' and supporting s274 parties' position was that Policy 7, particularly as it relates to coastal landscapes and natural character, should be given effect to in the TRMP prior to any further consideration of the future of aquaculture on the Wainui Bay site beyond 2024. Consideration as a controlled activity as proposed brought Policies 13



and 15 into play and the continuation of aquaculture activity at the site would not give effect to these policies.

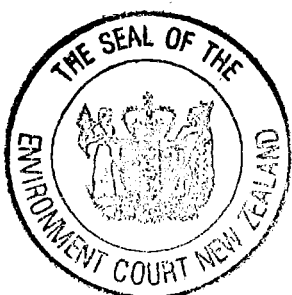
[79] Dr Jackson considered that as the TRMP and TRPS had not been updated to give effect to the natural character and landscape directions in the NZCPS, there was no regional policy framework for assessing the appropriateness of the spat catching activity in Wainui Bay. He contended that PC61 had "leapfrogged" over the strategic planning requirements in the NZCPS and gone straight to the provision of space for aquaculture under Policy 8. In his opinion, it was not possible to determine if the Wainui Bay site was appropriate under Policy 8 without having conducted the required strategic assessment process for natural character and landscape.

[80] Responding to this in rebuttal evidence Mr Turner acknowledged that while it may be desirable to seek to undertake timely comprehensive regional planning with all available information, the development of statutory planning instruments was an ongoing and evolving process. He maintained that the Plan Change application was supported by an assessment of the characteristics and qualities of the Wainui Bay environment and that the landscape experts for the parties agreed that there was sufficient information available to determine whether the Bay and its environments are an outstanding natural feature (ONF).

[81] Counsel for the Respondent noted that Policies 13 and 15 NZCPS require councils to identify and assess areas of outstanding natural character and outstanding natural features and landscapes in the coastal environment. Section 55 RMA directs that regional policy statements and plans must be amended so that their objectives and policies give effect to the NZCPS as soon as practicable. Where the NZCPS is specifically directive, such amendments must occur without following a Schedule 1 process.²¹ But there is nothing in the RMA that prevents the processing of changes to regional policy statements and plans while that s 55 duty is being undertaken. We were told the Respondent intends to notify plan changes in 2018 that identify and map ONFLs on dry land and at least in part in the coastal marine area. No corresponding assessments of natural character areas for inclusion in the TRMP is proposed in the near future.

[82] The obligation in s 67(3) RMA to give effect to the NZCPS when preparing plans or

²¹ Section 55(2A)(a) RMA.



plan changes requires the NZCPS to be applied whether or not its provisions have been included in the plan. The decision-maker is then tasked to assess and determine whether the plan change or variation, or the amendment sought in a submission on it, will give effect to the NZCPS.

[83] Counsel for the Respondent, relying on the expert evidence of Mr Turner as to planning matters and Mr John Hudson as to effects on landscape, natural character and their associated amenity values, submitted that the Court had sufficient probative evidence to enable the evaluation of relevant landscape and natural character values consistent with the directive policies in the NZCPS. Our first task is to test whether this is in fact the case.

Natural character and landscape

[84] As noted earlier the inclusion of controlled activity status for spat catching and holding in the AMA 4 Wainui in PC61 triggers consideration as to whether this is an inappropriate activity at this site under Policies 13 and 15 of the NZCPS. Central to this is the consideration of effects on the natural character and landscape values of Wainui Bay and its environs.

[85] The relevant parts of policies 13 and 15 of the NZCPS are:

Policy 13 Preservation of natural character

- (1) *To preserve the natural character of the coastal environment and to protect it from inappropriate subdivision, use, and development:*
- (a) *avoid adverse effects of activities on natural character in areas of the coastal environment with outstanding natural character; and*
 - (b) *avoid significant adverse effects and avoid, remedy or mitigate other adverse effects of activities on natural character in all other areas of the coastal environment;*
including by:
 - (c) *assessing the natural character of the coastal environment of the region or district, by mapping or otherwise identifying at least areas of high natural character; and*
 - (d) *ensuring that regional policy statements, and plans, identify areas where preserving natural character requires objectives, policies and rules, and include those provisions.*

Policy 15 Natural features and natural features

- (1) *To protect the natural features and natural landscapes (including seascapes) of the coastal environment from inappropriate subdivision, use, and development:*
- (a) *avoid adverse effects of activities on outstanding natural features and outstanding natural landscapes in the coastal environment; and*
 - (b) *avoid significant adverse effects and avoid, remedy, or mitigate other adverse effects of activities on other natural features and natural landscapes in the coastal environment; ...*
including by:
 - ...
 - (d) *ensuring that regional policy statements, and plans, map or otherwise identify areas where the protection of natural features and natural landscapes requires objectives,*



- policies and rules; and*
(e) *including the objectives, policies and rules required by (d) in plans.*

[86] Before turning to the evidence of the landscape experts, we refer to evidence presented to us about the Golden Bay/Mohua Landscape Project initiated by the Respondent and the various iterations of the Report of the Small Working Group. The Applicant put store in that process and on material that it considered supported the identification of outstanding features and landscapes in the region and Wainui Bay and controlled activity status for spat farming in Wainui Bay. Counsel for RFAB, Mr Anderson, submitted that the work of the Small Working Group should be given no weight. There was considerable cross-examination of those witnesses involved with the Small Working Group, particularly Helen Campbell a lay witness for the Friends and Deborah Martin in her capacity as Regional Manager Top of the South as a witness for RFAB.

[87] We do not intend to spend any time on those reports or the evidence in relation to them as they do not substantively advance matters in the context of this case. Importantly, and while no doubt valuable as a means of enabling discussion among stakeholders, the work has not been carried through into any notified plan change which would allow full community input.

[88] Our attention was also drawn to the work of what was described as the Wainui Bay Landscape Expert Panel Workshop, organised by the Applicant and attended not only by landscape experts (including Mr John Hudson) selected by it but also by its counsel. Mr Anderson for RFAB submitted that the work of the Panel should also be given no weight. We accept that submission because the workshop process was not open to experts other than those selected by the Applicant and included participation by counsel. We note that Mr Hudson appeared as an expert witness called by the Applicant with the opportunity available for cross-examination on his opinions and the bases for them.

[89] We also note that certain artworks which relate to Golden Bay were presented to us during the course of the hearing. One photographic work, in particular, makes the existing marine farms its focus.²² While not evidence or submission in the usual sense, that work highlights the aesthetic issue arising from the reaction which a person (whether as an artist or a viewer) may have to structures in the natural environment. We also received the evidence of Mr Craig Potton, a landscape photographer who is a member



²² *Mussel Farm, Golden Bay* by Peter Peryer, 2003, in the University of Auckland Art Collection (<https://artcollection.auckland.ac.nz/record/68460>).

of the Appellant and RFAB and who considered that the industrial structures of the marine farms severely compromised the beauty of Wainui Bay and presented his own photographs to illustrate that. The potential for different reactions in turn serves to emphasise the importance of preparing statutory planning documents which provide a clear framework for dealing with the effects, in resource management rather than aesthetic terms, of such structures on the environment.

[90] Mr Hudson and Ms Elizabeth Gavin, the expert consultant landscape architect for the Friends, identified the pertinent landscape characteristics and qualities at Wainui Bay in broadly similar terms. The experts agreed that Wainui Bay was a feature within the broader landscape of Golden Bay/Mohua and that this broader landscape qualified as an ONL, as described by the Court in the *Golden Bay Marine Farmers* reports.²³

[91] We respectfully consider that a finding that a large area, such as Golden Bay/Mohua, is an ONL does not preclude a finding that a smaller area within it, such as Wainui Bay, is also an ONL rather than a feature. There can be landscapes within landscapes: much depends on the viewpoints from which the assessment is made.²⁴ Golden Bay/Mohua is so extensive that it is impossible to perceive all of it at once except, perhaps, from great altitude. There is also, we think, a problem attendant on assessing a landscape for regulatory purposes where the scale of that landscape extends well beyond a unified set of views. We think it is likely generally to be better, for purposes of the RMA (including not only s6(b) but also Policy 15 of the NZCPS) to identify discrete landscape areas where those are most relevant to the resource management issues being addressed. In this case we find that Wainui Bay, within its headlands and extending offshore to, say, 3 nautical miles (5.6 km) (based on the view available from the shoreline to the horizon) constitutes the relevant landscape for the purposes of assessing the effects of the marine farms.

[92] Beyond this there was a considerable contest between the experts as to whether Wainui Bay qualified as an ONF or whether sufficient information was available to assess the areas natural character and assign a ranking to this.

[93] In their evaluation of the effects of the spat catching and spat holding farms the two experts also differed markedly. Mr Hudson considered that Wainui Bay did not qualify

²³ *Golden Bay Marine Farmers* W42/2001 at [732] – [733] on p131.

²⁴ *Western Bay of Plenty District Council v Bay of Plenty Regional Council* [2017] NZEnvC 147 at [82].



as an ONF and that the effects of the aquaculture activity proposed in PC61 on landscape characteristics and qualities would not be significant. In relation to the natural character of the area, he described this as high but not outstanding and that the activity did not have significant adverse effects on natural character values. Mr Hudson considered the existing farms as part of the environment in his evaluation, but did not see this as determinative in reaching his conclusion that Wainui Bay did not meet the threshold to be classified as an ONF. In his opinion, the farms simply contributed to the modifications in the Wainui Bay environment which include a range of structures and activities.

[94] Ms Gavin considered that Wainui Bay did qualify as an ONF and that there were significant adverse effects from the activity on the characteristics and qualities of this feature as well as adverse effects on the Golden Bay/Mohua ONL. In her opinion, there was insufficient information to evaluate and rank the area's natural character attributes, although she considered them to be high to outstanding. Ms Gavin's evaluation of the landscape values of Wainui Bay as outstanding was carried out in the context of the existing marine farms not being in place. She considered that the presence of mussel spat farms reduced both the natural character and the landscape values of the Bay, but not to the extent that it was no longer an ONF.

[95] In preparing their evaluations the experts identified the characteristics and qualities of Wainui Bay as a feature, placed values on these and made judgments on their ranking against a threshold for what is "outstanding." It was the difference in emphasis placed on the importance of various landscape characteristics by the two experts that resulted in Ms Gavin's conclusion that Wainui Bay was an ONF while Mr Hudson ranked the landscape as not meeting the test for outstanding in a regional context.

[96] The experts then went on to assess the effects of the presence of marine farms at the Wainui Bay site against the characteristics and qualities identified. The experts differed markedly in their approach to this assessment and it is this critical aspect of their evidence that causes us greatest concern. Mr Hudson adopted an approach of assessing effects at the scale of the visual catchment. Ms Gavin's approach was to assess the effects from a viewpoint perspective. The two approaches are perhaps best summarised in the following statement from the Court, with which she agreed:

You characterise Mr Hudson's approach as being the "hovering" or "moving" assessment. Your approach is to identify an appropriate viewpoint and assess from that viewpoint.

[97] Counsel for the Applicant referred Ms Gavin to the New Zealand Institute of



Landscape Architects' (NZILA) Best Practice Note: Landscape Assessment and Sustainable Management 10.1 dated 2 November 2010 in relation to establishing the scope of the assessment of effects within Wainui Bay. Mr Hudson and Ms Gavin had agreed that the NZILA Best Practice Note referred to should be considered as part of landscape assessment and agreed with the approach taken in that document.

[98] The NZILA Best Practice Note not only deals with the assessment of scope, but also introduces the notions of resilience, capacity, sensitivity and vulnerability in relation to the landscape. It defines these terms as follows:

***Landscape resilience** is the ability of a landscape to adapt to change whilst retaining its particular character and values.*

***Landscape capacity** is the amount of change that a landscape can accommodate without substantially altering or compromising its existing character or values.*

***Landscape sensitivity** is the degree to which the character and values of a particular landscape are susceptible to the scale of external change.*

***Landscape vulnerability** is the extent to which landscape character and values are at risk from a particular type of change.*

[99] As we commented during the hearing, we think that these notions are of assistance in describing a landscape, in understanding what effects on that landscape may be adverse and in trying to identify what an inappropriate subdivision, use or development might be in that landscape. They would thus be useful elements of any assessment of such matters in the context of both s6(b) of the Act and Policy 15 of the NZCPS. Unfortunately, neither Mr Hudson nor Ms Gavin framed their assessments in these terms.

[100] Counsel for the Applicant submitted that Mr Hudson had addressed these components as part of his assessment of effects. While this may be implicit in Mr Hudson's evidence in relation to the scale of the activity within the wider environment of Golden Bay/Mohua, we can find no explicit evaluation of the sensitivity of the Wainui Bay environment, its vulnerability to change, its resilience to adapt to or its capacity to absorb change.

[101] Ms Gavin acknowledged that while she had mentioned landscape sensitivity in her primary evidence, no analysis of this had been recorded in the evidence. Ms Gavin also acknowledged that she had focused her assessment on the significance of effects or whether there were any adverse effects. As such she had not looked at the matter of capacity for change within the Wainui Bay environment. In her opinion, the capacity of landscapes to assimilate the effects of activities was dependent on the level of that effect and where the landscape sits in terms of ranking. This had formed the basis of her



opinion noted earlier that the landscape could absorb the mussel farm and still remain outstanding.

[102] It is, regrettably, not uncommon for the Court to be confronted with competing expert evidence on landscape and natural character where experts have adopted different approaches and methodologies. The parties acknowledged that preferring the evidence of one of these experts would result in a completely different outcome when evaluated against the NZCPS provisions than would be the case if we preferred the expert evidence of the other. Examination of the merits of the landscape and natural character evidence would then necessarily involve an examination of the methodologies and a determination of best practice. This relates particularly to the assessment of the effects of the marine farms at the site on the various characteristics and qualities identified for Wainui Bay.

[103] If we are to be able to determine whether marine farming (limited to mussel spat catching and holding only) is to be provided for as a controlled activity in Wainui Bay we have to be satisfied that this is not an “inappropriate” activity in terms of Policies 13 and 15 of the NZCPS. That requires us to focus not just on whether the *outstanding* threshold is triggered and the reasons for that but also to understand what adverse effects there might be on the particular qualities and characteristics of that portion of the coastal environment. We are hampered in this determination by the absence of any development of the policies of the NZCPS in the provisions of the TRPS and TRMP. Areas of outstanding and high natural character and outstanding natural landscapes and features are not identified in the plans and there are no objectives, policies or rules that have been identified for the protection of these from inappropriate subdivision, use and development.²⁵

[104] This lack of specific policy at a regional level is especially problematic when we are faced with strongly competing evidence from experts on both the relevant classification of natural character and landscape in an area and the effects of an activity on the qualities and attributes of that area. We need to determine the nature and extent of these effects and therefore whether the proposed plan change gives effect to the provisions of Policy 15 of the NZCPS and to determine the visual effects on natural character elements of the Bay in accordance with Policy 13 of the NZCPS. We are not satisfied that the expert



²⁵ See the discussion of the same issue in *Western Bay of Plenty District Council v Bay of Plenty Regional Council* [2017] NZEnvC 147 at [121] – [125] and [129].

evidence about the potential effects of this activity on the qualities and attributes of the Wainui Bay landscape is sufficient to give us substantial help in ascertaining these facts which are of consequence to our determination.²⁶

[105] There would appear to be ample time for the Respondent to address this policy vacuum through a Schedule 1 RMA process in relation to both landscape issues and natural character in the coastal environment, prior to expiry of the existing permits at the end of 2024. Our preference is to have this strategic planning process completed before consideration is given to new consents for aquaculture activity in Wainui Bay.

[106] As noted earlier, controlled activity status as sought in PC61 would preclude examination of effects on landscape and natural character attributes and values at the Wainui Bay location when any application for renewal of permits was being considered. We also note the limitations on the consideration of effects on amenity values, with a relatively narrow compass in the matters to be considered in decision-making and the inability to decline consent. Mandatory public notification of such a controlled activity and the restricted discretionary activity default status, as provided for in PC61, does not offset those constraints of controlled activity status in dealing with the extent of potential effects.

Evaluation

[107] Since 2011²⁷ the identification of areas within the coastal marine area as AMAs has not been a prerequisite for the issue of coastal permits for aquaculture. The AMA provisions in Chapter 22 – *Aquaculture* and Chapter 25 – *Coastal Marine Area Rules* in the TRMP, as directed by the *Golden Bay Marine Farmers* reports, predated this legislative change. The existing AMAs were identified well offshore in order to manage the effects of the activities, particularly those related to landscape, natural character and amenity. These AMAs provide for a range of aquaculture activity in various subzones, subject to a variety of activity classes, area constraints and comprehensive adaptive management policy directives.

[108] Wainui Bay sits outside this framework. The Respondent included Policy 22.1.3.2 with its associated discretionary activity Rule 25.1.4.4 in the TRMP in what appears to be a direct translation of the Environment Court's finding that the Wainui Bay site be

²⁶ See s25(1) Evidence Act 2006.

²⁷ Resource Management Amendment Act (No 2) 2011 – see para [57] above.



*accorded discretionary activity status.*²⁸

[109] The mussel spat catching and holding activity has now been occurring at Wainui Bay for over 30 years. The evidence presented by the Applicant has demonstrated how factors such as mussel larvae availability, currents and coastal morphology combine to provide conditions for the capture of spat at this site that are far more reliable and efficient in terms of spat catch rate than have been found elsewhere. The social and economic value of this to the aquaculture industry was not contested.

[110] Recognition of the valuable nature of this particular site for the proposed activity is sought by the Applicant through PC61. This application for a private plan change involves a much narrower range of aquaculture activity (limited to mussel spat catching and spat holding) than provided for in the AMAs under the TRMP, but the proposed new policy 22.1.3.2 and the change in status to a controlled activity would provide for a high level of planning protection.

[111] The Friends and RFAB challenge this proposed change on the basis that it is inconsistent with the existing planning framework as directed by the Court in the *Golden Bay Marine Farmers* reports. They refer to findings of the Court in the First Interim Report²⁹ which they (and Dr Jackson) submit point to an unstated objective that there would cease to be any marine farms at Wainui Bay after the existing coastal permits terminate.

[112] We are, respectfully, doubtful that it is appropriate to identify some long-term intent in relation to appropriate planning provisions for aquaculture in Wainui Bay from the *Golden Bay Marine Farmers* reports that would bind us in making any decision on PC61. There are several reasons for this.

[113] The first reason is that the Court, in its first report, acknowledged that its jurisdiction did not extend to deleting the Wainui Bay site or including it in an AEA location because none of the appeals before it provided scope to do that.³⁰ On a strict approach to the content of a Court's decision, statements which form part of the reasons for the decision (sometimes collectively called by the law-Latin tag *ratio decidendi*) are to be distinguished from the other statements in the decision (*obiter dicta*) with the former having

²⁸ *Golden Bay Marine Farmers*, First Interim Report in the findings after [844] (p. 150).

²⁹ Above at [61] and fn 18.

³⁰ Above at [61] and fn 17.



substantially greater jurisprudential weight than the latter. While the Court referred to some of its statements about Wainui Bay as *findings*, the lack of jurisdiction to make any changes to the TRMP in relation to Wainui Bay means that these statements are closer to *obiter dicta* than to the *ratio* of the reports. We do not regard this reason as conclusive, but it supports the next two reasons.

[114] The second reason is that, read in their entirety, the findings in relation to Wainui Bay are not clear-cut. The statements in the First Interim Report quoted above³¹ note the Court's *general agreement* that the marine farm at the Wainui Bay site *is a significant adverse effect on the natural character of the CMA of Golden Bay and has a major adverse effect on natural character and visual landscape amenity values*. The Court then envisages a scenario where the permits may or may not be renewed on expiry by according them discretionary status as opposed to identifying the site as an AMA. But those comments must be read together with the Court's Second Interim Report where it concluded from the evidence, among other things:

- ... Wainui was presented as a high quality and quantity spat producer: as we recommended in our Interim Report that it be phased out because of the natural character values of the inshore areas of Golden Bay: this factor and how it might affect the AIP [Agreed Industry Position] ratio had to be considered; ...
- [S]ecuring permanent (as opposed to seasonal) spat supplies appears critical to marine farmers like Mr Goulding, but we concluded that may not be able to be achieved until it was known where long-term, effective sites (like Wainui) are located; ...³²

[115] While these comments support an interpretation of the earlier comments that the farms at Wainui Bay be *phased out*, when read together with associated comments about the importance of spat to mussel aquaculture they also indicate that the Court was reconsidering this given the high value of the site for catching spat. Later in its Second Interim Report, the Court appeared to anticipate that the farms at Wainui would continue to be a discretionary activity without any implication that they would be phased out:

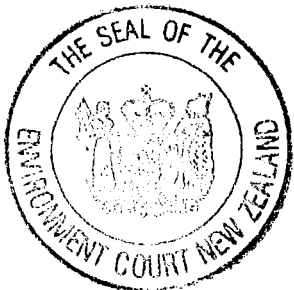
[631] *In the case of the Wainui Farms, their licences were renewed at the time of stage I of the inquiry and will now expire in 2008. At that point any new applications will need to be made as if for discretionary activities. ...*³³

[116] The Court did not, however, go further than this in providing any policy direction for future consideration of any application for aquaculture at the Wainui Bay site beyond

³¹ Above at [61] and fn 18.

³² *Golden Bay Marine Farmers*, Second Interim Report at [286] (p. 55 and 56-57).

³³ *Ibid.* at [631] (p. 119).



stating that the site did not fit with the Court's directions on AMAs and that it not be included in the AEA. There was no further substantive discussion of these issues in the Third Interim Report or the Final Report. In these circumstances we do not consider that the Court reached a final determination on the issues it identified at Wainui Bay.

[117] The third reason is that the Environment Court is not bound by its previous decisions and is free to consider each case on its own facts and merits.³⁴ That freedom is not without boundaries. The Court, like any court, will always be cognisant of the legal doctrine of standing by things which have been decided and respectful of the principle that unnecessary re-litigation should be avoided. To that end the Court should strive to agree with the relevant reasoning in its previous decisions on the same issues so that like cases are treated alike.³⁵ But the RMA is a very complex statute addressing the inherent complexities associated with the use and development of natural and physical resources and the Court's jurisdiction requires it to address many and various considerations depending on the matter before it.³⁶ That includes the requirement for prospective assessments to determine what the most appropriate plan provisions should be under Part 5 of and Schedule 1 to the RMA. It is well settled that past assessments of operative plan provisions are not determinative of the appropriateness of proposed plan provisions.³⁷

[118] The Friends argue that the statements in the First Interim Report envisaged that the site be phased out when the existing permits terminated and that this is how Policy 22.1.3.2 should now be interpreted. Given the subsequent statements in the Second Interim Report about the value of Wainui Bay for spat catching discussed above, we are not so sure that this is a correct inference. We agree with Ms Bray that Policy 22.1.3.2 contributes little to the focus of any discretionary application under Rule 25.1.4.4 for the site prior to expiry of the current permits in 2024.

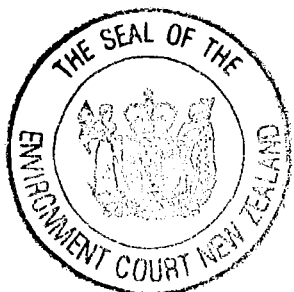
[119] We do agree, however, with the general thrust of the planning evidence from Dr Jackson and the submissions of counsel for the Friends and supporting parties that identifying the Wainui Bay site as an AMA would not be consistent with the policy intent and purpose for which AMAs 1 to 3 were provided for in the Plan. The environmental

³⁴ *Raceway Motors Ltd and Others v Canterbury Regional Planning Authority* [1976] 1 NZLR 605 at 607 (Sup Ct).

³⁵ *Murphy v Rodney District Council* [2004] 3 NZLR 421 (HC) at [39].

³⁶ *Shotover Park Ltd & ors v Queenstown Lakes District Council* [2013] NZHC 1712 at [89] - [90].

³⁷ *Wellington Club v Carson* [1972] NZLR 698 at 703; (1972) 4 NZTPA 309 at 314 (Sup Ct); *Leith v Auckland City Council* [1995] NZRMA 400 at 408-9 & 413-4 (PT).



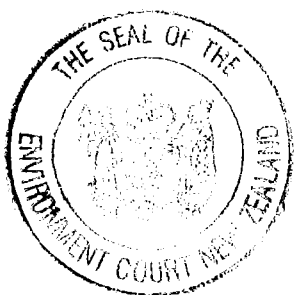
factors on which the framework for the AMAs is based are simply not applicable at Wainui Bay. In our view, whether or not such an outcome followed from a jurisdictional limit, the treatment of Wainui Bay as an exception to the general regime was an appropriate method to manage that specific situation while maintaining the integrity of the overall planning scheme. When the TRMP is reviewed, or should there be a comprehensive change proposed to the aquaculture provisions, then that framework can be revisited and, perhaps, a new framework proposed.

[120] This leaves us for the present with a policy gap within the overall strategic approach to aquaculture in the TRMP that would bring this aspect of the Plan in line with the directives in Policy 7 of the NZCPS. We are faced with the circumstance of an area within the coastal marine area of Golden Bay/Mohua that has not been zoned either AMA or AEA but, as the site of a long established and strategically important aquaculture activity of mussel spat catching and spat holding, has no strategic policy base against which an application for the activity to continue can be evaluated.

[121] In examining the first fundamental issue in this case as to whether the existing marine farms at Wainui Bay should be identified as AMA 4 Wainui in the TRMP, the parties focussed on two options:

1. To establish a new AMA for the existing farms at Wainui Bay, providing for spat catching and holding as a controlled activity (as sought by the Applicant); or
2. To retain the exception provisions with the existing Policy 22.3.1.2 (that is, the status quo as sought by the Friends).

[122] We accept the Applicant's submissions and evidence as to the value of this site for mussel farming, but, for the reasons set out in the preceding paragraphs, not to the extent of identifying the Wainui Bay site as an AMA. We note that the s32 report considered and rejected a hybrid approach of making spat catching a controlled activity but not making Wainui Bay an AMA. We accept the submissions of the Friends and the parties in support of them that there is an insufficient basis, on the evidence before us, on which to treat mussel spat catching and spat holding as a controlled activity. While the control of the intensity and scale of operational effects (mainly to do with noise, light and rubbish) appears to be a significant aspect of the sustainable management of the resources of Wainui Bay, the relative merits of enabling a valuable activity and of addressing the



potential for the character of that activity to adversely affect, in an inappropriate way, the values of this particular part of the coastal environment requires the retention of a discretion whether to grant or refuse any particular application for consent.

[123] In these circumstances we have considered whether there may be an intermediate third option between the two contended for, focussing more on the policy provisions than on the rule framework. This would involve retaining the Wainui Bay site as an identified exception to the AEA, but with a clearer policy basis for rules providing the opportunity to apply for limited aquaculture at the site and for the exercise of the discretion whether or not to grant consent to such activities.

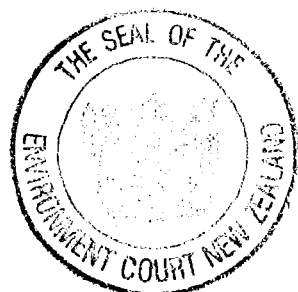
[124] Such a policy, to replace Policy 22.1.3.2, can be worded as follows:

To provide for and map a discrete area within Wainui Bay where a resource consent may be sought for mussel spat catching and spat holding in recognition of the favourable characteristics of this area for spat catching and its contribution to the aquaculture industry.

[125] Inclusion of such a policy in the TRMP would assist in completing the strategic provisions for aquaculture in accordance with Policy 7 and give effect to Policy 8 of the NZCPS. It recognises the existing and potential positive contribution to the social, economic and cultural wellbeing of people and communities by including provision for aquaculture activities in a particular area in the coastal environment that takes into account the social and economic benefits of aquaculture. It does this without altering the basis for the TRMP provisions for AMAs.

[126] Operative Rule 25.1.4.4 provides a consent pathway for aquaculture at the Wainui Bay site as a discretionary activity. By including a replacement Policy 22.1.3.2, the context envisaged by Policy 8 of the NZCPS is provided in the TRMP for the assessment of any new discretionary application at this site. Should the Respondent complete the Schedule 1 processes required to give effect to Policy 7, 13 and 15 regarding natural character, landscapes and features, this will provide the required policy context for such applications.

[127] As we have directed no change to the activity status for the catching and holding of mussel spat within the area identified in Wainui Bay, changes to provisions related to controlled, restricted discretionary and prohibited activity rules in Chapter 25 TRMP promoted by PC61 become redundant.



[128] To try and avoid arguments in the future about the status of mussel spat catching and spat holding as coming within mussel farming generally (which is regulated in the AMAs under Rule 25.1.4) we consider it desirable to add the words “including mussel spat catching and mussel spat holding” after “mussel farming” in Rule 25.1.4.4 and also add the proposed definition of “mussel spat holding” in Chapter 2 of the TRMP, as proposed in PC61.

[129] The area of the current activity should be identified and mapped in the coastal marine area of the TRMP. That could be done by relabelling PC61 Decision Update Map 56/1 Map affected: 181 which we were told contains the existing spat catching and holding consented areas.

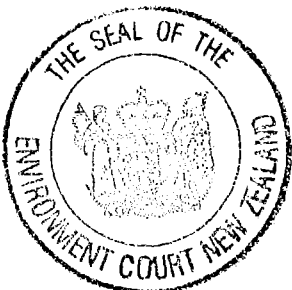
[130] The context for this new Policy 22.1.3.2, to the extent any needs to be stated in the explanatory text of the TRMP, can be provided in amended wording of an additional paragraph in the Introduction section of Chapter 22 as follows:

Wainui Bay is separately recognised as an exception to the AEA. There is a specific policy recognising the favourable characteristics of this area for spat catching and its contribution to the aquaculture industry. Implementing aquaculture rules provide for mussel spat catching and holding as a discretionary activity for which resource consent may be sought.

[131] We find that the approach of retaining the activity status for mussel farming, clarifying that it includes mussel spat collecting and spat holding (with an accompanying definition) in this area as discretionary under current provisions in the TRMP is the most appropriate approach. As we have concluded, provision for spat catching and holding in the defined Wainui Bay area as a controlled activity would preclude examination of the effects of this activity on the Wainui Bay landscape or natural character or other matters when any applications for renewal of the permits was being considered prior to their expiry in 2024.

[132] We also considered whether the proposed prohibited activity status for mussel farming that was not mussel spat collecting and holding which was part of the PC61 package should be carried through into the rule framework. However, we conclude that the case for this has not been made out during this process. While the provisions continue to provide for mussel farming as a discretionary activity, the specific policy on the mussel spat resource might indicate some priority to that activity.

[133] Section 32(1)(b) RMA requires examination of *whether the provisions of the*



proposal are the most appropriate way to achieve the objectives. PC61 does not propose any new objectives, but the purpose of the proposal³⁸ is to be considered as the objective to which the s32 evaluation applies.³⁹ Our decision on the limited extent of the changes that ought to be made to the TRMP by PC61 does not provide the degree of certainty sought by the Applicant that would have resulted from providing for mussel spat catching and holding at Wainui Bay as a controlled activity, but the provision of a replacement policy expressly recognising the favourable characteristics of the area for spat catching and holding provides at least a context for consideration of any application for a discretionary activity to continue the activity beyond 2024 within the ambit of the operative Objective 22.1.2. It does not, of course, remove or otherwise determine the wider considerations, including those relating to landscape and natural character in terms of Policies 13 and 15 of the NZCPS (and any provisions that may be included in the TRMP by then to give effect to those policies in the context of the region and particular areas within it) and the maintenance and enhancement of amenity values, including matters raised by residents Ms Foxwell and Mr Kaye for JBET.

[134] The alternative of providing for a new AMA at Wainui Bay with controlled activity status to be applied to new applications for mussel spat catching and spat holding would require full evaluation of natural character and landscape issues. We do not consider that approach to be appropriate for the reasons given earlier.

[135] In addressing PC61 as we have, we do not need to resolve the issues raised in the extensive evidence presented by expert witnesses and local people on the effects of mussel spat catching and spat holding activity at Wainui Bay, including effects on natural character, landscape and visual amenity and effects of noise and light on the amenity values of Wainui Bay. These matters remain for future consideration, whether in the form of a Schedule 1 process designed to give full effect to the NZCPS or through an application to consider a spat catching or spat holding activity at the Wainui Bay aquaculture sites on a discretionary basis.

The Respondent's Decision

[136] In arriving at our findings and directions, we have carefully considered the Respondent's decisions on submissions on PC61 at first instance. However, based on the submissions and evidence, including its testing under cross-examination and

³⁸ See above at [23].

³⁹ s 32(6) RMA.



questioning by us, and our consideration of the issues, we do not agree with the full extent of the Respondent's decision. Policy provision for aquaculture to a limited extent in Wainui Bay is appropriate, but we have declined to include any of the provisions related to a change in activity status for aquaculture activity at the Wainui Bay sites. We have set out our findings and reasoning throughout our decision.

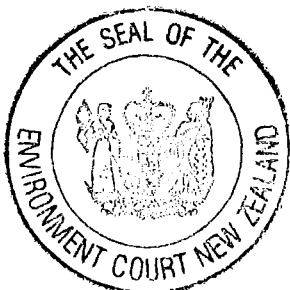
Outcome and Directions

[137] The outcome is to allow the appeal in part and refuse it in part.

[138] We direct the Respondent under s 291 of the Act to make the following amendments to PC61:

- (a) Include a new Policy 22.1.3.2 (replacing the existing Policy 22.1.3.2) as follows:
 - To provide for and map a discrete area where a resource consent may be sought for mussel spat catching and spat holding in recognition of the favourable characteristics of this area for spat catching and its contribution to the aquaculture industry.
- (b) Include a new paragraph in the second section of Principal Reasons and Explanation 22.1.30 as follows:
 - An area in Wainui Bay is separately recognised as an exception to the AEA. There is a specific policy recognising the favourable characteristics of this area for spat catching and its contribution to the aquaculture industry. Implementing aquaculture rules provide for mussel spat catching and holding as a discretionary activity for which resource consent may be sought.
- (c) Identify the footprint of the existing consented sites by re-labelling PC61 Decision Update Map 56/1 Map affected: 181.
- (d) Amend Rule 25.1.4.4 to add after the words "mussel farming" the words:
 - ", including mussel spat catching and mussel spat holding,"
- (e) Include a definition of "mussel spat holding" to apply to Rule 25.1.4.4 as follows:
 - Mussel spat holding – means the retention of Green-lipped mussel (*Perna canaliculus*) spat between 40 to 60 millimetres in length, on spat-catching structures;
- (f) Otherwise cancel the provisions of PC61.

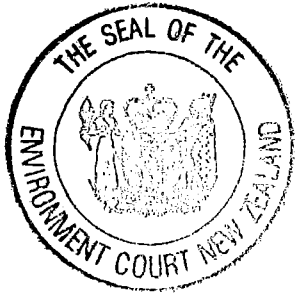
[139] The Respondent is directed to prepare and consult with the other parties on the final form of the provisions of the TRMP which are the subject of the Court's directions,



and particularly on any consequential amendments that may be necessary and which the Court has not identified, and to lodge these with the Court within 20 working days of the date of issue of these findings and directions after which the Court will make a final determination on its findings and directions.

[140] We consider, in light of both the context of an appeal under Schedule 1 and the outcome, that costs should lie where they fall.

For the court:



A handwritten signature in black ink, which appears to read "D A Kirkpatrick".

D A Kirkpatrick
Environment Judge