IN THE ENVIRONMENT COURT
AT AUCKLAND

I TE KŌTI TAIAO O AOTEAROA
KI TĀMAKI MAKAURAU

Decision No. [2021] NZEnvC 131

IN THE MATTER	of the Resource Management Act 1991
AND	an appeal under s120 of the Act
BETWEEN	WARWICK SUTHERLAND WILSON
	(ENV-2020-AKL-51)
	Appellant
AND	WAIKATO REGIONAL COUNCIL
	Respondent
AND	OHINAU AQUACULTURE LIMITED
	Applicant

Court:	Environment Judge J J M Hassan Environment Commissioner K A Edmonds Environment Commissioner K Prime
Hearing:	at Whitianga on 2-6 and 16-19 November 2020 Site visit on 7-8 December 2020
Appearances:	M Williams and C Beattie for the appellant M Mackintosh for the respondent Q A M Davies, A L Hills and E Deason for the applicant
Last case event:	19 February 2021

Date of Decision: 2 September 2021

Date of Issue: 2 September 2021

INTERIM DECISION OF THE ENVIRONMENT COURT

A: On the matters addressed in this decision, nothing in the RMA precludes capacity to consent the Proposal.

B: Directions are made concerning remaining matters as to biosecurity.

C: Costs are reserved, and a timetable will be set in due course if required.

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REASONS

Introduction

[1] This interim decision is on an appeal against the grant of a coastal permit to use and occupy part of the coastal marine area ('CMA'). This is for a mussel spat farm proposed in coastal waters of Mercury Bay / Te Whanganui o Hei ('Bay') in the Coromandel. The consent was granted by Independent Commissioners for Waikato Regional Council ('WRC') in April 2020. The appellant, Warwick Wilson, seeks a reversal of that outcome such that consent is declined.[1]

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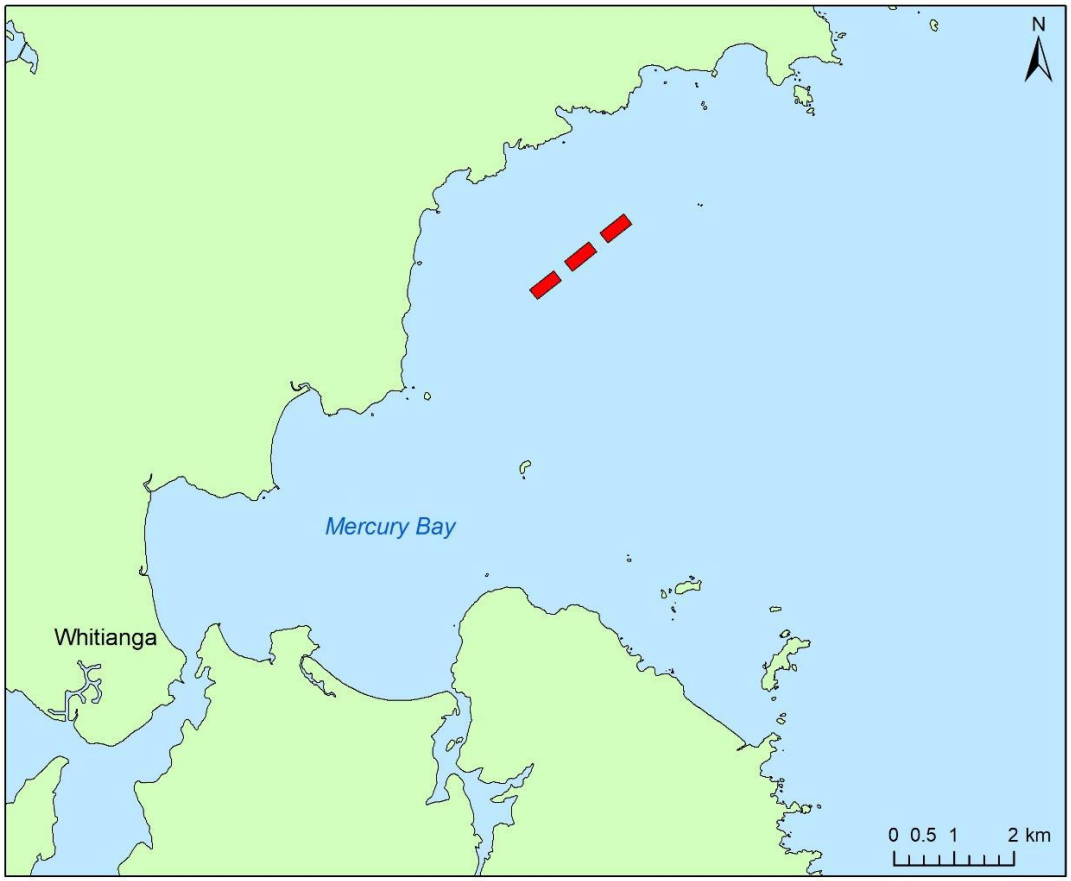
1 Mr Wilson submitted in opposition to the application before WRC.

The Proposal and applicant

[2] The Proposal is for the catching of the spat of New Zealand greenshell mussels (*Perna canaliculus*).[2] The site ('Site') is some 1.6km off the Whauwhau coast, north of Whitianga, broadly as indicated:[3]



[3] The applicant is Ohinau Aquaculture Limited ('OAL'). Its two directors, Peter Bull and Joseph Davis, are presently sole and equal shareholders. Mr Bull has interests in several mussel farms in the Firth of Thames. Harvested spat is intended to serve those farms. Mr Davis is a kaumatua of Ngāti Hei and he holds his shares on trust for Hei o Wharekaho Settlement Trust, a post-Treaty[4]

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2 Part A of the Annexure explains what is meant by "spat" and how they are caught.

3 From a document attached to the consent decision entitled "Whauwhau mussel spat farm Biosecurity Management Plan".

4 Treaty of Waitangi.

settlement entity of Ngāti Hei.[5] Ngāti Hei are tangata whenua and tangata moana for Te Whanganui o Hei.

[4] As the appealed decision describes, the farm would occupy 30ha, and be split into three 10ha blocks (i.e. approximately 30ha occupied in total).[6] Water depth there is some 20-25m. Each block would comprise:

Longlines, culture ropes, double-backbone lines, mooring ropes	Longlines run NE/SE parallel to tidal flows; support culture ropes (called 'dropper ropes') hung to a depth of some 15m; synthetic single and double-backbone lines (typically 150-160m in length and approx. 20m apart).
Supporting floats	Some 110/200/300 l in vol depending on spacing, approx. 10-14 per backbone line, approx. 14m apart. Orange coloured, for navigational safety purposes, at the end of each line and the middle of lines located at the end of each block; remaining floats coloured blue or black.
Screw anchors and warp lines	For attachment to the seabed, and associated warp lines (approx. 45-50m in length at each end) connecting the backbone lines to the anchors.
Lights and cardinal markers	6 perimeter "special lights" located on each of the corners (A, B, E, F, I and J, and H, G in the application) lit at night. Cardinal markers (D, K in the application) (flashing) on the seaward corners of the outermost blocks. This would be according to Maritime NZ Guidelines and the Harbour Master's requirements.

[5] The following diagram provides a general illustration of typical elements:[7]

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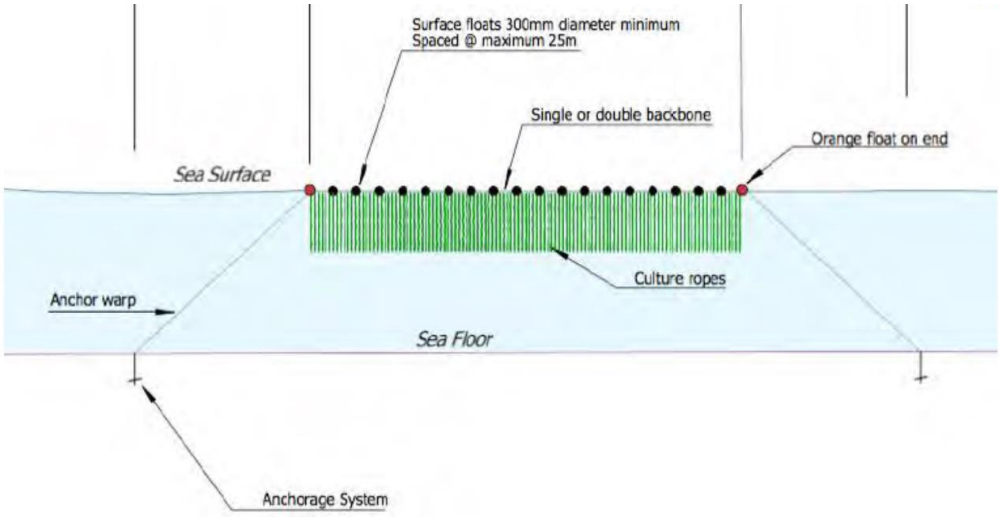
5 The remaining shares are held by Paddy Bull Limited, a company controlled by Mr Bull.

6 WRC Report and Decision of the Independent Hearing Commissioners, dated 23 April 2020, CB, Vol 4, pp 1-238.

7 Bull EIC, at [12] from s42A report dated November 2019 at p 17, CB, Vol 3, p 17.



[6] Sugar Loaf and Whitianga wharves would be used for the loading/unloading of ropes and equipment.

[7] Implementation of the Proposal beyond the first 10ha would be contingent on satisfaction of certain conditions as to the management of risks to marine mammals and biosecurity (as we later discuss).

[8] We are informed that the Proposal would benefit the marine farming industry. Given the decline of the Ninety Mile Beach wild spat resource, it would assist security of supply. As for the local economy, it is anticipated that the Proposal would result in eight additional full-time jobs and downstream economic benefits.[8]

The environment

[9] Mercury Bay/Te Whanganui o Hei is the rohe moana of Ngāti Hei and has historical connection to the iwi dating back many centuries, well before the arrival of Captain Cook. It was once an abundant pataka kai (food cupboard) for Ngāti Hei, although those natural resources are under considerable pressure

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8 Clough EIC.

today.

[10] Parts of the Bay and wider environs are recognised as having 'Outstanding' or 'High' natural character. There are some identified Outstanding Natural Features or Landscapes ('ONF/L'). This is as broadly depicted in the map in Part F of the Annexure.[9]

[11] Mercury Bay is an important holiday and tourist destination. Its scenic and recreational attributes are also highly valued by those who live there. Some who would see the spat farm live in remote baches accessible only by water or 4WD.

[12] Threatened or at-risk marine mammals are encountered in Mercury Bay/Te Whanganui o Hei and the wider Coromandel. These include Orca (kākahi) (*Orcinus orca*), Bottlenose Dolphins (terehu) (*Tursiops truncatus*) and Southern Right Whales (tohorā) (*Eubalaena Australis*). This coast is also on the southern ocean's migratory transit route for Humpback whales (paikea) (*Megaptera novaeangliae*).

[13] At present, there are no marine farms or other such structures in the Bay. That is by contrast to elsewhere in the Coromandel, particularly in the Firth of Thames.

Tikanga

[14] By arrangement with counsel, tikanga was observed prior to the commencement and adjournment of the hearing. The court was welcomed with appropriate karakia and mihi acknowledging the taha wairua and the ancestors who have passed on. Parties endeavoured to respect tikanga in their proposed site visit itinerary. However, due to unforeseen difficulties in the court's travel

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9 Part F of the Annexure is a reproduction of App I, a figure from the EIC of Bridget Gilbert.

arrangements, the itinerary had to be adjusted and foreshortened with the consequence that the parties' intended arrangements could not be fulfilled. Although that was in no way attributable to any fault on Mr Davis' part, we note his affidavit and apology dated 8 December 2020. He expresses "… personal regret, disappointment and embarrassment on behalf of Ngāti Hei …" that "… appropriate tikanga could not be followed…" and that the court "… could not be appropriately welcomed into the heart of Ngāti Hei…".

Site visit

[15] Assisted by the parties' proposed itinerary, the court undertook guided site visits by boat and 4WD vehicle over two days following the hearing adjournment. During the visit, given the lack of manawhenua clearance, Commissioner Prime elected not to visit a pā site identified on the itinerary.

Activity classification of the Proposal

[16] The appealed decision determined that the Proposal is a discretionary activity under r 16.5.1 of the Waikato Regional Coastal Plan ('WRCP').[10] The rule provides:

> The erection, placement, use of, or occupation of space by any structure in the CMA for operation as:
>
> …
>
> ii) buoys and lines for spat collection purposes outside of the Wilson Bay marine farming zone as identified in Map 11 in Appendix III of the Plan;
>
> is a discretionary activity provided it complies with the standards and terms stated in this Rule.

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10 All references in this section are to the Waikato Regional Coastal Plan, a hard copy of which was provided to the court by counsel for WRC.

[17] The appellant says that r 16.5.1 is not the applicable rule and the Proposal is a prohibited activity under r 16.5.6:

> The erection, placement, use of, or occupation of space by any marine farming structure that does not comply with the standards and terms for an activity in Rules 16.5.3, 16.5.4, 16.5.4A, 16.5.4B, 16.5.5A, 16.5.5B or 16.5.5D is a prohibited activity for which no resource consent shall be granted.

[18] Mr Wilson does not allege that the Proposal breaches any of the specified standards and terms of r 16.5.1 other than the specification that the Proposal is not 'for spat collection purposes'. The WRCP does not define 'spat collection purposes'. However, on an interpretation that 'spat collection purposes' is intended to be limited, Condition 1 of the appealed consent relevantly specifies the following spat size limits:

> … the catching of the spat of Greenshell™ mussels (*Perna canaliculus*) up to an average size of 10 mm in length, with no spat greater than 20 mm.

[19] Appellant counsel, Mr Williams, characterises the Proposal as side-stepping "the prohibition on marine farming on the eastern side of the Coromandel Peninsula".[11] That is on the basis of an interpretation of r 16.5.1 as only allowing for spat to remain on ropes to the stage where they settle. Hence, while the marine farmer may want spat to remain on the ropes after settling until such time as they can be successfully removed for seeding, the appellant interprets this further on-growing as "spat holding" not covered by r 16.5.1. Counsel refers to a report provided by OAL's consultants (Pacific Coastal Ecology) in response to a WRC request for further information about the Proposal. It states:[12]

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11 Outline of submissions for Mr Wilson, dated 2 November 2020, at [12].

12 NOE, l 10-34, referring to Pacific Coastal Ecology Ecological Effects Resulting from a Proposed Mussel Spat Catching Facility, Ohinau Marine Farms, February 2016, prepared by S White, Pacific Coastal Ecology, Proposed Mussel Spat Catching Facility Supplementary Ecology Report, Ohinau Marine Farms, May 2018, CB Vol 2, pp 62-199, p 135.

> In terms of resource management, Waikato Regional Council considers that the development of the newly settled mussel larvae to a size where they can be successfully slipped from the spat catching ropes and seeded onto growing ropes is the on growing of mussels, which is a separate activity from the catching of mussel spat.

[20] For OAL, Mr Bull explains that the industry generally regards mussels up to 40mm in size as spat.[13] OAL also rely on the evidence of zoologist, Dr Andrew Jeffs. He has particular expertise in mussel biology.[14] We set out a further summary of his evidence in Part A of the Annexure. He explains that mussel larvae drifting on ocean currents reach a stage of maturity known as "settling" where they seek to attach to suitable filamentous material such as seaweed (or spat farm culture ropes). In particular (our **emphasis**):[15]

> When a mussel larva settles, it attaches itself to the substratum with an anchor thread, and then rearranges its body, including developing gills which are used for filter feeding, and growing a harder shell for protection. At this point the juvenile mussel is less than half a millimetre long. **Small mussels from this size, up to around 10 mm in size are commonly referred to as "spat" and are the seed source used in mussel aquaculture**.

Discussion

[21] We find that the Proposal is a discretionary activity under r 16.5.1.

[22] That is primarily because, on the evidence of Dr Jeffs and Mr Bull, we find that the Proposal will be for 'spat collection purposes' provided that it is undertaken within the limits specified in Condition 1 (subject to observations we

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13 Bull rebuttal, at [30]-[33].

14 Dr Jeffs' qualifications include Master of Science with Honours in Zoology (1985) and Doctorate in Biological Sciences. His previous professional roles include Associate Professor, University of Auckland (2007), teaching in aquaculture and marine biology and General Manager and Principal Scientist for Marine Biotechnology and Aquaculture at the National Institute of Water and Atmospheric Research. He has published on aquaculture and mussel biology, amongst other things, in some 200 papers in international peer-reviewed scientific journals (mostly as lead author).

15 Jeffs EIC, at [18]. There is a helpful illustration in Part A of the Annexure (p 4).

make shortly on drafting elements of that condition).

[23] As 'spat collection purposes' is not defined, the ordinary meaning of those words applies, subject to being satisfied that interpretation is appropriate in light of how r 16.5.1 works in its WRCP context (including related objectives and policies and r 16.5.6). In an ordinary sense, spat 'collection' can extend beyond mere spat 'catching' to include a component of spat 'holding'.

[24] Considering r 16.5.1 in the context of the prohibited activity status of marine farming under r 16.5.6, 'spat collection purposes' is implicitly constrained. That is, r 16.5.1 does not operate to allow consent for what r 16.5.6 prohibits. Conversely, r 16.5.6 does not prohibit what r 16.5.1 enables consent to be secured for.

[25] Unlike r 16.5.1, r 16.5.6 relies on the following definition of "marine farming" (our emphasis):

> Marine Farming: means the activities of breeding, hatching, **collection,** cultivation, rearing, on-growing or harvesting of fin fish, shellfish, aquatic life or marine vegetation (**and includes spat catching and spat holding**), and includes the placement or erection of structures or other equipment, the disturbance of matter on the foreshore and/or seabed, and the use and occupation of the foreshore, seabed or water in the CMA (it should be noted that the breeding, hatching, collection, cultivation, rearing, on-growing or harvesting of fish and shellfish are controlled by the Ministry of Fisheries).

[26] As can be observed, marine farming is defined to encompass both "spat catching and spat holding". Rule 16.5.6 pertains to the significantly broader activity of erecting, placing, using and occupying coastal space for, any marine farming structure. For those purposes, the definition is broadly framed so that structures are caught regardless of the range of purposes they serve. However, that does not render r 16.5.1 otiose. Rather, provided that the relevant buoys, lines and other structures serve 'spat collection purposes' in the ordinary sense, r 16.5.1 is the operative rule.

[27] Implicit in the proper application of r 16.5.1 is a requirement to determine when spat collection is complete. That question involves a degree of judgment, informed by the science and industry experience on when it is generally safe to remove spat for seeding elsewhere for on-growing. We accept the evidence of Dr Jeffs and Mr Bull on these matters. That evidence supports an interpretation whereby the Proposal is treated as within r 16.5.1.

[28] We are satisfied that, on our interpretation, r 16.5.1 fulfils its statutory purpose of assisting to achieve and implement the WRCP's related objectives and policies (s67, RMA). We discuss relevant objectives and policies later in this decision. However, our interpretation of this intended purpose of r 16.5.1 is further supported by the explanatory statement under r 16.5.1 entitled 'Principal Reasons for Adopting'. It explains that r 16.5.1 provides for the establishment of 'spat catching buoys and lines' recognising that these can have adverse (including cumulative) effects. The statement goes on to list several of the effects that are the subject of evidence before us and the related intentions of the WRCP as follows:

> These include, for example, cumulative effects on recreation, natural character, amenity, landscape and seascape, cultural and ecological values, and navigation safety. By providing for these structures as discretionary activities, and specifying standards and terms that must be met, the effects of these structures on the values identified can be avoided as far as practicable.

[29] We find the appealed consent is legally sound in its specification of an upper-size limit, namely "up to an average size of 10 mm in length, with no spat greater than 20 mm". That specification, on the evidence of Dr Jeffs and Mr Bull, confines the activity to spat collection purposes only. It reflects the degree of informed judgment required to fulfil the intentions of r 16.5.1 and the WRCP. In drafting clarity terms, however, the condition would be better expressed:

> … of a length not exceeding 20 mm in any case and 10 mm on average.[16]

[30] On that basis, therefore, we find the Proposal, if subject to an appropriately refined condition on mussel length, is a discretionary activity under r 16.5.1.

Statutory framework

RMA and Hauraki Gulf Marine Park Act 2000

[31] In determining the appeal, we have the same power, duty, and discretion as WRC had (through its independent commissioners). We may confirm, amend, or cancel the appealed decision (s290, RMA). We hear and determine the appeal *de novo*, although we must have regard to that appealed decision (s290A). We may grant or refuse consent and, in any grant, may impose conditions (ss 104B, 108).

[32] As the Proposal is a discretionary activity, we must, subject to pt 2, have regard to the relevant matters in s104(1), RMA, including:[17]

(a) environmental effects (actual and potential);
(b) relevant provisions of the New Zealand Coastal Policy Statement 2010 ('NZCPS'), the Waikato Regional Policy Statement ('WRPS'), the WRCP, the operative Thames-Coromandel District Plan ('oTCDP') and the proposed District Plan ('pTCDP');[18] and

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16 Whilst we have considered Mr Bull's evidence that the industry would regard mussels up to 40mm in length as spat, we find the length specifications (as clarified) properly consistent with the biological science evidence and workable.

17 There are various other directives in s104 on what we must or must not consider, and how we exercise our discretion. Insofar as these arise, we address them later in this decision.

18 Following case management directions in advance of the hearing, the parties agreed a compilation of relevant policy and planning instruments and their provisions. We evaluate those that materially bear on the issues. There are no relevant national policy statements or national environmental standards. We consider applicable regulations.

(c) any other matter we consider relevant and reasonably necessary for determination (s104(1)(c)).

Other matters

HGMPA

[33] As part of Te Whanganui o Hei, the Site is within the Hauraki Gulf (Tikapa Moana/Te Moananui a Toi) for the purposes of the Hauraki Gulf Marine Park Act 2000 ('HGMPA'). The Hauraki Gulf Marine Park encompasses all common marine and coastal area (other than as held for defence purposes) and all common marine and coastal area and seawater of the Gulf (s33, HGMPA). The HGMPA supplements the matters for consideration under s104, RMA, as we shortly discuss.

Non-statutory documents

[34] As we later discuss, of some relevance to our consideration of effects on natural character is a WRC report entitled *Natural Character Study of the Waikato Coastal Environment*.[19]

Interpretative principles on pt 2 and RMA instruments

[35] RMA policy statements and plans give local expression to pt 2. In regard to the NZCPS, the Supreme Court has directed that we pay close attention to the wording of applicable policies, giving greater weight to those expressed in more directive terms.[20] In essence, relevant policies are to be identified and their intentions ascertained and applied. As discussed by the Court of Appeal in *R J Davidson Family Trust*[21] and the High Court in *Tauranga Environmental Protection*

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19 Dated March 2016; provided by WRC in supplement to the CB.

20 *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 (*NZ King Salmon*) at [129].

21 *R J Davidson Family Trust v Marlborough District Council* [2018] NZCA 316.

Society,[22] the same approach to NZCPS and other RMA instruments is to be taken in the consideration of resource consent applications. We are to refer to pt 2 if a careful purposive interpretation and application of the relevant policies requires it.[23]

[36] In terms of the hierarchy of applicable RMA policy and planning instruments, regional plans must give effect to regional policy and national policy statements (including the NZCPS). In *Tauranga Environmental Protection Society,* Palmer J suggests that there is a similar proper order of analysis, starting with the most localised instrument.[24]

Application of principles to the interpretation of RMA policy as to pt 2

[37] According to that approach, our order of scrutiny of the relevant RMA instruments is: WRCP › WRPS › NZCPS › pt 2.

[38] The WRCP is the most localised instrument and prescribes the rules that necessitate consent being secured. However, as it was made operative in October 2005, it cannot be said to give full and proper effect to the NZCPS (operative 3 December 2010) or the WRPS (notified in 3 November 2010, made operative in May 2016). There is a similar issue with the WRPS. There is a related need to consider policy directives in those instruments and pt 2, RMA.

[39] In *NZ King Salmon,* in regard to s6(b) RMA on ONF/Ls, the Supreme Court determined that 'inappropriate' should be assessed by reference to what is sought to be protected.[25] We are also guided by that approach in regard to the consideration of natural character and s6(a), RMA. Part of what we consider in those terms are the mapped proposed ONF/Ls and areas of high natural character ('HNC') and outstanding natural character ('ONC') and related pTCDP

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22 *Tauranga Environmental Protection Society Inc v Tauranga City Council* [2021] NZHC 1201.
23 *Tauranga Environmental Protection Society Inc* at [86].
24 *Tauranga Environmental Protection Society Inc* at [89].
25 *NZ King Salmon*, at [101].

provisions.

The determinative issues

[40] The parties filed an agreed 'Issues Table' prior to the hearing. In light of the evidence and submissions, we find the determinative issues concern two overarching questions:

(a) would there be unacceptable risks for marine mammals, significant habitats and/or marine ecosystems?
(b) would the Proposal properly respect environmental connections, values and associations?

[41] We address the several issues under those main groupings. Before we do so, we address some overarching procedural and other preliminary issues.

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Preliminary procedural and other overarching issues

Does Mr Davis speak for Ngāti Hei?

Submissions

[42] In closing, Mr Williams submits:[26]

> … Joe Davis is not Ngāti Hei; nor is Ngāti Hei (as an iwi or Post Settlement Governance Entity), the applicant.

Evidence

[43] That submission is with reference to evidence given by Mr Davis as to

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26 Closing submissions for Mr Wilson, at [99].

how the Proposal would benefit Ngāti Hei commercially and culturally.

[44] It is not disputed that Ngāti Hei are mana whenua and kaitiaki of this area. There are some 250 registered members of the iwi.[27] Mr Davis was the only witness to give evidence about their cultural interests and perspectives. Within Ngāti Hei, he is a respected kaumatua. He is a mandated negotiator for the iwi on Treaty Claims. He represents Ngāti Hei in several senior positions he holds on local, regional and national bodies. Other witnesses, both for and against the Proposal, acknowledge his expertise.

[45] Mr Davis explains that his 50% shareholding in OAL is held for and on behalf of, and will be transferred to, Hei o Wharekaho Settlement Trust ('HWST").[28] HWST is a Post-Settlement Governance Entity of Ngāti Hei[29] and represents the iwi's commercial interests (and, to a point, their cultural interests).[30] Mr Davis acknowledges some members of Ngāti Hei are personally opposed to the Proposal, having signed a petition against it.[31] Notwithstanding those positions of individuals, he says that the HWST reflects Ngāti Hei "tribal values".[32]

Discussion

[46] We accept Mr Davis' evidence on these matters. Conditions to duly reflect the intentions to transfer his OAL shareholding to HWST should be included in any resource consent we may in due course determine to grant. Our provisional view, subject to opportunity for further submissions, is that this could be as shown below (changes shown tracked against the appealed consent version):

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27 NOE, p 4, l 9.
28 NOE, p 4, l 15-32.
29 Davis EIC, at [1], rebuttal at [7].
30 NOE, p 3, l 26-31.
31 NOE, p 5, l 29-34.
32 NOE, p 6, l 7-15.

> That pursuant to sections 104, 104B, 108, 108AA, 108A, 116A and 123A of the Resource Management Act 1991, this coastal permit is granted to Ohinau Aquaculture Limited ~~the Waikato Regional Council grants the resource consent sought by Peter Bull and Joe Davis (the latter on behalf of Ngāti Hei)~~ to erect, use and occupy coastal space with structures for a spat catching farm at Whauwhau in outer Mercury Bay, subject to the following conditions of consent …
>
> 3. This resource consent shall commence on whichever of the following dates is the latter:
>
> a. the date that the aquaculture decision related to the spat farm is notified by the Ministry of Primary Industries in accordance with s 116A of the Resource Management Act 1991 ('RMA'); or
>
> b. the date the Council is notified that 50% of all shares in the consent holder have been transferred to Hei o Wharekaho Settlement Trust
>
> and shall expire ~~20 years later~~ on the twentieth anniversary of the date of its commencement.

Can we proceed without determining matters as to biosecurity risks at this time?

[47] A significant issue is whether the Proposal would pose unacceptable biosecurity risks. Primarily, those are associated with the transfer of spat ropes and movement of servicing vessels to and from the Firth of Thames. Both biosecurity experts[33] discuss these risks. For example, OAL's biosecurity expert, Dr Carina Sim-Smith, explains:[34]

> It is possible that the proposed spat farm and operations may introduce pests and diseases to the Mercury Bay Region … .

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33 Dr Kate James gave evidence on these matters as an expert called by Mr Wilson.

34 Sim-Smith, EIC at [2].

> … The main pests of concern are the clubbed tunicate (*Styela clava*), Japanese kelp (*Undaria pinnatifida*), the Mediterranean fan worm (*Sabella spallanzanii*), the Whangamata sea squirt (*Didemnum vexillum*) and the droplet tunicate (*Eudistoma elongatum*). … .
>
> … These pests are not known to be established the [*sic*] Mercury Bay region, though some species have been recorded from other areas of east Coromandel. … The impacts that these pest species have on New Zealand's marine ecosystem are unknown and difficult to quantify. They have the potential to out-compete native species and can cause changes in the community composition.
>
> Recommended mitigation methods to reduce the likelihood of new pest and disease incursions include … Ensuring that all farm equipment used on site is new, or has been cleaned and disinfected, or left to dry on land for at least a month prior to use on the spat farm; … Implementation of a Biosecurity Management Plan that is in accordance with biosecurity best practice.

[48] Some unsatisfactory dimensions to OAL's proposed biosecurity management were revealed in the testing of evidence. Issues include:

(a) OAL's lack of access to sufficient land to dry the spat ropes for disinfection purposes;
(b) a lack of clarity as to whether other arrangements for disinfection would be practicable and efficacious;
(c) risks associated with the transportation to and from existing Coromandel farms where there are marine pests and diseases;
(d) an impression that Mr Bull was not sufficiently familiar with, or necessarily in support of, all elements of the Biosecurity Management Plan as recommended by Dr Sim-Smith; and
(e) related uncertainty as to the efficacy of the proposed approach and related conditions.

[49] More broadly, we were not informed of any engagement with relevant authorities under the Biosecurity Act 1993.

[50] Dr Kate James does not consider OAL's proposed biosecurity risk management methods efficacious, given the risks presented.

[51] After this evidence was called and tested, we signalled to the parties that, in view of those difficulties, we were minded to approach matters sequentially. Following the adjournment, a Minute was issued indicating the court's intended staged approach as follows:[35]

(a) an interim decision would deal with all matters other than biosecurity;
(b) depending on that decision, further directions could be made as to matters the court would then require to be addressed in regard to biosecurity.

[52] As explained to counsel, this sequential approach is for reasons of procedural efficiency. Depending on the findings on all other matters (including as to marine mammals and natural character), findings on biosecurity may be unnecessary or, in any case, could be made at a second stage. After hearing from counsel at a teleconference, we made related directions for closing submissions for the first part of that staged approach.[36]

Submissions

[53] Nevertheless, Mr Williams submits that the biosecurity concern "is too important to divorce from the overall substantive consideration as to whether consent should be granted or refused". He characterises biosecurity risks as "one of the principal grounds" upon which the Proposal would "have a cumulative effect, to an extent whereby it represents inappropriate use and development of the coastal environment". He exemplifies this by reference to the natural character issue which has an interface with the biosecurity risks presented. He

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35 Minute dated 9 December 2020.

36 Record of Judicial Teleconference, dated 10 December 2020.

submits that OAL has "failed to discharge its evidential and persuasive burden on these critical elements" and this should be fatal to its application.[37]

[54] OAL and WRC submit that there is no procedural impediment to the court's signalled approach. That is in the sense that suitable conditions would be able to be framed should the court be satisfied biosecurity management arrangements.[38]

Discussion

[55] Due assurance of sound biosecurity risk management is a prerequisite for any grant of consent. That is by reason of the direct ecological harm consequences that otherwise could ensue as well as consequential effects for example on natural character values. Our findings on those and other values are, therefore, qualified.

[56] However, we remain satisfied that it is sound and appropriate to leave biosecurity risk management issues aside in this interim decision as we have indicated. That is for the reasons we have indicated in terms of principles of procedural fairness and efficiency. We acknowledge the costs and inconvenience including in our likely need for further evidence. It is fair to observe that this is largely attributable to OAL's inadequate case preparation. However, we have reserved costs and, if need be, will deal with such matters in due course.

Are the issues more appropriately addressed by plan change or review?

[57] As the Proposal is a discretionary activity under the WRCP, we must determine the appeal on the merits, according to the statutory framework we have set out. It is not the court's role to determine that matters are best addressed by plan change or review. Nor can the court direct what the industry should do by

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37 Closing submissions for Mr Wilson, at [27]-[43].

38 Closing submissions for OAL, at [157]-[159], closing submissions for WRC, at [45]-[46].

way of any "coordinated … response to the regional supply and demand deficit" for spat. Nor do we interpret the NZCPS 2010 or the RPS as giving any such direction. Therefore, we do not accept Mr Williams' submissions on these matters.[39]

What assurance is needed as to consideration of alternatives?

Principles

[58] The RMA prescribes that, where adverse effects are significant, an application AEE[40] is to report on any possible alternative locations. As to that specification, the law is well-settled. Generally, there is no requirement to prove that an application site is the best available or that other sites are not available. Rather, at least for discretionary activities, proposals generally stand or fall on their merits.[41]

[59] However, the Proposal involves use of a shared resource, namely coastal waters. There are related policy directions:

(a) WRCP Pol 7.1 refers to the CMA as public space and seeks that any allocation recognises the Crown's interests and conflicting uses;
(b) WRCP Pol 3.1.4 is relevantly to the effect that use or development is to be considered inappropriate if it:[42]
    (i) does not have functional need for location in the CMA; and/or
    (ii) could be located in an alternative area where natural character is already modified or compromised;

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39 Closing submissions for Mr Wilson, at [44]-[45].

40 Assessment of effects on the environment under s88 and Sch 4, RMA.

41 See for example *Meridian Energy Ltd v Central Otago District Council* [2010] NZRMA 477 at [121] (HC).

42 This policy also specifies an activity to be inappropriate if it contributes to sprawling or sporadic use or development. The Proposal is on a single 30ha Site in Mercury Bay where there are no other such developments. In terms of the ordinary meanings of 'sprawling' and 'sporadic', this aspect of the policy is not triggered.

(c) Pol 3.1.4's 'Explanation and Principal Reasons' comment that the policy works together with Pol 12.1.2 and App II in defining what WRC "considers to be inappropriate" in the consideration of applications for discretionary and non-complying activities in the CMA. App II is the more relevant. It sets out related decision-making criteria and considerations. Of particular relevance to alternatives and Pol 3.1.4 are:

> Whether practicable alternatives existing outside the CMA have been given serious consideration.
>
> The extent to which the applicant has a special relationship with the site or location of the proposed use or development;

(d) NZCPS Pol 6 gives direction as to efficient use of coastal space and that "activities that do not have a functional need for location in the coastal marine area generally should not be located there".

Evidence and submissions

[60] The planner called by OAL, Robin Britton considers that the Proposal properly accords with those policy directions. She explains how potential alternative sites were found to be unsuitable. This was by reason of identified conflicts with navigation or cruise routes, surf breaks, areas of high public use, or anchorages and/or the presence of conflicting structures such as boat ramps and moorings. The investigation also revealed that the Site would not compromise existing marine reserves or islands with colonies of seabirds that are classified as Nationally Threatened or At Risk.[43] WRC planner, Suzanne O'Rourke, agrees with Ms Britton.[44]

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43 Britton EIC, at [9]-[10], rebuttal, at [13]-[20].

44 O'Rourke EIC, at [28].

[61] The appellant's planner, Peter Reaburn, considers that OAL's analysis of alternatives was wrongly premised on an assumption that any site had to be within Ngāti Hei's rohe. He considers that land-based spat farming ought to be appraised as a potential alternative.[45]

[62] Submissions generally reflect those contrasting planning theories. Mr Williams further submits that, at an industry-wide level, there is no strategic justification for the Proposal. For this, he refers Dr Jeffs' acceptance that:[46]

> … even if this spat farm is declined, the broader industry strategy for bridging the gap between supply and demand would remain, with this application falling within but one of 13 subparts to an overall three-point strategy directed to that end, and whereby through increasing spat retention by just 1% alone, spat supply could be increased by 20%.

Discussion

[63] On the evidence, we find that:

(a) the relevant emphasis of WRPS Pol 7.1 and NZCPS Pol 6 is as to whether the activity in question has a functional need for a CMA location, not whether an industry as a whole has a functional need for the activity itself;

(b) the Proposal has a functional need to be located in the CMA, and there are no practicable alternatives outside the CMA, in that the Proposal is for wild spat catching and harvesting, activities that cannot occur outside the CMA;

(c) OAL has a special relationship with the Site and the location in that it is within the rohe of Ngāti Hei and Mr Davis' shareholding is on trust for that iwi's legal entity, HWST, and would be transferred to

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45 Reaburn EIC, at [16]-[30].

46 Closing submissions for Mr Wilson, at [9], referring to NOE at p 254, l 20-27, p 273, l 13, p 262 l 1-17 and 29 and p 272, l 15, p 273, l 13.

that entity;

(d) it was not practicable for OAL to have chosen a location where natural character is already modified or compromised, such as in the Firth of Thames or other localities in the Coromandel where marine farms are established. That is because sites outside of Ngāti Hei's rohe were not capable of fulfilling the strategic economic and cultural intentions of the Proposal for Ngāti Hei as explained by Mr Davis;

(e) potential other sites within Ngāti Hei's rohe were duly considered, as explained by Ms Britton. We accept her evidence that none proved practicable and the Site lacked sensitivities in terms of existing marine reserves or colonies of threatened or at-risk seabirds; and

(f) therefore, we find the choice of the Site and Proposal does not offend any policy directions under the noted RMA instruments or related RMA principles as to matters of need and the consideration of alternatives.

What assurance is needed as to the Proposal's commercial viability and feasibility?

Submissions

[64] Mr Williams characterises the Proposal as ill-considered, not offering any assured economic or other benefits and imposing undue risk of environmental harm. He refers to concessions by OAL's witnesses as to the lack of recent testing to confirm the presence of spat in the Bay in sufficient quantities to make the Proposal viable. He refers to the risk of the venture failing, just as others have, due to environmental stresses, sediments, contaminants and/or climate change. He notes the added risks inherent in transferring spat ropes to the Firth whilst working with the constraints of the catching season and the need to secure

a viable spat size for effective spat catching.[47]

Discussion

[65] We leave aside from this interim decision our consideration of biosecurity risks in spat rope transfers. Aside from those matters, the key environmental risk that would be associated with any commercial failure of the venture would be as to redundant structures. We find those risks would be sufficiently addressed by the existing consent conditions to the following effect:

Conditions	Description
16	The consent holder must maintain all structures and ensure they remain restrained, secure and in working order so as to not create a navigational or entanglement hazard.
95-101	The consent holder must provide a satisfactory bond to WRC prior to installation of structures, to ensure removal and disposal of all structures. The bond must be maintained for two years following consent expiry.

[66] All other aspects of commercial viability are for the boardroom, not our determination.

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Would there be unacceptable risks for marine mammals, significant habitats and/or marine ecosystems?

Introduction

[67] The notice of appeal alleges the appealed decision:

(a) fails to meet the "bottom line directives" of Pol 11, NZCPS;

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47 Closing submissions for Mr Wilson, at [4]-[12], referring to NOE at p 41, l 13, p 72, l 25 and p 73, p 40, l 9, p 40, l 20, 22, p 41, l 11, p 41, l 19, p 66, l 21, p 67, l 6 (Bull), p 72, l 25, p 73, l 9, (Clough), p 259, l 5, p 261, l 20-30, p 262, l 1-17 and l 29, p 264, l 13, p 265, l 8-15, (Jeffs).

(b) conflates likelihood and consequence and does not apply the precautionary approach as per Pol 3, NZCPS;

(c) applies an adaptive management approach that invalidly defers until later "determination of whether spat farm would have minor effects on marine mammal species once partially established, when as a matter of law reaching that finding was a mandatory prerequisite to granting consent from the outset".

Relevant policy directions

[68] As we discuss, the most directive policies on this set of issues are in the NZCPS. There are some similar policy directions in the WRPS and the WRCP, although both instruments pre-date the NZCPS.

[69] NZCPS Obj 1 seeks to safeguard the integrity, form and functioning of the coastal environment and to sustain its ecosystems, including maintaining the diversity of New Zealand's indigenous coastal flora and fauna.

[70] Related to that objective:

(a) Pol 11 is to:

(i) avoid adverse effects on threatened or at-risk taxa;[48]

(ii) avoid significant adverse effects and avoid, remedy or mitigate other adverse effects of activities on:

- habitats in the coastal environment that are important during the vulnerable life stages of indigenous species; and
- habitats, including areas and routes, important to migratory species.

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48 As per listing in the New Zealand Threat Classification System or the International Union for Conservation of Nature and Natural Resources.

(b) Pol 3 directs the adoption of "a precautionary approach" towards proposed activities "whose effects on the coastal environment are uncertain, unknown, or little understood, but potentially significantly adverse".

The evidence

Lay evidence

[71] A number of the lay witnesses for the appellant attested to sightings of, and encounters with, marine mammals including Orca, Bottlenose Dolphins and other cetaceans. Fraser Lampen gave evidence on his compilation of informal sightings' data from various sources including the internet. That evidence provides helpful facts and context for our consideration of the related expert evidence.

Expert evidence and related application assessment

[72] We heard from two marine biologists. Helen McConnell[49] was called on behalf of OAL. She has significant experience in marine mammal and coastal ecology assessments. Dr Ingrid Visser was called on behalf of Mr Wilson.[50] Dr Visser is an authority on New Zealand Orca and has been significantly involved in cetacean research and rescues over many years.

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49 Ms McConnell has a MSc (dist.) in Marine Science from University of Otago (2002). She has some 16 years' public and private sector experience in research and policy development in marine mammal ecology and conservation. She was called on behalf of OAL. She has particular experience in assessments of oil contamination and response options for marine mammals and in the aquaculture industry. She is Principal Consultant at SLR Consulting NZ Limited, an environmental consultancy firm.

50 Dr Visser's doctorate, which we understand was gained from the University of Auckland, was on the New Zealand Orca and she gained it in 2000. She has some 20 years' experience in cetacean research. She has been involved in several stranded cetacean rescues (including humpback whale, orca and bottlenose dolphin). She is a co-founder of Whale Rescue, the only NGO to be certified to conduct disentanglements. She has published several, oft-cited, peer reviewed scientific articles, including many as lead author.

[73] Ms McConnell authored the assessment of marine mammals and ecology that formed part of the application AEE and informed the development of the Proposal and its conditions. It was in essence a desk-top assessment. It encompassed a geographically defined 'Area of Interest' ('AOI') stretching from Cape Colville south to Otahu River mouth, near Whangamata, and several kilometres seaward.

[74] Dr Visser gave evidence, essentially by way of a peer review of Ms McConnell's analysis and the Proposal.

Sightings and strandings data and relationship to the AOI

[75] The DoC data is in two databases – one as to strandings and the other to sightings. The experts agree that the sightings' database is an under-resourced "messy" and "opportunistic" platform that contains errors, duplications and gaps. Nevertheless, they also agree that it is "a valuable source of information".[51] Sometimes, the experts do not distinguish between the two databases. We refer to both by a single acronym: 'MMSD'. Ms McConnell deliberately chose this relatively large AOI to account for the margin of error in the MMSD on marine mammal sightings. Dr Visser accepts that the AOI is generally appropriate insofar as it goes.[52] However, to account for the limitations of the MMSD, she favours adding a '50km margin of error' so as to include some additional informal sightings records of SRW.[53] In addition, Dr Visser draws on informal sightings that are not included in the MMSD.

Some minor points of difference between the experts

[76] The experts differ on some matters that are not significant for the findings we need to make. In essence that is because those findings are not sensitive to

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51 JWS – Marine Mammals.

52 Visser EIC, at [48].

53 Visser EIC, at [75].

which opinion on those matters is the more reliable.

Is it likely that Southern Right Whales would be present in relevant proximity?

[77] One such difference concerns the relative likelihood that SRW are present in relevant proximity to the Site. The experts differ to a degree on this. Dr Visser considers this species is likely to be present within Mercury Bay and the AOI.[54] Ms McConnell considers that SRW are only "possibly (…) present on an infrequent basis".[55] In essence, their differences derive from their interpretations of sightings' data and the scientific literature and deductions from SRW's behavioural characteristics.

[78] It is not necessary for us to make any election for which expert is likely to be more correct. Rather, it is sufficient for our purposes to focus on the experts' more significant differences concerning two related questions pertaining to habitat matters:

(a) are SRW likely to re-colonise Mercury Bay?
(b) is the Site likely to be within, or in relevant proximity to, important habitat?

Are Humpback Whales and other species likely to be present?

[79] Dr Visser considers Humpback Whales are likely present in the AOI including Mercury Bay. Ms McConnell does not. We prefer Ms McConnell's opinion on this. While Humpbacks may occasionally traverse through the AOI on their annual southern migration, we find no sound scientific basis to conclude that they are likely to head into Mercury Bay and remain present in relevant proximity to the Site.

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54 JWS – Marine Mammals, at 1.

55 JWS – Marine Mammals, at 1, McConnell EIC, at [39], [40], rebuttal at [34].

[80] The JWS – Marine Mammals records agreement that other marine mammal species are likely to be present in Mercury Bay. These include threatened Bottlenose Dolphins, as well as Common Dolphins (popokanau) (*Delphinus delphis*) and New Zealand Fur Seals (kekeno) (*Arctocephalus forsteri*). Dr Visser considers Bryde's Whales, Leopard Seals (popoiangore) (*Hydrurga leptonyx*) and other species may also be present in the AOI. The consent application acknowledges the possible, infrequent, presence of Bryde's Whales and we do not understand Ms McConnell to dispute that.

[81] However, ultimately, the relative likelihood or otherwise of any of those species being present is not determinative. Properly, closing submissions focus on Orca and SRW as threatened or at-risk species for which fatal entanglement or even sub-lethal incidents could give rise to population-level consequences. As we discuss shortly, given those potential consequences, we find that we should apply a precautionary approach in our consideration of the Proposal. We do so on the basis that the evidence does not reveal that any further measures would be required that are not also required in regard to Orca and SRW.

Sea birds

[82] While the appeal raises effects on seabirds, these were not in issue in the hearing. The written evidence of avifauna ecologist, Dr Rachel McClellan, was entered by consent. It presents a detailed analysis of the various potential risks for identified seabirds, including of entanglement, habitat exclusion, benthic habitat changes, foreign debris, navigational lights, disturbance, and noise. It concludes that the Proposal would pose a very low risk, with any effects on known avian species being negligible. We accept Dr McClellan's evidence and hence find the Proposal satisfactory in these terms.

DoC's Large Whale Disentanglement Team

[83] The experts differ to some extent on the consent conditions that require that, in the event of any entanglement, the consent holder must engage assistance

from DoC's Large Whale Disentanglement Team. Dr Visser recommends against reliance on that Team due to her personal experience of its inadequacies.[56] Ms McConnell responds that DoC intends to employ and train additional local staff. She also floats the potential to modify the conditions by adding reference to Dr Visser's "'Whale Rescue' organisation" as a second potentially-usable certified team.[57]

[84] We can return to these matters, in light of submissions, in due course should we determine to grant consent.

Boat strike

[85] Dr Visser points out that New Zealand has the highest rate of boat strikes on Orca in the world (citing *Visser & Hupman, 2018*).[58] That is not challenged by Ms McConnell, and we accept it is correct. However, Mercury Bay already experiences significant commercial and recreational boating activity. The servicing of the spat farm will increase boating activity but we find that would not be to a significant extent.

Underwater noise and alteration to trophic pathways

[86] Underwater noise disturbance and alteration to trophic pathways were not addressed to any significant extent in other evidence or submissions. We find these are not material additional risks, given the already-busy nature of Mercury Bay.

Key points of disagreement between the experts

[87] In terms of the issues we need to decide, the experts' key points of

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56 Visser EIC, at [226]-[246].

57 McConnell rebuttal, at [82], [83], referring to Visser EIC, at [3].

58 Visser EIC, at [266].

difference, as we next discuss, are as follows:

(a) the experts differ on an overarching question pertaining to all matters we must decide concerning marine mammals and habitats, namely:
   - is there sufficient information for our necessary findings?

(b) the experts differ about some inter-related questions concerning whether the Site is or could come to be within 'important habitat' (as those terms are used in the NZCPS) and any related risks, i.e.:
   - are SRW likely to re-colonise Mercury Bay?
   - is the Site within or in relevant proximity to important habitat?
   - would the Proposal present a significant risk of habitat exclusion/modification?

(c) accepting the likely presence of Orca and SRW, and the potential for a population-level consequence[59] or serious harm consequences should any such marine mammal become entangled or otherwise harmed, the experts differ on:
   - does the Proposal present significant risks of entanglement or other harm (e.g from marine debris)?
   - is the Proposal adequately designed against such risks?

(d) an added issue affecting all other issues is the uncertainty arising from climate change;

(e) those differences between the experts inform their ultimate differences on the precautionary approach. Assuming that a precautionary approach is to be applied, they differ on the questions:
   - does a precautionary approach warrant consent decline? or
   - can it be effectively addressed through consent conditions?

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59 We understand 'population-level consequence' to mean a consequence of reduction in a species' reproductive rate or survival rate, as described by Ms McConnell: NOE, p 99, l 32 – p 100, l 3.

Is there sufficient information for the making of necessary findings?

[88] Ms McConnell considers that the MMSD "can be safely interrogated to identify species that are potentially present over most of coastal New Zealand". She regards it as a reliable indicator of the "marine mammal species that are most likely to be encountered in Mercury Bay". In using it, she removed "obvious errors and duplications". However, in view of its lack of reliability, she defined a large AOI to account for species with a presence in the general region.[60]

[89] Dr Visser characterises the MMSD as "fundamentally flawed".[61] She describes various examples of deficiencies and discrepancies in it.[62] She considers that it cannot be used as the "primary basis for establishing the distribution … [or] prevalence of, marine mammals in any given area around the New Zealand coastline".[63] Unlike Ms McConnell, she also draws from informal data of sightings of SRW in a broader area than the AOI.[64] Those include the sightings compiled by Mr Lampen.[65]

[90] As noted, the experts agree that the MMSD is deficient and each also relies on the scientific literature.

Habitat issues

Are Southern Right Whales likely to re-colonise Mercury Bay?

[91] SRW are classed as at-risk and recovering. That is from their decimation, during late 19th – early 20th century whaling. *Patenaude (2003)* reported sightings around the New Zealand coast between 1976 and June 2002. These included

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60 McConnell rebuttal, at [11].
61 JWS – Marine Mammals.
62 Visser EIC, at [56]-[97].
63 Visser EIC, at [96].
64 Visser EIC, at [55].
65 Lampen EIC.

clusters in Northland (east coast), Bay of Plenty, Hawke Bay, Marlborough Sounds/Cook Strait/Wellington, Banks Peninsula and Foveaux Strait/Stewart Island. The literature records this species as demonstrating a behavioural characteristic of site fidelity that could see them rapidly expand into former habitat: *Carroll et al. (2013)*.

[92] Dr Visser considers it is likely that SRW would re-colonise the AOI, including Mercury Bay. Ms McConnell does not.[66]

[93] Given the species is in recovery, Dr Visser says even a single sighting is highly significant.[67] In addition to the MMSD, she notes there were informal sightings of two cow-calf pairs in Opito Bay in 2006[68] and another of a SRW (for more than a week) in Mercury Bay in 2015. She considers that the higher numbers of sightings (including of calves) is indicative that the Coromandel is becoming favoured by the species.

[94] Ms McConnell relies on *Patenaude (2003)* and *Carroll et al. (2013)* for her conclusion that SRW are only "possibly" present on an infrequent basis[69] and Mercury Bay is not likely to be a place that would support emerging breeding aggregations.[70] She explains that *Carroll et al. (2013)* "further analysed southern right whale sightings around the New Zealand mainland and noted that the regions with most sightings of this species were Northland, Otago, Foveaux Strait and Stewart Island". She comments that the east coast of Coromandel is "noteworthy for its lack of sightings".[71]

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66 JWS – Marine Mammals.
67 Visser EIC, at [110].
68 Dr Visser notes that this could be two sightings of the same pair.
69 McConnell EIC, at [39], [40], rebuttal at [34].
70 McConnell rebuttal, at [36].
71 McConnell rebuttal, at [36].

Is the Site within, or in relevant proximity to, important habitat?

What determines what is 'important'?

[95] The experts generally agree that important (or "critical") habitats include:[72]

(a) areas used during the vulnerable life stages of species (juveniles, breeding animals and migrating animals) (as defined by the NZCPS and DoC 2010 NZCPS Pol 11 guidance); and
(b) areas where animals rest and feed.

[96] However, that consensus is coloured somewhat:

(a) Ms McConnell treats as a prerequisite a requirement that the habitat is in regular or repeated usage during the vulnerable life-stages (juveniles, breeding animals, migrating animals) or for rest and feed;
(b) Dr Visser favours a broader construct developed by the internationally renowned cetacean researcher and conservationist, Dr Erich Hoyt. In particular, Hoyt describes "critical habitat for cetaceans" as:[73]

> a place or area regularly used by a cetacean group, population or species to perform tasks essential for survival and maintaining a healthy population growth rate. The most crucial areas are those where feeding, breeding and calving take place.

Important habitat for Orca?

[97] Dr Visser considers that inner Mercury Bay has above average habitat

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72 JWS – Marine Mammals.

73 Dr Visser cites *Marine Protected Areas for whales, dolphins and porpoises. A world handbook for cetacean habitat conservation* (Hoyt, 2005) and its companion *Marine Protected Areas for whales, dolphins and porpoises. A world handbook for cetacean habitat conservation and planning* (Hoyt, 2011).

suitability, compared to the balance of the AOI (citing *Torres et al. (2013)*). She notes Orca's foraging behaviour, including in a range of depths (from 1.5m to > 500m) and habitats. She points out that Orca show long term (even inter-generational) affiliations with areas where they have hunted. She notes that a high percentage (around 50%) of DoC data sightings in the AOI were associated with foraging, including at Opito Bay, Whitianga Harbour, Matarangi Beach, Wharekaho, Simpsons Beach and Whiritoa. She notes the further informal sightings of nine Orca foraging in an area from Whitianga Harbour to Waitaia Bay. She points out that Orca have a capacity to travel large distances daily and a tendency to frequently change their critical habitat. Given those behavioural characteristics, and in light of sightings' data, she considers that the AOI qualifies as important habitat.

[98] Ms McConnell notes that Orca move readily between locations over large distances (citing *Visser, 2007*). Compared to their vast home range, she says the 30ha area of the Site is relatively small (pointing out that this is also the case for Bottlenose Dolphins). She says Orca, like other marine mammals that forage or breed in the broader AOI, would have plenty of alternative habitat available nearby. Hence, while habitat within Mercury Bay is used for some feeding/breeding/resting behaviours, she considers the Site is not important during the vulnerable life stages of this species. Alternative habitat (of equivalent quality to the Site) is "present and available within Mercury Bay (which maintains ecological corridors)". Hence, she considers that the Site is not within important habitat for Orca. Nevertheless, she concedes that Orca are most likely to be present in Mercury Bay during the spat catching season when the dropper ropes are deployed.[74]

<u>Important habitat for SRW?</u>

[99] Dr Visser notes that the AOI is also documented as part of a historical

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74 NOE, p 117, l 10-16 (McConnell).

migratory route for SRW. She comments that it is clearly more than just "a transitory corridor". She says the shallow waters of Mercury Bay are consistent with the winter habitat preference of SRW, as described in *Rayment et al. (2012)* and *Rayment et al. (2014)*. Specifically, those authors describe SRW's preference for shallow, "sheltered … nearshore waters during the early life-stages of their calves". She comments that, once a calving female has made use of an area, she can expect to remain for an extended stay (citing *Patenaude, 2003*).

[100] Dr Visser considers that the Site is within 'critical habitat'[75] for SRW. That is by reason of the presence of calves in, and immediately adjacent to, the AOI and the extended use of the area by at least one SRW.[76]

[101] Dr Visser considers that the AOI will become increasingly important habitat. That is because SRW have a relatively long lifespan, are slow breeders (one calf every three to four years) and use coastal calving and nursery areas exclusively. That is particularly as the population increases and more individuals become 'available' to use it.[77]

[102] Ms McConnell notes that SRW have a large range with plenty of alternative habitat rather than any dependence on Mercury Bay. She comments that, despite occasional reports of sightings in Mercury Bay, there is no consistency such as would indicate routine usage of this habitat. She observes that this "paucity of sightings records for baleen whales in the vicinity of the proposed farm site is a clear indicator that the site is not specifically important during vulnerable life stages of any baleen whale nor does it represent important migratory habitat".[78]

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75 NZCPS Pol 11, refers to "important" habitats. The experts use 'important' and 'critical' as somewhat interchangeable qualifiers. For our purposes, we understand 'critical' to indicate an opinion that NZCPS Pol 11 applies.

76 Visser EIC, at [132].

77 Visser EIC, at [142].

78 McConnell EIC, at [60].

Would the Proposal present a significant risk of habitat exclusion/modification?

[103] According to the literature, habitat exclusion/modification is one of two risks associated with marine farms that are of 'primary concern' (the other being entanglement).[79] The experts agree that an appropriate method for mitigating against habitat exclusion/modification is to prevent "the overlap between farms and important habitat".[80] However, they differ on whether the Site would overlap with such habitat. Their differences in part concern the present state of the information:

(a) Dr Visser considers that the lack of sufficient information on important habitats is part of what makes the choice of Site unsuitable;[81]

(b) Ms McConnell acknowledges that, for "a lot of species" we have only indicators, rather than quantification, of where those habitats are.[82] However, she considers that the Site is adequately separated from important habitats so as to "minimise interactions" with all relevant marine mammals.[83] She comments:[84]

> … even if species are entirely excluded from that farm location, I would not anticipate any population level of effects or any – by population level effects meaning reduced reproductive rate or reduced survival rate.

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79 McConnell EIC, at [47], citing *Clement (2013)*.

80 JWS – Marine Mammals.

81 JWS – Marine Mammals, at 5.

82 NOE, at p 94, l 27-32.

83 Ms McConnell also supports related design features of the Proposal, including as detailed in an associated draft Marine Mammal Management Plan. We deal with relevant aspects later in this decision.

84 NOE, at p 99, l 34 – p 100, l 3.

Does the Proposal present significant risks of entanglement or other harm?

Is the Proposal adequately designed against such risks?

[104] Entanglement in spat farm dropper ropes is the primary acknowledged source of risk. That is supported by the literature (*Clement, 2013*) and was the primary focus of the expert evidence. Other risks discussed include ingested marine farm debris.

[105] Risk is measured according to both:

(a) scale; and
(b) relative likelihood.

[106] As for the scale of potential harm for marine mammals, there is only a narrow difference between the experts and one we find is ultimately not determinative. In essence, it is not disputed that a fatal entanglement could have a population-level consequence for both Orca and SRW. Ms McConnell appeared to acknowledge that at least significant harm could occur even outside of important habitat.[85] Dr Visser goes somewhat further in that she considers a population-level consequence could arise even if an entanglement is not fatal. She explains that cetacean entanglements can be complex and affect multiple body parts. An entangled animal would seek to avoid predators. Their capacity to move and feed would be compromised. That could result in a drop in body condition and other health related problems.[86]

[107] We accept Dr Visser's opinions on the consequences of entanglement (but not the likelihood). In any case, given the scale of consequences for Orca or SRW could be of that order of seriousness, we find a precautionary approach is

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85 NOE, p 105, l 28 – p 106, l 14.
86 Visser EIC, at [172]-[179].

triggered.

[108] Ultimately, the key issue is as to what applying a precautionary approach should mean for determination of the appeal, namely consent decline or the imposition of appropriate conditions. Our consideration of that issue is informed significantly by the second dimension of risk, namely likelihood. It is on this second aspect that the experts' opinions materially differ.

[109] Before we discuss those differences, we note a contributor to entanglement risk that is beyond the control of any consent holder is feeding behaviour. In particular:

(a) New Zealand Orca forage for rays that may find haven under marine farms. Dr Visser explains that there is also a behavioural risk that especially young impetuous Orca are inclined to pursue prey once detected. That impetuosity in the hunt for prey would reduce the protective advantages of echolocation.[87]

(b) baleens do not have the advantage of echolocation. Furthermore, they feed by lunging. The experts agree that this puts SRW at relatively greater risk of entanglement in spat farm ropes when feeding.[88] We add that the consent application also comments that baleens are less agile and tend to roll when entangled, have large pectoral fins and tail flukes and gaping mouths and some baleen species are curious (particularly about novel objects).[89]

<u>Key differences between the experts on relative likelihood of serious harmful consequences</u>

[110] In addition to their differences on whether the Proposal is sited to

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87 NOE, p 231, l 29-30.

88 JWS – Marine Mammals.

89 Draft Marine Mammal Management Plan attached to the consent application and the appealed decision.

minimise interactions with marine mammals, the experts also differ about:

(a) the relative probability or chance of an entanglement occurring; and
(b) related to that, the relative effectiveness of design features of the Proposal in mitigating against that risk.

[111] Dr Visser considers that the Proposal presents a "credible risk" of entanglement for Orca and SRW (as well as Humpback Whales, Bottlenose Dolphins, Common Dolphins and two species of endangered turtle).[90]

[112] She explains that New Zealand has one of the highest entanglement rates for Orca in the world. Since 1979, at least twenty-two entanglements (of both sexes and including adults, juveniles and calves) were documented. This was in "commercial fisheries gear, including gill and trawl nets, long-lines and cray-pot lines, as well as … private fishing gear from pots, rods and/or handlines". Eight were documented to have died and only five disentangled and released.[91] Dr Visser also refers to MMSD data on three further entanglements in the AOI. She notes two involved cray pots (the cause of the third not being specified). In addition, she refers to a cray pot entanglement in November 2012.[92] She also gives overseas examples of painful injuries to large whales, including cuts to the bone and flensing, as a result of entanglements in "large fixed nets [such] … as codfish traps" and their anchor lines.[93] She refers to *Bellazzi et al. (2012)* concerning large whale entanglements in Argentinian waters. She explains that these include an entanglement attributed to a "seed collector" for a mussel farm.[94]

[113] Ms McConnell points out that none of Dr Visser's entanglement examples, whether in New Zealand or overseas, was associated with marine

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90 Visser EIC, at [46].
91 Visser EIC, at [193], citing Orca Research Trust unpublished data and *Visser and Hupman, 2019*.
92 Visser EIC, at [194]-[197].
93 Visser EIC, at [220]-[225]. Mr Collicott, a lay witness, also raises concern about this: Collicott EIC, at [14].
94 Visser EIC, at [186], [187].

farming. She points out that the so-termed "seed collector" in *Bellazzi et al. (2012)* was a "twisted monofilament fishing line" which bears no resemblance to a dropper line as under the Proposal. As for the number of entanglements involving cray pots, Ms McConnell points out that these use a much narrower gauge of line (8-16mm, compared to the 50-55mm for the proposed spat droppers) and, as such, have greater entanglement risk.[95]

[114] Ms McConnell cites *Laverick et al. (2017)* and *Clement (2013)* as the primary references for consideration of the impacts of marine farms on marine mammals in New Zealand. She says those studies support her opinion that marine farms generally pose a low risk (relative to other sources) of entanglement.

[115] In particular, she says *Laverick et al. (2017)* is "the most comprehensive and up to date summary of whale entanglements in New Zealand waters". She notes that the authors document forty-four large whale entanglements between 1984 and 2017, thirty-nine of which were attributable to pot/trap and set net fisheries. Of the remaining entanglements, three involved longlines and two were associated with mussel farm gear (as reported in her evidence, at [62]). Those were in the Hauraki Gulf in the 1990s (involving Bryde's Whales). One involved a spat line, the other a buoy. She comments that those two cases are the only known cetacean fatalities attributed to mussel farming in New Zealand.

[116] Ms McConnell explains that there have been only two other entanglements attributable to spat farms anywhere in the world. These were in Iceland, in 1998 and 2010 respectively, and involved a Harbour Porpoise and a juvenile Humpback Whale. Those entanglements were understood to have been in single spat dropper lines.[96] However, she accepts that spat farms present a "slightly higher entanglement risk than cultivation farms". That is due to two factors – the lines are not anchored and they do not carry the same weight as a

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95 McConnell rebuttal, at [69].

96 NOE, p 125, l 14-28.

typical marine farm (hence they are not as tensioned).[97]

[117] Nevertheless, Ms McConnell considers the Proposal is properly designed against the contingency of an entanglement.[98] She explains that the design is informed by industry experience of the two Hauraki Gulf incidents. She notes the following features, in particular:[99]

(a) the use of weighted dropper ropes, a feature designed to keep the rope vertical in the water column and to eliminate any slack and so reduce the potential formation of loops that could encircle part of a whale or dolphin. Ms McConnell comments that, due to their negative buoyancy, the weighted drop ropes should not tangle even in rough sea conditions;[100]
(b) the restriction of deployment of dropper ropes only to when spat collecting episodes are predicted, so as to keep the subsurface largely unimpeded for large parts of the year; and
(c) the Marine Mammal Management Plan required under the consent conditions.

[118] Mr Bull explains that the ropes would be in the water for 2 – 3 weeks at a time if spat is not caught or 2 – 5 months if spat is caught. The ropes would then be removed until another spat fall is predicted. Mussels typically spawn twice per year.[101]

[119] Dr Visser explains that her concerns about the spat farm design pertain to

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97 NOE, p 124, l 30 – p 125, l 6.

98 For completeness, Ms McConnell acknowledges that a DoC planning witness mentioned marine mammals in his evidence to the independent commissioners' hearing but did not challenge her evidence and supported the proposed Marine Mammals Management Plan.

99 McConnell EIC, at [65].

100 McConnell rebuttal, at [79] referring to Bull EIC, at [31] and noting this is as required under Condition 81.

101 Bull EIC, at [31], [35], [36].

the cumulative length of rope in the water, the number of droppers[102] and the fact they would be looped along the backbone (which she says could compound the risk).[103] She opines that the weighing of the dropper ropes would appear to have "little influence over whether they will interact with the line(s)".[104] That is by reason of the rotational torque and power of an Orca or SRW.[105]

[120] In reply, Ms McConnell comments that, according to the literature, the entanglement risk does not arise from looping *per se*, but from the snaking and curving of slack rope in the water column (in essence, when a slack rope "crosses itself") (citing *Lindell & Bailey, 2015* and *Young, 2015*). She concludes:

> entanglement incidents in spat lines are highly unusual in New Zealand despite spat collecting operations occurring in a number of coastal locations that are considered to be highly suitable habitat for some marine mammal species and which typically support relatively high marine mammal densities e.g. Hauraki Gulf, Marlborough Sounds, and Golden Bay (see paragraphs 53 and 59 above). Indeed, when the area of consented (and utilized) marine farms in New Zealand (see Table below) is considered alongside the contrasting low number of marine mammal entanglement incidents (as listed in paragraph 62 of my evidence in chief) it is clear that the overall risk of entanglement is low. Given this low risk of entanglement coupled with the low density of marine mammals expected at the proposed farm site and the lack of critical/important marine mammal habitat here, significant effects on NZCPS Policy 11(a) species are not anticipated (see paragraph 91 below for a summary of my conclusions in regard to NZCPS Policy 11).

[121] We point out that Dr Visser acknowledged that she was not closely familiar with the Proposal's design and her observations were contingent on what Ms McConnell would explain. In view of that concession, it is notable that counsel for Mr Wilson did not ask her to respond to Ms McConnell's

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102 Visser EIC, at [18], [199]. Mr Lampen also raises this in his EIC, at [23].
103 Visser EIC, at [212], [213].
104 Visser EIC, at [202]-[210].
105 Visser EIC, at [220]-[225].

explanations in rebuttal. When the court asked about these matters, Dr Visser indicated a lack of time to be able to familiarise herself with the relevant elements of the design and the consent conditions.[106]

Marine debris

[122] Dr Visser comments that the risks of entanglement also extend to rope or equipment that becomes detached from a marine farming structure to be dispersed by wind, tides and/or currents. This also represents an ingestion risk. She notes that this risk is not managed by any proposed consent conditions (in that they are confined to beach clean-up).[107]

[123] Ms McConnell acknowledges that some of the deployed rope (e.g. backbone lines) would be buoyant.[108] However, Mr Bull explains measures that are now employed to reduce the risk of buoys detaching. This involves use of a wedge design and connection of floats to the backbone via a slot at the end of each float. In addition, his practice is to ensure buoys are branded with the company name.[109]

How should we account for climate change?

[124] Dr Visser touches on the growing body of evidence showing that climate change is causing changes in distribution and the expansion or contraction of suitable habitat and therefore marine mammal ranges (*MacLeod et al., 2005*, *MacLeod, 2009*). Dr Visser points out that the relative abundance and availability of sea lice and krill, the primary prey of SRW and other baleens, could be potentially significantly impacted by increases in sea temperature. She notes that it is not presently known how sea surface temperature, a key determinant for predicting the occurrence of Orca in New Zealand (citing *Torres et al. 2013*), will

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106 NOE, p 239, l 20 – p 242, l 8.
107 Visser EIC, at [247]-[255].
108 McConnell rebuttal, at [85].
109 Bull rebuttal, at [34]-[36].

impact either directly or through changes in prey availability. Dr Visser considers climate change and related risks are a proper basis for the application of a precautionary approach. She refers to commentary to the effect that the challenges presented by climate change for cetaceans warrant an "innovative, large scale, long term and multinational response from scientists, conservation managers and decision makers" (*Simmonds & Eliot, (2009)*).

[125] Ms McConnell does not respond to this part of Dr Visser's evidence.

Does a precautionary approach warrant decline or can it be addressed through consent conditions?

[126] The experts' differences on those matters inform their overall opinions on the precautionary approach and the Proposal:

(a) Dr Visser considers that the proper application of the precautionary approach should mean that consent is declined;
(b) Ms McConnell supports the choice of Site as reflecting principles of avoidance of contact with marine mammals, the mitigation features of the Proposal and the consent conditions.

Submissions

[127] Submissions address why we should prefer one or other of the expert's opinions on the various issues discussed. For OAL, Mr Davies emphasises the consistency of Ms McConnell's opinions with the scientific literature. For the appellant, Mr Williams refers to Dr Visser's extensive research history and direct experience with Orca and whale recovery. Mr Williams notes various concessions made by Ms McConnell and her lack of field experience and analysis. Mr Davies argues that aspects of Dr Visser's opinion demonstrate a lack of balance and proportion.

[128] Counsel generally agree that it is appropriate that we apply a precautionary approach. They differ significantly on what this means for the appeal outcome.

[129] Mr Williams submits that the proper application of this approach should see the consent declined.

[130] He submits (our emphasis):[110]

> *should* a fatal entanglement eventuate, *and whatever view might be taken as to the probability of that occurrence*, it would have population level consequences, which are significant in Policy 11 NZCPS terms.

[131] He argues that the adaptive management conditions of the consent would fail "on almost every test" when considered in terms of the Supreme Court decision in *Sustain Our Sounds.*[111] In particular, he refers to the regime of allowing for development of the first 10ha block, noting that this would result in a population-level consequence risk and hence not avoid the potential for irreversible significant effects which are precluded by the bottom-line directives of the NZCPS.[112]

[132] Mr Davies submits that the Proposal's design and the relevant consent conditions sufficiently reflect a precautionary approach. He responds that an 'avoid' policy does not dictate an "untenable outcome" but rather, a "high degree of scrutiny" and that, on the evidence, the Proposal can be safely found to pass "the statutory test" in terms of NZCPS Pol 11. He submits that, even on the basis of Dr Visser's evidence, in both in absolute terms and compared to other activities around New Zealand, the Proposal presents a "very low" risk. He notes that the marine farming industry took "practical steps" following the two spat

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110 Closing submissions for Mr Wilson, at [2], [3], [13]-[17].

111 Closing submissions for Mr Wilson, with reference to *Sustain Our Sounds Inc v NZ King Salmon Co Ltd* [2014] NZSC 40, [2014] 1 NZLR at [129] and [133].

112 Closing submissions for Mr Wilson, at [22]. We record that Mr Williams makes related submissions concerning biosecurity risk management, on which the court reserves its determination.

farm entanglement incidents off Great Barrier Island in 1996.[113] He points out that:[114]

> Since that time, despite the expansion of the aquaculture industry into areas that appear to be highly suitable for marine mammals, there have been no incidents that have been described by official sources as entanglements caused by marine farms.

Discussion

There is sufficient information for the making of necessary findings

[133] We find that the evidence is collectively sufficient to enable us to make all necessary findings. Those findings are primarily predictive and evaluative, in that we are considering:

(a) the prospect of the Proposal being established in the future and for the consent duration of ≤ 20 years;
(b) by reference to the directive policies of RMA instruments, pt 2 and other RMA provisions.

[134] There is an inherent limit to any capacity to make predictive findings as to the state of a future environment and how a proposed activity may affect it. Facts about the existing environment, whilst important, can only go so far in informing predictions about the future environment. They do not necessarily account for the dynamics of climate change, for example.

[135] The MMSD dataset is inadequate of itself as a source of factual information about the presence or otherwise of Orca, SRW and other cetaceans in the AOI or in closer proximity to the Site. Nor is it materially augmented by informal sightings' data as such data is also prone to observational bias and

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113 Referring to NOE, p 226.
114 Closing submissions for OAL, at [178].

recording error. However, bearing in mind the predominantly predictive and evaluative nature of our task, we find the MMSD's limitations are not such as to preclude us from making necessary findings. Rather, the MMSD is one albeit limited thread of evidence that helps inform our findings.

[136] The scientific literature is important for our purposes in various ways. It provides some independent corroboration and augmentation of what the MMSD reveals. For instance, *Patenaude (2003)*, *Laverick et al. (2017)*, *Clement (2013)* and *Torres et al. (2013)* each offers insights into historical and present patterns of movement and the related habitat preferences of the marine mammals in issue. Importantly, the studies offer independent scientific analysis of these matters to help us gauge potential risks. Furthermore, as independent scientific analyses, the literature assist us in our weighing of the related opinions of Ms McConnell and Dr Visser.

[137] The desk-top nature of Ms McConnell's underpinning assessment does not materially limit our capacity to make necessary findings. Cetacean field research is clearly an important underpinning of sound regulation of our coastal resources. However, Ms McConnell's assessment draws from the available such research, as we have noted. It is not realistic or necessary for that to be duplicated for the relatively confined purposes of determining whether, and if so on what basis, a coastal permit should be granted for the Proposal. Dr Visser's peer review assists us to scrutinise Ms McConnell's assessment and hence better inform our findings.

[138] Considered as a whole, those various threads of evidence leave some uncertainties and unknowns but allow for necessary RMA determinations. The uncertainties and unknowns inform our application of a precautionary approach in terms of NZCPS Pol 3 (and related directions in the WRCP and WRPS). As we have noted, any consent issued is for a limited term, i.e. $\leq$ 20 years. As we later discuss, we have capacity to impose consent conditions that allow for future review in the event that fresh science reveals a need to do so.

[139] As to the evaluative aspect of our task, a particular focus of this is the directions in NZCPS Pols 11 and 3 (and similar directions in the WRPS and WRCP). Each of those directions calls for properly-informed evaluative judgements. For instance, that is reflected in NZCPS Pol 11 through directions as to avoiding 'adverse' effects on threatened or at-risk taxa and avoiding 'significant' effects on 'important' habitats. NZCPS Pol 3, as to the precautionary approach, calls for a range of judgements for example as to the sufficiency or otherwise of the science, the potential significance of the related adverse effects, and ultimately what a precautionary approach calls for in the final result.

[140] As we are satisfied that all relevant expert opinions are soundly based, we find that they provide a further basis for our evaluative findings.

The Site is not within or in relevant proximity to 'important habitat'

[141] The ordinary meaning of 'habitat' is broad and of little help for RMA purposes, namely 'the natural home of an organism'.[115] The NZCPS Pol 11 adds the qualifying requirements that the habitat must be important:

(a) during the 'vulnerable life stages of indigenous species' and/or
(b) as an area or route for 'migratory species'.

[142] Dr Visser and Ms McConnell differ only subtly on how those qualifiers are to be understood, or more specifically what is to be regarded as 'important' during the 'vulnerable life stages of indigenous species'. The Hoyt definition, preferred by Dr Visser, acknowledges as crucial those areas where feeding, breeding and calving take place. Clearly those are examples of vulnerable life stages. Ms McConnell's interpretation is comparatively more restrictive. It colours Pol 11 somewhat with the qualifier of regular or repeat usage. Ultimately, we find nothing determinative in these subtly different approaches to describing what constitutes important habitat for the purposes of Pol 11. Rather, we weigh

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115 New Zealand Oxford.

all of the evidence to determine whether, in light of what is revealed on the nature and extent of usage during vulnerable life stages, the environment of the Site should be regarded, in a qualitative sense, as 'important' habitat.

[143] We accept Ms McConnell's evidence in finding that the Site is not within important habitat for Orca and SRW and is sufficiently removed from such habitat. For Orca, *Torres et al. (2013)* modelled and reported the locality of the Site as having "not particularly high"[116] habitat suitability (by comparison to the higher suitability of the Firth of Thames, for example). For SRW, it identified suitable habitat along the North Island's east coast and elsewhere in New Zealand.

[144] Our preference for Ms McConnell's opinion is primarily because it is supported by the available scientific literature. By contrast, we mean no disrespect to Dr Visser in observing that her opinion is more a hypothesis that runs somewhat contrary to the literature and is not firmly based in observational or other data. Nevertheless, we acknowledge Dr Visser's considerable expertise in the study of cetaceans, including their behavioural characteristics.

[145] We have considered the fact that SRW are a recovering species and have a behavioural tendency of staying faithful to former habitats. However, the evidence does not justify any assumption that SRW are likely to return to colonise or remain in Mercury Bay. Rather, on the present state of the evidence, recolonisation is no more likely to occur in the vicinity of the Coromandel than elsewhere along the extensive New Zealand coastline, including in the Marlborough Sounds where there are extensive marine farming areas. We find the following figure from *Patenaude (2003)*, referred to by Ms McConnell, a helpful illustration of that. It illustrates locations of known sightings and re-sightings of SRW reported around mainland New Zealand between 1976 and June 2002:[117]

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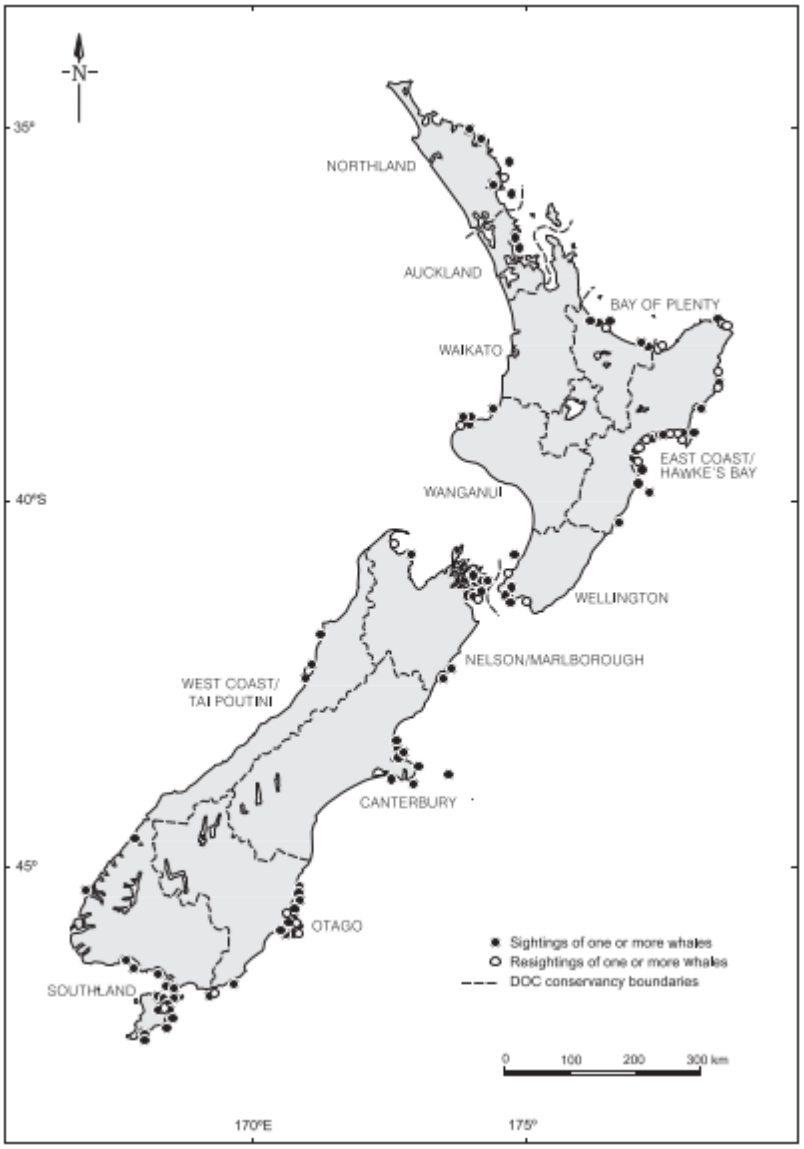
116 McConnell rebuttal, at [53].

117 McConnell rebuttal, Fig 5.



[146] We acknowledge that the science does not exclude the possibility that SRW may re-colonise Mercury Bay at some stage. We account for that prospect in our consideration of the Proposal and the consent conditions.

There is not a significant habitat exclusion or modification risk

[147] It follows that, preferring Ms McConnell's evidence on these matters, we find that the Proposal would not present a significant habitat exclusion or modification risk.

Climate change adds prediction uncertainty that can be addressed

[148] We accept that climate change adds a dynamic that makes it more difficult to make predictions about the future locations and states of habitats and the related vulnerability of marine mammals. On the other hand, we can approach our determination on the basis that there is some capacity for later regulatory intervention, should consent be granted. In particular, any consent would be for a specified term (≤ 20 years) and on conditions that can include capacity to undertake condition review.

The prospect of serious harm for threatened or at-risk marine mammals is very low

[149] A population-level consequence of any fatal entanglement or other such incident would plainly constitute serious harm. Any such consequence, were it to occur, would plainly also harm indigenous biodiversity in the coastal environment.

[150] However, we accept Ms McConnell's evidence in finding that the prospect of such a consequence (or even non-lethal harm) for any threatened or at-risk marine mammal is very low. That is for these primary reasons:

(a) the Site is not within, or in relevant proximity to, important habitat. Hence the choice of Site would not increase risks of interaction with threatened or at-risk marine mammals;
(b) there is a realistic prospect of spat farm encounters by Orca (and even SRW) given these mammals' feeding behaviours. However, despite the fact that marine farming is long-established in several areas around New Zealand's coast where Orca and other cetaceans are commonly present, there continues to be a very low incidence of entanglements (not just in New Zealand but worldwide);
(c) the Proposal's spat farm design is informed by the long history of industry experience and the industry's design-change response to the

two incidents of spat farm entanglements;

(d) we find the design of the spat farm is sound and would mean that, in the event of any encounter with an Orca or SRW or other cetacean, it is highly improbable that there would be an entanglement, bearing in mind that this is the primary source of the risk of harm. The risk is very low in terms of the parameters of any 'effect' within the meaning of s3.

The Proposal does not offend any relevant policy directions

[151] For those reasons, subject to some matters we raise later in this decision concerning the consent's adaptive management conditions, we find that the Proposal:

(a) would not offend NZCPS Pol 11; and

(b) would be properly consistent with related policies of the WRCP and WRPS.

[152] We bear in mind that NZCPS Pol 11 uses the adjective 'avoid'. In *Environmental Defence Society,*[118] the Supreme Court held that word (as used in NZCPS Pols 13(1)(a) and 15(a) on areas classed as ONC or ONF/L) to mean 'not allow' or 'prevent the occurrence of'.[119] The majority characterised the policies as providing 'something in the nature of a bottom line'.[120] Furthermore, we acknowledge that the protection directive in Pol 11 is not qualified by reference to 'inappropriate' use and development.[121] However, the application of Pol 11 is nevertheless qualified. It serves to 'protect indigenous biodiversity in the coastal environment' and applies only to 'effects' determined as 'adverse'.

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118 *Environmental Defence Society Inc v New Zealand King Salmon Company Ltd* [2014] NZSC 38, [2014] 1 NZLR 593.

119 *Environmental Defence Society*, at [62].

120 *Environmental Defence Society*, at [103].

121 *Environmental Defence Society,* at [126].

[153] We find, on the evidence, Pol 11 is not offended. In particular:

(a) Pol 11(a) is not triggered given the high improbability of entanglement in the event of any encounter; and
(b) Pol 11(b) is not triggered given our findings on issues as to habitats.

A precautionary approach should be applied

[154] NZCPS Pol 3 and related WRCP policies allow for relatively broad discretion in determining whether to apply a precautionary approach and as to what that means for any activity in issue. Despite our finding that it is highly improbable that an entanglement would occur, we find we should apply a precautionary approach in view of the potentially highly serious consequences of an entanglement.

A precautionary approach can be reflected in consent conditions

[155] Guided by *Sustain Our Sounds,*[122] we find that a precautionary approach can be effectively reflected in consent conditions, rather than dictating consent decline. That is by reason of the following:

(a) our findings concerning the level of risks presented in regard to marine mammals and as to habitats;
(b) the fact that the design of relevant elements, informed by industry experience, would minimise entanglement risks, particularly in the choice of heavy and tensioned looped lines;
(c) the fact that there would remain effective capacity for intervention should science, including as to potential future environmental change, reveal this is warranted. In particular, the coastal permit, if issued, would be of only limited duration (≤ 20 years) and there is

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122 *Sustain Our Sounds Inc v New Zealand King Salmon Co Ltd* [2014] NZSC 40, [2014] 1 NZLR 673.

ample capacity for such effective intervention through related consent conditions.

[156] Therefore, in terms of the factors noted in *Sustain Our Sounds*, we find:

(a) as to 'the extent of environmental risk (including the gravity of the consequences)': the risk is very low and the consequences can be effectively managed by conditions;
(b) as to 'the degree of uncertainty': the uncertainty concerning any future change in the environment can be effectively managed by consent duration and conditions; and
(c) as to 'the extent to which an adaptive management approach will sufficiently diminish risk and uncertainty': adaptive management is an appropriate application of the precautionary approach in this case.

The consent conditions do not adequately reflect a precautionary approach

[157] The general effect of the relevant present consent conditions is as follows:

Conditions	**General effect**
14 – 16, 24, 80, 81	***Design, construction and maintenance*** • The proposed design must be implemented. Its elements must be maintained under proper professional supervision. No cut pile ropes may be deployed.

23, 72, 77, 84, 89, 90	***Operations including adaptive management*** • Beyond the first 10ha block, development of the Proposal is conditional upon a Certified Report by an independent suitably qualified and experienced expert to the effect that such further development is expected to have minor (or less) effects on marine mammals. • All activities must comply with the Marine Mammal Management Plan ('MMMP'). • Dropper ropes may be deployed only when spat fall is reasonably expected by the consent holder and must be removed after three weeks if no spat are caught. • No dropper ropes may be deployed before the certified MMMP is in place.
42, 70 – 79, 82, 83, 89, 90, 91	***Monitoring including under the MMMP*** • Annual operational monitoring be reported to WRC on relevant matters, including on deployment of dropper ropes, maintenance procedures, crew compliance training, and information on any marine mammal entanglements, vessel strikes, injuries or deaths. • Marine mammal monitoring must be undertaken according to a certified MMMP developed by independent suitably qualified and experienced expert(s) and related reporting to WRC and DoC, and related 'adaptive management' staged implementation of the Proposal (Conds. 70 -77); • An independent expert review of the MMMP must be undertaken on the first, third, tenth and fifteenth anniversaries and within six months of any reported marine mammal entanglement, injury or death.

	• Any marine mammal entanglement, injury or death within the Site or as a direct result of vessel strike, must be reported to WRC within 24 hours of becoming aware of any such incident. • Any discovery of any dead marine mammal within the Site must be reported to DoC.
72, 102	***Review*** • WRC is empowered to review the conditions for broadly expressed purposes, notably including in the event that the Certified Report under Cond. 72 reports that the first 10 ha block is having more than minor effects on marine mammals.
94 – 101	***Decommissioning (including bond)*** • All structures (except screw anchors) to be removed upon consent expiry, forfeiture or surrender. A bond for such purposes must be provided prior to installation.

[158] We find the conditions on design, construction and maintenance, monitoring, review and decommissioning are generally suitable and appropriate as part of a precautionary approach. That is also the position for a number of the operational conditions.

[159] However, we find the adaptive management and review conditions are inadequate as part of a precautionary approach, bearing in mind the observations in *Sustain Our Sounds*.

Adaptive management and review conditions

[160] The adaptive management conditions in *Sustain Our Sounds* were qualitative

standards that were objectively measurable.[123] An important aspect to them, as the Supreme Court noted, was that they maintained the controlling role of the consent authority. In particular, the Court observed:[124]

> Importantly, if the "baseline plan" is not approved by the Council, then the consent will lapse after three years from the date of the consent's commencement. If the resulting "baseline report" is not approved by the Council, no structure(s) can be placed on the marine farms. Therefore, if the analysis and monitoring of the baseline information shows that the development of a marine farm would be inappropriate, the Council can effectively halt any further development of the marine farms by not approving the report.

[161] By contrast, the obligations under the adaptive management conditions (and the related MMMP) are not objectively measurable and effectively delegate to independent experts the judgement as to whether or not the Proposal would be able to be fully developed beyond the first 10ha block. The broad licence so conferred is aggravated by the conditions' reliance on amorphous words (e.g. 'minor (or less)', 'more than minor', 'minimise effects to the point they are minor or less').

[162] However, we consider those defects are remediable.

[163] Provisionally, such remediation could include the replacement of Conditions 71 and 72 with conditions to the following effect:

(a) the right to undertake development beyond the first 10ha block would remain contingent except that this would be on the basis of informed clearance being given by WRC not any delegated expert(s);
(b) the revised role of expert(s) would be to report to WRC on whether there is any material change to the state of the receiving environment as may be relevant to WRC's application of NZCPS Pol 11;

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123 For example, Conditions 50-62 (pp 188-195 Vol 2 Board of Inquiry report).
124 *Sustain Our Sounds*, at [89].

(c) the expert(s)' report on those matters would still need to be certified by WRC as satisfying the reporting requirements specified in the consent conditions;

(d) WRC would be empowered to do one of two things following its consideration of a certified report (within a specified period, e.g. 30 working days):

  (i) notify the consent holder of a review of the consent conditions to address the report; or

  (ii) notify the consent holder that it is satisfied that the report does not warrant such a review;

(e) no further development beyond the first 10ha block would be permissible either:

  (i) pending WRC's report on those matters; or

  (ii) should WRC notify a review, pending completion of that review and subject to any revised conditions;

(f) full development beyond the first 10ha block would be permissible in the event that WRC notifies that the report does not warrant review, and from the date of that notification.

[164] We are mindful that replacement conditions to that effect would leave WRC with a relatively broad discretion as to any review of conditions it may elect to undertake in response to the expert(s) report. However, we are satisfied that giving a consent authority such licence properly accords with NZCPS Pol 3. As was observed in *Environmental Defence Society*, Pol 3 "requires councils to adopt the precautionary approach, but naturally enough the implementation of that approach is addressed only generally".[125]

[165] In addition, there would need to be a related clarification to the objectives of the MMMP to more clearly crystallise relevant and enforceable obligations concerning marine mammals' protection. The list of risks noted at 1.2 of the

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125 *Environmental Defence Society*, at [127].

draft MMMP should be specified, with related outcomes to be achieved, in Condition 75. Similarly, Condition 76(a) would need to be more clearly targeted to the specified risks.

[166] The review conditions would need consequential amendment. In addition, as a further reflection of a precautionary approach, our provisional view is that the review conditions should allow for review in response to any relevant initiatives for the protection of at-risk or threatened marine mammals under the Marine Mammals Protection Act 1978 ('MMPA') and/or the Wildlife Act 1953 ('WA').

[167] That is simply to reflect the principle that there should be capacity for effective intervention should new science or other information come to light that would warrant that.

[168] The MMPA and WA each provide for the Minister of Conservation to promulgate a "population management plan" ('PMP'). MMPA PMPs can be for threatened or other species of marine mammal (s3E, MMPA). The Fisheries Act 1996 provides for complementary related regulatory powers. MMPA PMPs can include an "assessment of the degree of risk caused by fishing-related mortality and other human-induced sources of mortality to the species, whether within New Zealand fisheries waters or elsewhere within the range of the species". WA PMPs can specify, inter alia, the maximum allowable level of fishing-related mortality for the species, in New Zealand fisheries waters (s14F(1)(f)). The WA also allows the Minister to "prepare and carry out wildlife surveys" (s41). Through effective condition review, there is capacity to achieve more effective integration of RMA regulation with those related statutory interventions for the protection of marine mammals.

[169] A related rationale for such review is that it allows for readier response to the dynamics of climate change. Dr Visser quoted a telling observation about

that from *Simmonds and Elliott (2009)*:[126]

> The challenges presented by climate change require an innovative, large scale, long term and multinational response from scientists, conservation managers and decision makers. This response that should encompass a precautionary approach, including addressing the detrimental effects of other factors negatively impacting populations and species.

[170] Therefore, our provisional view is that the review conditions should be enhanced to the effect that WRC is empowered to review relevant consent conditions in response to any relevant MMPA or WA PMP or WA wildlife survey. As this aspect has not been traversed in legal submissions, we will allow opportunity for that. Hence, our observations on this are provisional.

[171] Subject to being satisfied with revised adaptive management and review conditions, we find that the Proposal would satisfactorily reflect a precautionary approach, in terms of the matters noted in *Sustain Our Sounds*. In particular:

(a) *the extent of environmental risk (including the gravity of the consequences)*: the risk would be very low and the consequences can be effectively managed by refined conditions;
(b) *the degree of uncertainty:* the uncertainty concerning any future change in the environment can be effectively managed by consent duration and those refined conditions; and
(c) *the extent to which an adaptive management approach will sufficiently diminish risk and uncertainty:* adaptive management is an appropriate application of the precautionary approach in this case, subject to our being satisfied with the final revised conditions.

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126 Visser EIC, at [275].

Debris

[172] Given the large quantity of ropes and buoys that would be deployed, there is inevitable risk of breakages occurring and, hence, potential for marine debris. Compared to the risk of entanglement (which we find highly improbable), we find, on the evidence, there is comparatively even less risk of ingestion of marine debris. The scientific literature referred to does not suggest debris ingestion is a significant risk. Furthermore, we note Mr Bull's explanation of design features to mitigate against accidental loss of bouys. We find that the risk is so low it does not warrant either decline of consent or the imposition of conditions beyond those already included in the consent under appeal.

The effects of climate change

[173] We recognise the dynamic nature of climate change, including its potential to impact on cetacean prey, habitat preferences and migration patterns. These matters add to the scientific uncertainty about how the future environment may change relevant to consideration of the Proposal. We are satisfied that these matters can be adequately provided for, in accordance with the precautionary approach, through consent conditions (including modified monitoring and review conditions).

Coastal ecosystems

[174] We find the Proposal would not harm coastal ecosystems, including their intrinsic values (s2(1), RMA). Rather, it would serve to catch relatively insignificant quantities of abundant wild ocean spat. It would also properly safeguard the life-supporting capacity of water and ecosystems (s5(2)(b)). It would not conflict with WRCP Pol 3.4.3 as to protection of the functioning of the coastal ecosystem. It would be properly consistent with the HGMPA, including its identification of the life-supporting capacity of the Gulf and the maintenance of its ecosystems as matter of national importance (s7(2)(c)).

The importance of the Proposal

[175] *Sustain Our Sounds* indicates that it is also relevant to consider the importance of the activity in issue. We find that the Proposal has pt 2 RMA importance in enabling Ngāti Hei's kaitiakitanga and enhance their relationship to their rohe moana. That kaitiakitanga role extends to kākahi whakairoiro, tohorā, terehu and other taonga marine mammal species. We infer that role will be duly exercised so as to demonstrate responsibility in adhering to the specified conditions. In those terms, the Proposal will have relevant environmental stewardship and protection dimensions.

[176] In these aspects, we consider RPS Pol 11.1. It links the maintenance or enhancement of indigenous biodiversity to, inter alia, tangata whenua relationships with indigenous biodiversity including their holistic view of ecosystems and the environment. The Proposal would assist to achieve that policy.

[177] However, even leaving this factor aside, we are satisfied that decline of consent would not fairly and reasonably relate to the risks presented and be a disproportionate and unreasonable application of a precautionary approach. Rather, a sufficient and the most appropriate application of a precautionary approach is through consent conditions that are improved in the ways we have explained.

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Would the Proposal properly respect environmental connections, values and associations?

Introduction

[178] At the heart of the case is a tension between different world views and associated environmental connections, values and associations:

(a) Mr Davis explains how the Proposal would help restore and rejuvenate Ngāti Hei's relationship as tangata whenua with Te Whanganui o Hei, a relationship dating from time immemorial. He characterised the Proposal as a "pou" that "sits in the bay to protect our rohe as we know it";[127]

(b) Warwick Wilson and several other lay witnesses explain how the Proposal would harm what they and their families value and enjoy as part of their connection to Mercury Bay. Mr Wilson said the Proposal would be a visual 'pollutant'.[128]

[179] In considering the competing interests of the parties, we must consider and apply a number of inter-related principles in pt 2, RMA. Each is related to achieving the RMA's sustainable management purpose (s5), including as to the cultural wellbeing of people and communities. The related principles concern how the Proposal affects:

(a) the preservation and protection of the natural character of the coastal environment (s6(a));
(b) the protection of outstanding natural features and landscapes (s6(b));
(c) the maintenance and enhancement of public access to and along the coastal marine area (s6(d));
(d) the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, wāhi tapu, and other taonga (s6(e));
(e) kaitiakitanga (s7(a)); and
(f) the maintenance and enhancement of amenity values and of the quality of the environment (s7(c), (f)).

[180] We must also take into account the principles of Te Tiriti o Waitangi (s8).

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127 NOE, p 13, l 25-30.
128 Warwick Wilson EIC, at [30].

[181] As we later discuss, the RMA policy and planning instruments provide only limited assistance on these matters.

[182] We received evidence on environmental connections, values and associations from landowners, on behalf of Ngāti Hei and from various experts. The expert evidence is primarily evaluative and pertains to landscape character, natural character and visual amenity values and recreational values (as well as navigational safety). The landscape experts' evidence is primarily concerned with how the Proposal would affect people's perceptions of and associations with their environment. Evaluation of those matters involves a significant element of judgement for which a sound factual foundation is important. In particular, that is the case for opinions on what people and communities would perceive, associate with, value or find degraded. The same applies to the evidence on recreational values. However, for the landscape expert evidence in particular, there are particular sensitivities concerning how the experts approached their evaluations.

Lay evidence of landowners and maritime users

[183] Some of the landowners spoke about their families' inter-generational associations with their land and Mercury Bay. For example, Warwick Wilson gave evidence about the more than 50 years' of association he and his wife have with Waitaia. His son, Nick Wilson, also spoke about his family's associations. Ms Georgina Hackett talked about childhood holiday memories of going with other children on adventures, led by Warwick Wilson, to find glow worms at Waitaia and "moa gizzard stones".

[184] A number of lay witnesses describe shared and common perspectives on the area's qualities and characteristics and its related values and attributes. These include:

(a) a deep respect for the natural character and beauty of their environs including of the ocean and its beaches, bushland, streams, kiwi and other indigenous birds, including seabirds, Orca and other cetaceans and marine mammals;[129]

(b) a cherishing of the wildness, seclusion and "one with nature" remoteness of the land and its environs;[130]

(c) associated ethics of conservation and stewardship;[131]

(d) associated concerns about introducing commercial activity of the kind proposed into Mercury Bay, and more particularly the coastal waters of Whauwhau. Those concerns pertain to the risk of harm to threatened or at-risk marine mammals, pollution of the sea and beaches, introduction of biosecurity risks and degradation of visual amenity and natural character values that the witnesses hold;[132]

(e) concerns that the Proposal would degrade recreational use of the Bay;[133] and

(f) opinions that the Proposal is unlike other existing established land uses (e.g. dwellings, forestry) and commercial tourism uses of the Bay.[134]

[185] Other lay witnesses spoke about the recreational amenities they and others enjoy in the waters of Mercury Bay. For some, their businesses rely on sharing that enjoyment with domestic and international tourists.[135]

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129 For example, EIC of Warwick Wilson, James Wilson, Sarah Oxford, Fraser Lampen.

130 For example, EIC of Warwick Wilson, Nick Wilson, Charles Hackett.

131 For example, EIC of Warwick Wilson, James Wilson, Sarah Oxford, Amy Hyde, Fraser Lampen.

132 For example, EIC of Warwick Wilson, Nick Wilson, James Wilson, Sarah Oxford, Amy Hyde, Georgina Hackett, Charles Hackett, Fraser Lampen, Chris Severne, Avon Hansford.

133 For example, EIC of Amy Hyde, Avon Hansford, Simon Rawlinson.

134 For example, EIC of Warwick Wilson, Charles Hackett, Fraser Lampen, Mathew Collicott, Avon Hansford.

135 For example Mathew Collicott, Avon Hansford, Simon Rawlinson.

Evidence of Ngāti Hei's cultural interests and associations

Ngāti Hei and its rohe moana

[186] Ngāti Hei are tangata whenua of the Mercury Bay area. Mr Davis explains that the iwi have occupied the area from prior to Captain Cook's arrival in 1769 since "time immemorial".[136] Ngāti Hei are one of the twelve iwi recognised by the Hauraki Māori Trust Board.[137] Their main marae, Wharekaho, is situated north of the Whitianga township.[138]

[187] There is some discrepancy between the map produced by the Waitangi Tribunal and that in Fig 1 of Mr Davis' evidence. We accept his explanation that this was "…to alleviate any challenge that might come from" a neighbouring or over-lapping iwi.[139] While no clear line can be mapped to indicate the extent of their ancestral habitation, Ngāti Hei now have an accepted area representing their heritage and connection.[140]

Pā sites

[188] Mr Davis witnesses that there are 14 pā sites between Kuaotunu and Hahei.[141]

[189] Panerahi Pā is highly significant to Ngāti Hei as a place where they defended against invasion from Marutuahu, and were then exposed to the full brunt of Ngāpuhi raids from the north.[142] Whare Taewa Pā in Wharekaho is believed to have been occupied by Ngāti Hei when Captain Cook arrived in New

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136 Davis EIC, at [3] and [5].
137 Davis EIC, at [4].
138 Davis EIC, at [11].
139 NOE, p 14 l 16-19.
140 Davis EIC, at [24].
141 Davis EIC, at [31].
142 Davis EIC, at [30].

Zealand.[143] There are two other pā sites of note: Hereheretaura and Te-o-a-hei (abbreviated to Hahei) at the southern end of Hahei beach.[144] These are of particular significance to Ngāti Hei as Ngāpuhi with their muskets are known to have captured the higher pā site and massacred Ngāti Hei sheltering in the lower pā.

Ūrupa/wāhi tapu

[190] We understand from Mr Davis that the largest and best known of the wāhi tapu is the ūrupa Hukehuke situated opposite the ancient pā of Hei Turepe at the harbour mouth. Today it is part of the Whitianga township.[145] Tawakerahi and Toumuia are two other significant wāhi tapu on the Wharekaho beach as they are considered the likely burial sites of Ngāti Hei killed by Ngāti Tamatera about 1800.[146] Other wāhi tapu/ūrupa include Puhiwai and Raupuha ūrupa. There are several burial grounds, battle sites, wāhi tapu, and pā sites along most of the coastline in their rohe from Whangapoua to Opoutere.[147]

The natural and cultural resources of Ngāti Hei

[191] Mr Davis explains that lands that have passed into private ownership remain significant to Ngāti Hei as connection to their ancestors who lived there and used these lands and the sea.[148] Historically, Ngāti Hei enjoyed abundant resources within Te Whanganui o Hei. These included kai moana, coastal fishing, transportation, rongoa (traditional Māori medicine), bird snaring, firewood, stones and aquatic plants. Whauwhau was an abundant pataka kai (food cupboard) renowned for its shellfish, mussel, kina, paua. Fishing was prolific.[149]

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143 Davis EIC, at [32] and Fig 6.1.
144 Davis EIC, at [35]-[36].
145 Davis EIC, at [37], Wai 705 Claim, p 82.
146 Davis EIC, at [38].
147 Davis rebuttal, at [18].
148 Davis EIC, at [39].
149 Davis EIC, at [45]-[46].

However, modern day pressures on those resources are leading Ngāti Hei to consider the imposition of rāhui, mataitai or taiapure within their rohe.[150]

[192] Mr Davis comments:[151]

> Resources of our rohe can also sustain us in an intangible way; they can connect us with our past. The Maori worldview encompasses a different time scale to that of a traditional western one. The practices and stories our elders, passed on to our mokopuna, are as relevant today as they have been before.

[193] Mr Davis acknowledges that not all visitors will understand that Ngāti Hei have a deep connection with the area and are part of their environment. Their hope is there will be understanding that their rohe is not only a place where they live and play. It is also a place where they want to continue to gather kaimoana and work to provide for their mokopuna and pass on skills and knowledge. Their hope is that others using the area will acknowledge that Ngāti Hei seek to sustainably use the resources available to them within their rohe in an appropriate way.[152]

Ngāti Hei values

Kaitiakitanga

[194] Mr Davis comments that, as kaitiaki, Ngāti Hei have the duty or obligation to manage the resources in their rohe in a sustainable way.[153] Protecting the resources that sustain kaitiakitanga is, in his opinion part of that duty.[154] In addition to protection and preservation, he says kaitiakitanga extends to using

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150 Davis EIC, at [46].
151 Davis EIC, at [77].
152 Davis EIC, at [116].
153 Davis EIC, at [117].
154 Davis EIC, at [66].

resources for social and economic purposes.[155] He explains:[156]

> Kaitiakitanga is part of our whakapapa, it is passed down through the generations and it recognises the relationships between people and the natural world. Kaitiakitanga includes a collective guardianship role undertaken in accordance with tikanga Māori, and includes spiritual, cultural, social and economic dimensions. We are responsible for the careful stewardship of resources and of our people. We are connected to the natural world in every way.

[195] As to the Proposal itself, Mr Davis opines that:[157]

> In developing and operating the farm, we would also be exercising kaitiakitanga. Further, in monitoring the farm, maintaining the farm, and harvesting its produce, we will also be exercising kaitiakitanga.

Manaakitanga

[196] Manaakitanga encompasses the care and hospitality of visitors (manaaki manuhiri), an integral part of Māori culture. Reciprocal hospitality and respect from one individual or group to another – with values like mana and utu (reciprocate) – are reflected in culture, language, and continuous efforts to be generous hosts.[158] Mr Davis observes that Ngāti Hei's mana depends on their ability to provide the best quality kaimoana to their guests at their marae and when attending hui elsewhere.[159]

Taha Wairua (Spirituality)

[197] Mr Davis explains that Ngāti Hei recognise the land and the sea as their source of spirituality and mauri. Their history and whakapapa are intimately tied to those spiritual stories and beliefs that have been passed down from previous

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155 Davis EIC, at [111].
156 Davis EIC, at [106].
157 Davis EIC, at [79].
158 App JJ3, p 0053, Hearing Bundle.
159 Davis EIC, at [71].

generations.[160]

Mātauranga Māori

[198] Mr Davis describes mātauranga Māori as the concept of Māori understanding and worldview.[161] He explains that Ngāti Hei hope to learn from Mr Bull and his whanau, in terms of their experience in owning and operating marine farms, and equally contribute their traditional views such as on harvesting kaimoana and on weather patterns.[162]

[199] Mr Davis explains that Ngāti Hei seek to address socio-economic deprivation and bring his people back together in a way that would strengthen their future and enable them to pass their mātauranga on to their mokopuna.[163]

Navigation and maritime recreation and access

[200] The matters of navigational safety and effects on recreational usage are somewhat related. Several lay witnesses (e.g. Amy Hyde, Avon Hansford, Charles Hackett, Simon Rawlinson and Mathew Collicott) have concerns about one or other or both matters. Mr Hansford has experience in operating a sailing vessel for tourists. Messrs Rawlinson and Collicott run yachting regattas in the Bay. Others enjoy recreation such as kayaking, which is an activity enjoyed outside well-transited harbour routes.

[201] As a rebuttal witness for WRC, Whitianga Harbourmaster, Mr Peter Head, considers that the Proposal would not present a navigational hazard. It would be sited beyond well used transit routes and is designed for and must comply with navigational safety specifications. It would not be an obstacle during storms (in that "there is sufficient distance to the north of the spat farm to travel along the

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160 Davis EIC, at [80].
161 Davis EIC, at [99].
162 Davis EIC, at [102].
163 Davis EIC, at [20].

coastline").[164] Furthermore, its location would be duly notified (via ATONs) and "any 'reasonable' skipper will know its location and/or will adjust any transit to avoid the area because of adverse conditions".[165] He comments that organisers of yacht racing regattas would be able to set courses to avoid the Site, according to Maritime New Zealand guidelines.[166]

[202] Mr Robert Greenaway is an expert in recreation and reserve management planning assessments. He considers that the Proposal would "alter recreation or tourism patterns in Mercury Bay to only a minor degree". He acknowledges the Bay as a "very busy boating setting" and characterises it as having "very limited capacity for any additional developments of this type". However, he considers that the Site is outside "particularly favoured" fishing locations. Speaking from his yachting experience in Whitianga, he acknowledges the potential for some frustration to be experienced by yachties having to shorten some tacking manoeuvres.[167]

[203] However, he concedes that there are several types of recreational uses that may prefer not to be in busy areas of the Bay. These include "kayaking, snorkelling, walking along the beach, picnicking on the beach, holidaying in the area".[168] He also acknowledges that recreational amenity values are not simply measurable by the numbers recreating but also by the quality of the experience.[169] He told us that such information was not available to him from the material he drew from.[170]

[204] He explains that the foundation for his opinions was his own experience and a "literature review, review of online sources, review of submissions to the

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164 Head rebuttal, at [40]-[50].
165 Head rebuttal, at [38], [51]-[54].
166 Head rebuttal, at [47]-[49].
167 Greenaway EIC, at [16].
168 NOE, p 618, l 5-8.
169 NOE, pp 621, 622.
170 NOE, p 620, l 17-33.

Council hearing, the evidence of other experts",[171] and data from DoC as to concessions and from other sources on boating movements (STRAVA and AIS).[172] His "online sources" include pamphlets from tourist operators (including "Windborne Charters", the owner/operator of which gave evidence opposing the Proposal). He did not interview any of those operators and accepts that, had he done so, he may have got "more colour" on their activities.[173] He acknowledges that some of the online pamphlets would have predated the COVID-19 pandemic and may not be up to date.[174]

Coastal processes and related effects including on surf breaks

[205] Matters as to coastal processes and related effects on surf breaks were signalled as being in issue.[175] However, Mr Wilson did not call expert evidence about them and nor did these matters feature significantly in counsel's submissions. The only expert, Dr Brett Beamsley, called by OAL, presented his evidence by audio-visual link. In summary, his unchallenged opinion is:[176]

> Given the scale of the proposed activity, the distance from the shoreline (at its closest point approximately 1.6 km – see Figure 1) and taking into consideration that the density of spat catching lines and associated line roughness is expected to be several orders of magnitude less than a full mussel farm, … the impact of the proposed spat catching farm is expected to be less than minor with respect to wave conditions in the immediate vicinity of the proposed farm and negligible beyond, and have no impact on the locally significant surf breaks, nor impact the dynamic equilibrium of any beach inshore of the farm.

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171 Greenaway EIC, at [17].

172 Greenaway EIC, at [35]-[42].

173 NOE, p 618, l 9 – p 619, l 32.

174 Greenaway EIC, at [21].

175 Aspects of Dr Beamsley's evidence pertains to matters of biosecurity that remain for determination.

176 Dr Beamsley EIC (summary), at [12], [14].

> Given that the density of spat catching lines and associated line roughness are expected to be several orders of magnitude less than a full, or 'grow out', mussel farm, the impact of the proposed spat farm is expected to be localised, and less than minor with respect to currents/hydrodynamics and hence no impact on the dynamic equilibrium of any beach within the environs, nor the movement of any detritus.

Landscape experts' evidence

The experts' opinions

[206] The landscape experts[177] considered three related issues, namely whether the Proposal is appropriate in terms of its effects on natural character, landscape character and so-termed "visual amenity". Cross-examination, while extensive, did not materially qualify or alter their opinions.

Terminology and constructs for assessments

[207] In their joint witness statement ('JWS – Landscape'),[178] the experts agree that 'visual amenity' is informed by landscape character as interpreted by the viewer.[179] In response to court questioning, Ms Gilbert explained the concept as follows:

> … visual amenity is the subset of amenity values. However, I don't think should be confused that visual amenity only relates to 7(c). That's part and parcel of landscape under 6(b).

[208] For the purposes of their assessments of how the Proposal would affect areas of natural character and landscapes of the coastal environment the experts

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177 John Hudson for OAL, Bridget Gilbert and Rebecca Ryder (subpoenaed) for Mr Wilson and David Mansergh for WRC.

178 JWS – Landscape.

179 JWS – Landscape.

agree that:[180]

(a) 'natural character' includes abiotic, biotic and experiential attributes and values; and
(b) 'landscape character' includes biophysical, sensory and associative attributes.

[209] Those constructs closely parallel the NZILA's related definitions:[181]

(a) 'natural character' means the expression of natural elements, patterns and processes in a landscape;
(b) 'landscape character' means the cumulative expression of natural and cultural features, patterns and processes in a geographical area, including human perceptions and associations.

Methodologies

[210] The experts undertook their assessments in respect of a defined geographic area encompassing the landward area of the Waitaia catchment and a swathe of coastal waters encompassing the Site.[182] This is as mapped by Mr Mansergh (his Attch 19). He describes it as:[183]

> … the landscape and seascape contained within the greater Waitaia Catchment and the inshore waters surrounding the application site (to a distance of 3.5km from the outer edge of the proposed spat farm) and including Motumanga Island (the Twins), Motukorure Island (Centre Island) and Mahungarape Island (Round island).

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180 JWS – Landscape.

181 Mansergh EIC, at [128], referring to New Zealand Institute of Landscape Architects, *Best Practice Note 2010* and 'Figure 2' from *Natural Character Study of the Waikato Region* Boffa Miskell, p 12.

182 Gilbert EIC, at [13].

183 Mansergh EIC, at [142].

[211] It is not a point of dispute that the Proposal, being located in the waters off Whauwhau, is several kilometres from the nearest recognised outstanding natural feature or landscape ('ONF/L'). As such, it does not have any physical effect on any ONF/L. As for the biotic and abiotic attributes of natural character, the experts account for the evidence concerning marine mammals and ecology. However, each primarily focusses on how the Proposal would impact upon the experiential and associative values of natural character and landscapes as deriving from how the visible features of the Proposal would be perceived.

[212] Their assessments identify as contributing to the Proposal's visual appearance:

(a) orange and black plastic buoys and lines, and cardinal markers and, by night, flashing navigational lights;
(b) their dynamic movement in changing seas; and
(c) occasional service vessel activities.

[213] Their assessments essentially follow this sequence:

(a) rating the existing natural character and landscape character;
(b) assessing the extent of visual change experienced at representative viewing points; and
(c) rating and evaluating the consequential effects for natural character, landscape character and visual amenity in the assessment area.

How the Proposal would affect visual amenities

[214] The experts derive the following overall ratings:[184]

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184 'NA': not assessed, 'L': low, 'L-M': low-moderate, 'M': moderate, 'M-H': moderate-high, 'H': high, 'VH': very high.

Daytime audiences

	Hudson	**Mansergh**	**Gilbert**	**Ryder**
Water based (<500m from Site)	NA	M to MH	H to VH	H
Water based (> 500m, < 1 km from Site)	M	L-M to M	M-H to H	M-H
Land based at sea level (< 2 km from Site)	L-M	L-M	M	M-H
Land based elevated (up to approx 2.5 km from Site)	M & L-M	M	H	H

Night-time audiences

	Hudson	**Mansergh**	**Gilbert**	**Ryder**
Water based within analysis area	NA	NA	VH	NA
Land based (up to approx. 2.5 km from Site)	NA	NA	VH	M-H

How the Proposal would affect natural character and landscape character

[215] The experts derive the following related ratings of how the Proposal would affect natural character and landscape character:

	Hudson	**Mansergh**	**Gilbert**	**Ryder**
Natural character	L-M	M (CMA)[185] and L (TA)[186]	M to VH	H

185 Coastal marine area.

186 Terrestrial areas.

Landscape character	M	L (including ONFLs)[187]	H	M

Preliminary matters as to the weighing of opinions on natural character and landscape character

[216] The opinions that the landscape experts offer on how the Proposal would affect natural character and landscape character involve a significant component of evaluative judgement. That judgement is as to how people and communities would perceive the Proposal's impact on those matters. A particular sensitivity in this case is that the lay evidence for the appellant and OAL reveals significantly different world views and a related divergence of perceptions and associations concerning both the existing natural and landscape character and the impacts that the Proposal would have on this.

[217] Each of the experts followed the relevant guidelines of their professional body, the New Zealand Institute of Landscape Architects Tuia Pito Ora ('NZILA'). However, the experts acknowledge there is presently a lack of NZILA professional guidance in how to evaluate landscape assessment in terms of te ao Māori and none of the experts profess relevant expertise.[188] The present lack of NZILA guidance in these matters is of some concern bearing in mind that the experts also agree that a principal role of a landscape expert is to help communities to define the landscape and understand their relationships to it.[189]

[218] None of the experts drew from any community survey or other source of empirical information or data about what people and communities may perceive and value about natural character, landscape character or related amenity values. We were not informed of any NZILA guidelines or policies about gathering such

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187 Outstanding Natural Features and Outstanding Natural Landscapes.

188 We understand from Ms Gilbert that NZILA is underway with an initiative to broaden the construct of 'Associative Values' in its best practice guidelines NOE, p 718, l 9-18 – p 719, l 26.

189 NOE, p 717, l 7 – p 718, l 7.

foundation evidence for evaluative opinions. On the other hand, NZILA's seven-point evaluative scale assumes the expert will be in a position to offer a duly informed opinion on how relevant community perception effects should be scored.

[219] As the Higher Courts have noted, RMA policy and planning instruments serve to flesh out and give relevant local context to the directions in pt 2. We understand that to extend to the consideration of natural character and landscape character. As local policy statements and plans are prepared through public participation, they can help inform landscape experts on community preferences. However, as we have noted, relevant instruments in this case are outdated or incomplete in these terms.

[220] In that constrained context, the landscape experts offer opinions on these matters largely on the basis of their professional judgements and experience, according to NZILA's recommended 'seven-point rating scale'.[190]

[221] There are clear risks when experts offer evaluative opinions on a sensitive matter of how a Proposal will impact in community perception terms where those impacts are at the core of the dispute between the parties. Those risks are enhanced in this case given the different world views underpinning the strongly divergent positions of the parties. Furthermore, as we have noted, while the experts have significant experience, their professional opinions draw from relatively limited foundation data or evidence on community preferences. Yet, those opinions concern an ultimate question at the core of a dispute that the court must inevitably adjudge.

[222] For reasons we now traverse, we find we must approach the divergent opinions offered by Mr Hudson and Ms Gilbert on natural character and landscape character with caution.

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190 JWS – Landscape.

Opinions of Mr Hudson and Ms Gilbert on natural character and landscape character

[223] Mr Hudson and Ms Gilbert reach the following conclusions about the Proposal's effects on natural character and landscape character:

	Hudson	**Gilbert**
Natural character effects	L - M	M - VH
Landscape character effects	M	H

[224] As with other experts, Mr Hudson drew from the RMA instruments to inform his opinion on these matters. By contrast to Ms Gilbert, he did not draw (at least explicitly) from the evidence of landowners. A further point of difference between him and both Ms Gilbert and Mr Mansergh is he did not assess visual impacts for any users of the water within 500m of the Site. As to matters concerning associated values and perceptions, he comments:[191]

> Associational values differ depending on the individual's frame of reference. I have acknowledged associational values as part of my landscape assessment and in my EIC, including community values and the recognition of Ngāti Hei's relationship with the area. … I also undertook an assessment of effects against identified areas of ONL, which include associational values.

[225] Ms Gilbert draws significantly from her evaluation of the evidence of the lay witnesses for the appellant in forming her opinion on natural and landscape character and the related effects of the Proposal. She considers that:

(a) there is a "high level of 'shared and recognised values', as evidenced by the appellant's witness statements" and this "demonstrates how highly the site and local area is valued and cherished by the community";[192]

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191 Hudson rebuttal, at [93].

192 Gilbert, at [137](b).

(b) the commitment of most landowners to Project Kiwi and "landscape restoration and management" and other initiatives (including in a "landscape-led" subdivisional development) "speaks to a coastal terrestrial landscape that is transitioning to a landscape management exemplar" and "this spirit of landscape guardianship aligns well with the principles of kaitiakitanga expressed by Mr Davis";[193] and

(c) these "associative attributes identify why the landscape in its current state 'matters' to those that have contributed to that state, including the landowners, Ngāti Hei and others who 'share and recognise' these values, and the distinctive 'sense of place' which results".[194]

[226] Ms Gilbert acknowledges the evidence of Mr Davis. She opines that the Proposal would "nourish Ngāti Hei in a tangible and spiritual sense" and is important to the iwi's kaitiakitanga and sense of place".[195] However, she offers in essence an ultimate opinion that the "overall sense of place associated with this portion of Mercury Bay will be appreciably diminished as a consequence of the spat farm".[196] She concludes, in summary (her emphasis removed):[197]

> My visual amenity and landscape character effects assessments identify more than minor and significant adverse effects for locations that coincide with ONL 46. My more than minor adverse effect rating applies to land based audiences at sea level (within approximately 2.5km of the site) that coincide with the landscape overlay. My significant adverse effects rating applies to elevated land based audiences (within approximately 2.5km of the site) that coincide with the overlay.
>
> I also identify significant adverse effects for all land based audiences (within approximately 2.5km of the site) with respect to night time lighting.

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193 Gilbert, at [137](d).
194 Gilbert, at [137](e).
195 Gilbert EIC, at [240].
196 Gilbert EIC, at [241].
197 Gilbert EIC, at [281]-[286].

> On this basis, I consider that the introduction of a distinctly human intervention of the scale anticipated by the spat farm into the waters of the bay, together with night time lighting will detract from the expressiveness, legibility, coherence and sense of place and identity values associated with ONL 46.
>
> My natural character effects assessment identifies more than minor effects within ONC 64. For similar reasons to those outlined above, I consider the proposed development will detract from the biophysical and perceptual values of ONC 64.
>
> I understand the relevant test that applies to areas of the coastal environment that are outside ONC[198] areas to be the avoidance of significant adverse effects.
>
> My natural character effects assessment identifies significant adverse natural character effects across the seascape, to at least 500m of the proposed spat farm.

[227] Each witness identifies significant flaws in the methodologies of the other:

(a) Ms Gilbert considers Mr Hudson's election not to assess the effects on amenity values of water users within 500m of the Site is flawed. She comments that his consideration of broader scale effects does not bear any physical or visual connection to the Site and, potentially, skews his findings "in favour of a lower adverse effect rating";[199]

(b) Mr Hudson considers that Ms Gilbert conflates her natural character assessment with her visual amenity assessment. That is particularly in the sense that it fails to recognise that different scales need to be applied in each such assessment. Landscape and natural character areas "share the larger scales but not the very small", whereas visual amenity assessment is "viewpoint-specific" and can be at "different scales" down to "small and intimate".

[228] We have no doubt that both experts assiduously sought to adhere to the Code of Conduct. Each sought to offer only their professional opinions as

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198 Referring to areas of 'outstanding natural character' within the meaning of the NZCPS.

199 Gilbert EIC, at [41].

independent experts. Neither consciously coloured their opinions nor sought to be an advocate. Indeed, in response to the court's request through counsel that each reflect on their pre-filed statements before giving evidence, each candidly and responsibly made changes and offered clarifications.[200]

[229] However, we are left to conclude that their opinions on natural character and landscape character effects were both significantly impacted by technical bias. That is because, in a context of limited foundation material, their professional opinions were unduly, albeit unintentionally, influenced by their respective clients' world views and perspectives. In Mr Hudson's case, that was demonstrated by the call he made to set aside close views from the water. Given those views were important in the eyes of some residents, his position could only have been that he should set those perspectives aside because he did not agree that those views are important. Yet, the evidence we heard revealed that they are legitimately held views. In Ms Gilbert's case, technical bias was demonstrated by her strong emphasis on, and reinterpretation of, landowners' perspectives and her view that these should be given greater sway in the final analysis.

[230] Ultimately, these difficulties have not significantly impeded our capacity to make relevant findings. We have found the opinions offered by Mr Mansergh on these matters helpful, particularly as he has approached the matter without the impediment of a client strongly invested in the appeal outcome. Ms Ryder is in a similar position, as a subpoenaed witness. In any case, landscape experts' opinions on peoples' perceptions about natural character and landscape character are just one input into our findings. Other important inputs include the direct evidence of lay witnesses, the albeit limited directions offered by the RMA instruments and, ultimately, our judgment as to what is just and appropriate in

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200 Mr Hudson removed some commentary on Mr Davis' evidence. Ms Gilbert modified her expression of some opinions to avoid any wrong impression of exaggeration. The court noted it did not have similar concerns in regard to Mr Mansergh's written evidence. Similarly, the court did not consider it necessary for Ms Ryder to reflect on her evidence.

the determination of the appeal.

Ms Ryder's opinion on natural character and landscape character

[231] In relative terms, Ms Ryder considers that the Proposal would have a comparatively more adverse effect on natural character and landscape character than does Mr Mansergh. That is, she rates these effects as respectively 'High' and 'Moderate'. Those ratings are consistent with her overall higher impact ratings for visual amenity values.[201] They derive from her sound evaluation of the evidence and are essentially a matter of her professional judgement.

Mr Mansergh's assessments of natural character and landscape character effects

Natural character

[232] The other experts agree with what Mr Mansergh described and mapped as the relevant assessment area of "landscape/seascape" for consideration of natural character and how the Proposal would affect it.

[233] For natural character effects, Mr Mansergh explains that the relevant focus is on how people and communities would perceive natural character. That is in the sense that:[202]

> Effects on natural character arise when changes occur to this preconceived expectation, which are assessed by comparing the changes in the biotic and abiotic environment that we can perceive or experience.

[234] He cautions against conflating or confusing "effects on visual amenity

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201 JWS – Landscape, Ryder EIC.

202 Mansergh EIC, at [137]-[150].

associated with proximity with effects on natural character", explaining:[203]

> … an assessment of visual effects is primarily concerned with changes in visual amenity from specific view locations, which are considered within the context of aesthetic judgement and influenced to a greater extent by the factors such as visual composition of a view and the available viewshed.

[235] In terms of what people perceive, in natural character terms, Mr Mansergh describes a "dichotomy" between perceptions associated with the coastal marine area/foreshore, and those associated with adjacent terrestrial areas:[204]

> … along the continuum of least natural to most natural, I would expect perceptions of naturalness to be higher when the less modified parts of the shoreline, coastal hinterland and landscape backdrop are considered within the context of the inshore waters and island associated with Mercury Bay and the ocean beyond.
>
> Correspondingly, perception of naturalness drops with evidence of modification such as buildings, roads, pastoral development, and plantation forestry.

[236] Mr Mansergh's natural character assessment draws from various source documents, including:

(a) WRC's study entitled *Natural Character of the Waikato Coastal Environment* ('NCWCE');
(b) a study commissioned by TCDC entitled *Natural Character Assessment Thames-Coromandel District* ('NCATCD'); and
(c) the pTCDP.

[237] The NCWCE was prepared in response to NZCPS Pol 13 and identifies the Site as being "partially contained within an area of High Natural Character

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203 Mansergh EIC, at [152].
204 Mansergh EIC, at [157]-[160].

value, and near to two areas of Outstanding Natural Character".[205] The NCATCD was commissioned to inform district plan mapping. It identifies areas of outstanding natural character ('ONC') and high natural character ('HNC') value "at a district wide level". In the relevant vicinity of the Site, these are:[206]

Opito Point – Matapoua Bay	HNC
Motukoranga Island	ONC
Western Bush Margins of Matapaua Bay and Coastline	HNC
Sandy Bay to Eastern Waitaia Bay Coastline	HNC
Whauwhau to Northern Wharekaho Bay	HNC
Round Island (Mahungarape and Centre Island (Motukorure)	ONC

[238] Mr Mansergh takes account of the following natural character areas identified in the pTCDP within the AOI surrounding the Site (on planning maps 13, 14, 14C and 18):

> … Natural Character Area 64 | Sandy Bay to eastern Waitaia Bay coastline (planning maps 13, 14 and 14C). Classification| ***Outstanding***
>
> … Natural Character Area 65 | Whauwhau Bay to northern Wharekaho Bay coastline (planning maps 13, 18 and 18D). Classification| ***High***
>
> … Natural Character Area 66 | Round Island (Mahungarape) and Centre Island (Motukorure)(planning map 18). Classification| ***Outstanding***.

[239] The pTCDP includes an associated Table 7A.5 that identifies the values and characteristics of the natural character areas, classifying each as "High" or "Outstanding". However, Mr Mansergh notes that Table 7A.5 is incomplete in

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205 Mansergh EIC, at [162]-[164].

206 Mansergh EIC, at [175].

that it:[207]

> … does not have regard to cultural and spiritual values for tangata whenua, as required by Policy 15(c)(viii) of the NZCPS or provide any guidance regarding the relationship between the adjacent CMA and terrestrial areas.

[240] He explains that "perceptions of a relatively undeveloped area which is both scenic and remote" are informed by the "larger scale abiotic and biotic factors". These factors pertain to geology and topography, land cover and land use patterns, hydrodynamics and water quality, marine mammals and other marine life and atmospheric conditions and light qualities.[208] He refers to influences of the sea, rocky coastline, bays and headlands, sheer escarpments and sandy beaches, small inshore islands and stacks, patches of mature indigenous native bush in the hinterland of the catchment and along the prominent headlands, production forestry, pastoral development and scattered buildings and access tracks.

[241] As for transient factors, he observes that stimuli such as sounds and smells only "begin to influence" perceptions of natural character to a greater extent "at more intimate distances", particularly at night when visual stimuli are more limited. He identifies other such factors as including variable weather patterns and light and sea conditions, wildlife and the nature of audience experiences from the water.

Effects on natural character

[242] Mr Mansergh assessed how perceptions of natural character would be affected from selected viewpoints. These were chosen to represent likely viewer experiences of the Site from the sea (by boat users/fishers/etc) and from land (including at the shoreline and at different elevations, from 1.6km from the Site

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207 Mansergh EIC, at [181].

208 Mansergh EIC, at [189]-[226], Attch H.

and beyond.

[243] As for existing natural character, Mr Mansergh considers that the Proposal "will not be located within an area of Outstanding Natural Character in terms of section 6(a) of the RMA or Policy 13(1)(a) or 15(a) of the NZCPS", but rather "… within an area of high natural character value in terms of the NZCPS".

[244] He concludes (his emphasis removed):[209]

> … while the analysis area contains pockets of development and land uses that have significantly altered the natural processes and patterns that would have existed previously, overall the natural character value of the coastal environment, including the CMA, within the analysis area is High (*Moderate – High* using Mr Hudson's terminology).
>
> I do not consider that the application site is located within an area of Outstanding Natural Character.
>
> …
>
> In my opinion, the proposed spat farm will change the existing natural character values of the northern part of Mercury Bay by introducing an activity associated with primary production into a natural appearing environment. I consider that while the proposed spat farm will detract from the scenic qualities and sense of remoteness/wildness of the area, it will not do so to the extent that it will change the wider natural character in a significant way.
>
> From an experiential perspective, the introduction of a matrix of floats and lights on the water surface will reduce the existing sense of remoteness/wildness associated with the area.
>
> When experienced against a backdrop of the scattered buildings, exotic plant species and cleared pastoral /grassland areas within the terrestrial environment along the Whauwhau – Matapaua Bay coastline, the darker coloured floats will

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209 Mansergh EIC, at [236]-[249].

integrate to a greater extent with the backdrop. The end row of orange floats and the corner markers will be more obvious.

The floats also have the potential to affect the appearance of the surface of the water by changing the intensity of surface ripple patterns in calm conditions. While this change is not expected to be as obvious as within a mussel farm, which has closer float spacing, the water surface within the spat farm may appear glassier than the surrounding waters.

…

At night, the presence of the navigation lights will introduce a new light source into an otherwise dark part of Mercury Bay. While the lights will not illuminate the spat farm itself, they will indicate and highlight its spatial extent. The flashing cardinal lights will draw attention towards the site.

The presence of mussel barges on occasions will reinforce the presence of the spat farm and may result in a temporary change in the existing sound environment, … .

…

In my opinion, when considered within the context of the analysis area identified in my evidence, overall, the proposed spat farm will have a *Low - Moderate* (*low-moderate to moderate* using Mr Hudson's terminology) effect on existing natural character values.

I consider that existing natural character values, within the CMA will be affected by the spat farm to a *Moderate* (*moderate* using Mr Hudson's terminology) extent, effects on natural character values along the coastal edge and within terrestrial areas within the affected catchment will be *Low* (*low-moderate* using Mr Hudson's terminology).

…

In addition, knowledge of the existence of the spat farm may be enough to create a perception of an adverse effect on natural character, regardless of whether an associated change in the receiving environment is experienced or not.

Landscape character

[245] Mr Mansergh points out that the Site is not within any recognised ONF or ONL. That is on the basis of what is identified in the RPS, the oTCDP and pTCDP and related documents[210] and his own analysis. The closest identified ONF/L is some 4.5km from the Site.

[246] Mr Mansergh assesses the landscape character of the assessment area and related effects, by reference to the "key landscape attributes" that underpin the identification of ONF/Ls in the RPS, oTCDP and pTCDP. On biophysical matters, he notes that his assessment is the same as for his natural character assessment. He identifies the main effects on the adjacent ONF/L and other landscapes as being "perceptual and associative".

[247] As for Ngāti Hei's cultural and associative values, Mr Mansergh comments that these "add to the landscape's values by providing an enhanced understanding of its place within cultural history". Relating to that, he refers to a Waitangi Tribunal report for the WAI 705 Claim. It records:[211]

> Pre-European Maori utilised this environment in a number of ways. Kaimoana from the extensive harbour and associated mud flats, as well as blue water fishing, was a major food source. Maori gathered fern root from the surrounding hills. Owing to a milder climate and rich volcanic soils, they grew root and other crops as much as possible on nearby islands, particularly Ahuahu (Great Mercury Island). Maori witnesses in Native Land C0U11 hearings also refer to gardens on the mainland. They trapped animals and birds in the forest. Seasonal exploitation of resources meant Maori at Mercury Bay moved from foreshore to inland forests to flax swamps to fern covered hills to island gardens at various time during the year. Of the forest trees, Maori particularly valued the totara for their canoes and other purposes. Whitianga Maori reserved them for their own

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210 Notably including the non-statutory study of natural character commissioned by WRC for parts of the region outside the District Plan's jurisdiction and entitled *Natural Character Study of the Waikato Coastal Environment* Boffa Miskell (2016).

211 Mansergh EIC, at [277], referring to *Whitianga A report commissioned by the Waitangi Tribunal for the Wai 705 Claim*, D Ellis, 2001.

> use when negotiating a local milling lease. Local Maori economies based on archaeological sources are given in more detail in Louise Furey's report for the Ngati Hei (Wai 110) claim. There were many settlement sites in the Bay and 14 pa sites have been identified between Kuaotunu and Hahei.

Effects on landscape character

[248] Mr Mansergh concludes:[212]

> … due [to] the distance between the proposed spat farm and the nearest landscape features, the effects on existing landscape character and the effects on the key attributes that contribute to the ONFL's will be very low (low using Mr Hudson's terminology).
>
> … Effects are likely to be associative only, and largely derived from views of the floats within the context of the adjacent landscape.
>
> …
>
> The spat farm is not located within an area identified as being an ONFL in terms of s6(b) of the RMA within either the RPS or TCDC Proposed or Operative District Plans. It will not affect the key attributes that contribute to the ONFL status of the adjacent landscapes or island or put the status of these areas in jeopardy. Effects on these features will be very low (low using Mr Hudson's terminology).

Related effects on visual amenity

[249] Mr Mansergh considers that the Site is within an area with "high visual amenity values in terms of s7(c) of the RMA". He observes that those effects would differ "depending on viewer location, distance from the site and

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212 Mansergh EIC, at [267]-[280], [330]. We have not included Mr Mansergh's final observation that this is below the minor threshold of the RMA. That observation does not reflect the RMA's requirements and is not properly a matter for expert opinion.

elevation". In overall terms, he concludes that the Proposal would have:[213]

> low to moderate (low-moderate to moderate using Mr Hudson's terminology) adverse effects on the existing visual amenity when experienced from terrestrial locations along the coastline between Whauwhau Bay and Double Bay. When experienced from within the CMA the effect on visual amenity will range between negligible and high (moderate-high using Mr Hudson's terminology).

Submissions

Submissions for Mr Wilson

[250] Counsel for Mr Wilson submits that the court does not need to be concerned about conflating its application of ss 6 and 7, RMA. He observes that there is "nothing unusual about a landscape which is rated as outstanding in s6(b) terms, also revealing significant amenity values" (and, indeed the converse of that would also apply). He submits:[214]

> The primary focus as to landscape should be on the stated characteristics and values (as addressed above), which would drive a conclusion as to whether the proposal offends the policy 15 bottom line tests.

[251] As part of his submission for why the court should prefer the opinions of Ms Gilbert and Ms Ryder, Mr Williams characterises the methodologies of Messrs Mansergh and Hudson as out of line with the more disciplined assessment approach endorsed in recent case law. That is in the sense that they take an "averaging" approach of effects across the relevant landscape scale. He submits that their assessments ought to have been undertaken "relative to the identified values and characteristics of the landscape concerned". Furthermore, he says they do not articulate their conclusions and reasoning for their assessments. He acknowledges that natural character and landscape assessments should be

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213 Mansergh EIC, at [330].

214 Closing submissions for Mr Wilson, at [69]-[73].

undertaken at a "community scale" rather than simply being from "the individual perspective".[215] However, he submits that the evidence of Mr Wilson and other lay witnesses for the appellant:

> … reveals values and concerns which are representative of a relevant 'community of interest', and … demonstrate not only "shared and recognised" associative values relevant to the landscape assessment, but do so in a more consistent and coherent way than was available to the Court in the evidence of any other community, including that represented by Mr Davis.

[252] Mr Williams acknowledges that "the Māori world view including that of Ngāti Hei would inform associative values". However, he submits that Mr Davis' evidence, without corroboration, was essentially his personal views rather than evidence of Ngāti Hei's shared and recognised values.[216] Moreover, counsel submits that the matters concerning Māori cultural relationships in ss 6(e), 7(a) and 8 (as to Māori cultural associations, kaitiakitanga and Te Tiriti o Waitangi) should be treated as separate and distinct from those in ss 6(a) and (b).

[253] Counsel acknowledges that the reference to "provide for" in s6(e) is more directive than its associated directive to "recognise". However, he submits that this does not extend to providing for "activities, the effects of which have to be avoided under other NZCPS directives". He characterises the NZCPS as revealing that "deliberate choices have been made by the Minister of Conservation in giving substance to the Part 2 requirements (including that in s 6(e)". He adds:[217]

> That is, as to the coastal environment specifically, the Minister has not employed language within the NZCPS regarding the s 6(e) dimensions at play in this case, in anywhere near as directive a fashion as it has for the landscape, natural character and biodiversity dimensions.

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215 Closing submissions for Mr Wilson, at [83].

216 Closing submissions for Mr Wilson, at [59], [60], [61], [84].

217 Closing submissions for Mr Wilson, at [90]-[93].

[254] Mr Williams submits:

> … as with Part 2 itself, the less directive provisions of the planning framework should not be applied to arrive at an outcome which would subvert a clearly relevant restriction in the NZCPS, or which is contrary to the thrust of the directive provisions of that instrument.

Submissions for OAL

[255] Mr Davies observes that the court's task in regard to landscape matters required a "series of overlapping judgments", encompassing objective findings (e.g. as to visibility), interpolation and interpretation (e.g. as to degrees of visibility) and consideration and weighing of policy and planning instruments. He submits that this integrated task is beyond the role of the experts.

[256] Given that community perspectives are "multi-faceted", Mr Davies submits that Ms Gilbert's evidence is "problematic" in drawing from an unduly narrow range of sources. He submits that her sources were essentially "those who own land in the immediate area, the friends and family of those persons, and those who lodged a submission in opposition on this application".[218]

[257] Furthermore, Mr Davies urges that the court be mindful of the acknowledged weaknesses in the profession's approach to te ao Māori. He submits that, on a proper interpretation, of NZCPS Pols 11, 13 and 15, the mātauranga Māori world view is also relevant. He adds:[219]

> … the scheme of the RMA is not to consider Treaty obligations as distinct issues but to bear them in mind at each stage of the planning process.

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218 Closing submissions for OAL, at [20]-[24], referring to NOE p 746, l 7 and following, and pp 399-400.

219 Closing submissions for OAL, at [34].

Submissions for WRC

[258] We do not need to report on WRC's submissions in detail. However, on amenity values, Ms Mackintosh submits that any analysis "must be reflective of an appropriate section of the community – not just a selective group of private views".[220]

Discussion

Relationship between various principles in ss 6 – 8

[259] The evidence reveals inter-relationships between concepts underpinning these pt 2 provisions:

(a) the constructs of 'natural character', 'landscape character' and 'visual amenity value' (as applied by the landscape experts) each pertain to how people perceive and appreciate their environment;

(b) the constructs of 'amenity values' and 'the quality of the environment' allow for findings to be informed by different world views and related cultural associations and perspectives, including te ao Māori. In particular, both constructs encompass cultural dimensions. The definition of 'amenity values' refers to '… qualities and characteristics of an area that contribute to people's appreciation of its … **cultural** … attributes' (our emphasis). The definition of 'environment' includes 'the social, economic, aesthetic, and **cultural** conditions' which affect the other matters specified in that definition (including people and communities and amenity values) (our emphasis).

[260] Each of the differently expressed directives in ss 6, 7 and 8 must be applied. However, that does not dictate a compartmentalised approach that

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220 Closing submissions for WRC, at [18]-[21].

assigns matters in evidence to certain of those directives to the exclusion of others. It would be artificial and unnecessary to do so. Rather, if matters in evidence pertain to more than one of the pt 2 directions, that is how we consider them.

[261] A similar approach was applied in *Western Bay of Plenty District Council v Bay of Plenty Regional Council*[221] (commonly called *Matakana*). This was a plan appeal where a central issue concerned the appropriate geographic extent of an ONF/L along the seaward edge of Matakana Island. Relevant to that issue was a question as to:[222]

> Whether the relationship of the tangata whenua to the island should be considered as part of the assessment for the purposes of s 6(b) or whether it should be excluded from such consideration because it could be considered under either s 6(e) or s 6(f) or both.

[262] The court found unsound the approach that some witnesses took of treating ss 6(b) and (e) "in isolation" when both were engaged on the evidence.[223] The court rejected submissions that treating the provisions together would be "double counting".[224] We respectfully concur in that interpretation of the intentions of pt 2.

[263] Similarly, we find it would be contrary to the intentions of the NZCPS to treat its relevant policies on natural character, landscapes and mātauranga Māori as compartmentalised. Inasmuch as we are to consider shared and recognised and associative values when applying Pols 13 and 15, we should do so in light of evidence from the range of world views and cultural perspectives before us. Nothing in Pols 13 or 15 or the NZCPS more generally directs otherwise. On

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221 *Western Bay of Plenty District Council v Bay of Plenty Regional Council* [2017] NZEnvC 147 (*Matakana*).

222 *Matakana,* at [138]-[139].

223 *Matakana*, at [130].

224 *Matakana* at [132], citing *Wakatipu Environmental Society Inc v Queenstown Lakes District Council* [2000] NZRMA 59, at [79].

the contrary, Pol 2 relevantly includes the following directions:

> a. recognise that tangata whenua have traditional and continuing cultural relationships with areas of the coastal environment, including places where they have lived and fished for generations;
>
> …
>
> c. with the consent of tangata whenua and as far as practicable in accordance with tikanga Māori, incorporate mātauranga Māori … in the consideration of applications for resource consents …;

[264] We accept Mr Davies' submission that, in this case, mātauranga Māori should "be considered integral for defining natural character". Put another way, the evidence satisfies us that the relevant associative values for both natural character and landscapes includes those matters of cultural heritage, connection and relationship to Te Whanganui o Hei described by OAL witness, Mr Davis. We go further in finding his evidence also pertains to our consideration of landscape character and matters under s7(f), as to the maintenance and enhancement of the quality of the environment.

Relationship of 'visual amenity' to 'amenity values'

[265] We bear in mind that 'visual amenity' is a construct developed and applied by the landscape architects. It is not confined to s7(c) and serves to inform the experts' assessments of effects of the Proposal on natural character and landscape character. By contrast, the RMA defines 'amenity values' more holistically. Furthermore, the evidence of the lay and representative witnesses for Mr Wilson and OAL reveals that people experience their amenity values, and the quality of the environment, holistically but in accordance with their particular perspectives and world views.

Findings on the evidence

Evidence of Warwick Wilson and other lay witnesses for the appellant

[266] Much of the evidence presented by the lay witnesses for the appellant concerns the amenity values and qualities of the environment that they appreciate.

[267] The shared association that Warwick Wilson and his family have Kuaotunu, its beaches, native bushland, "crystal clear streams" and native bird life, dates back more than 50 years. They value the "tranquillity" of Waitaia Bay, a "special place" that "invariably puts people's goals into perspective in the complicated lives so many of this generation are leading right now". Those perspectives and associations draw from a long history of shared family experiences. Mr Wilson, like several other landowners, is an active conservation steward of the area. He sees commercial tourism and forestry as in keeping with his family's amenity values, but regards the Proposal as quite at odds with, and degrading of, those values.

[268] Several lay witnesses spoke about their shared values and associations and why they seek that these be protected from what they regard as the intrusion of any spat farm. By way of illustration, Ms Hackett's associations with Whauwhau and Waitaia Bay go back to her childhood. They are of times on holiday on "beaches, sea and bushland with whānau and friends". They include shared times "swimming, boogie boarding, snorkelling, boating, collecting mussels and pāua and fishing for eels". She also spoke about sightings of and encounters with dolphins, Orca and other whales and seals. As with Mr Wilson, Ms Hackett is active in voluntary conservation initiatives, including Project Kiwi.

[269] A number of lay witnesses have associations with the wider Mercury Bay area. These include Helen Vivian, who lives at Wharekaho Beach, and Chris Severne and Ms Hyde who live at Opito Bay. They are also active in stewardship and feel strong enduring connections to Kuaotunu more generally.

[270] We accept the evidence of the lay witnesses on these matters. That evidence informs our findings on whether the Proposal will maintain or enhance amenity values and the quality of the environment (ss 7(c), (f), RMA). That is in the sense that it is evidence of the:[225]

> … natural or physical qualities and characteristics of an area that contribute to people's appreciation of its pleasantness, aesthetic coherence, and cultural and recreational attributes.

[271] Respectfully, we do not give significant weight to Ms Gilbert's opinions on this evidence of landowner values. In particular, we refer to her observations that the evidence demonstrates "shared and recognised values" as to what is "valued and cherished by the community", "associative values" and the "sense of place". We also refer to her observations concerning commitments by some landowners to Project Kiwi and other conservation initiatives and her interpolations that this is akin to the exercise of guardianship aligned to kaitiakitanga. Those observations go beyond Ms Gilbert's true expertise and essentially intrude upon the court's role in weighing these and other competing considerations. Furthermore, they effectively elevate separate and distinct individual and family experiences to a level of a wider, yet undefined, "community" experience.

Evidence of Mr Davis on Ngāti Hei's shared and recognised values and associations and related values

[272] We accept Mr Davis' evidence on these matters as discussed at [46].

Expert evidence as to navigational safety and recreational opportunities

[273] We accept Mr Head's evidence in its entirety and prefer it to the contrary views on navigational safety and usage of the Bay offered by lay witnesses. We

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225 Section 2(1) RMA definition of 'amenity values'. 'Amenity values' are part of the definition of 'environment' in s2(1), RMA.

find a number of Mr Greenaway's opinions on recreational opportunities are not soundly supported by up-to-date foundation information. We prefer the qualitative evidence of usage offered by the witnesses for Mr Wilson.

Expert evidence as to coastal processes and surf breaks

[274] We accept Dr Beamsley's evidence on these matters.

Expert evidence on natural character and landscape character and related values

[275] We prefer and accept the evidence of Mr Mansergh on matters concerning natural character and landscape character and related values and effects. We have already traversed our reasons for giving less weight to the somewhat contrasting opinions of Mr Hudson and Ms Gilbert.

[276] Furthermore, we find:

(a) Mr Hudson's election to not assess visual amenity effects within 500m of the Site contributed to his under-rating of the visual amenity impacts of the Proposal. Whilst this part of the Bay is not frequently used, that does not deny the relevance of the reasonably high visual impact that the Proposal would have for those who do use it. To some extent, that would appear to contribute to his finding of comparatively more benign effects on natural character and landscape character than Mr Mansergh has found.

(b) Ms Gilbert's choice of relatively confined areas (e.g. Whauwhau, Waitaia Bay) in her assessment appear to have contributed to her finding materially more adverse effects on natural character and landscape character than Mr Mansergh did.

[277] By contrast, Mr Mansergh did not overlook close views from the water. Moreover, he assessed effects on ONF/Ls and areas of natural character at an appropriate geographic scale to encompass all relevant natural character areas,

feature and landscape. In addition, he duly accounted for the directions and intentions of the relevant RMA policy and planning instruments to derive properly balanced overall opinions. Furthermore, he brought a more broadly informed perspective of community perceptions and associations.

[278] His opinions essentially coincided with the court's own impressions of the related evidence, as also informed by our site visits.

[279] Ms Ryder's opinion that adverse effects are comparatively more adverse than Mr Mansergh has rated them is essentially a matter of professional judgement. For the reasons we have discussed, we prefer Mr Mansergh's opinion.

Related findings

Benefits in regard to Ngāti Hei's relationship to their rohe

[280] The Proposal, if consented, would:

(a) recognise and provide for Ngāti Hei's relationship to Te Whanganui o Hei as its ancestral lands and waters (s6(e), RMA);
(b) assist Ngāti Hei's exercise of kaitiakitanga according to tikanga (s7(a));
(c) related to those matters, uphold the Treaty principle of active protection (s8).

Effects on amenity values and the quality of the environment

[281] The Proposal would detract from the views of some landowners to some extent. In particular, that is the case for those who presently enjoy relatively uninterrupted views of the coastal waters of Whauwhau and beyond. Those landowners would experience the spat farm's presence in those waters, and associated commercial operations, as intrusive. At least initially, some would find the flashing of night-time navigational safety lights a reminder of this adverse

change.

[282] To that extent, the Proposal would not maintain the amenity values of those people so impacted. For them, it would not maintain the quality of the environment.

[283] The Proposal would have no significant effect on either coastal processes or recreational surf breaks.

[284] The Proposal would detract to a small degree from the maritime recreational experiences of some people. We refer, for example, to those who prefer to kayak or use other recreational craft in the quieter edge of Mercury Bay where the Proposal would be sited. To that extent, also, the Proposal would not maintain amenity values. On the other hand, some recreational fishers may perceive some advantage in being able to fish alongside the spat farm's buoys.

[285] The Proposal would enhance the quality of the environment as experienced by Ngāti Hei. That is in a context of a long history of loss and degradation within their rohe. Insofar as the Proposal would assist their exercise of kaitiakitanga and help restore their traditional and continuing cultural relationships with Te Whanganui o Hei, it would enhance the quality of the environment.

[286] Turning to the wider community scale, those who live or holiday at Mercury Bay enjoy high visual, recreational and other amenity values. Given that there are no other marine farms in the Bay, some may well interpret the presence of the spat farm negatively, at least initially. However, as a discretionary activity, the Proposal would not offend against any policy in any relevant RMA instrument on amenity values. Whilst it would potentially encompass a 30ha area, that area is only a comparatively small part of the Bay. We find it is not of a nature and scale as would materially detract from amenity values or the quality of the environment, considered at this broader community scale.

Effects on natural character and related RMA policy directions

[287] The Proposal would not offend s6(a) RMA, nor conflict with any policy or direction in any related RMA instrument.

[288] Our related findings are that:

(a) the Proposal is located within an area of High natural character in terms of the NZCPS and would have a Moderate effect on that character within the coastal marine area and a Low effect in adjacent terrestrial areas (including Natural Character Areas 64, 65 and 66 in the pTCDP and their specified values and characteristics) (applying Mr Mansergh's rating scales);
(b) those effects are primarily experiential and sensory due to the Proposal's visibility and how it would change the visual appearance of the sea in its locality;
(c) the Proposal would not materially affect the abiotic and biotic factors that contribute to natural character (subject to our reservation of biosecurity matters).

[289] In those findings, we take into account the fact that the pTCDP's Table 7A.5 remains incomplete. However, we have accounted for the evidence of Mr Davis. Te ao Māori ratings of existing natural character and related impacts would be appropriately adjusted down but not so as to affect our overall findings concerning s6(a) and related RMA instruments.

Effects on landscape character and related values

[290] The Proposal is not within any ONF/L. Nor would it affect any of the key attributes or values that contribute to the recognition of any ONF/L in any RMA instrument. As such, the Proposal would not offend s6(b), RMA.

[291] Considering landscape character matters more generally, the Proposal's

effects would be confined to associative values arising from the visibility of the Proposal from public and some private viewpoints. In particular, that is the visibility of cardinal markers and floats and their geometric patterning on the water and, at night, flashing navigational lights.

[292] We find on the evidence that those visual changes would not materially detract from any associative values in relation to landscape character.

[293] In regard to the listed associative values for Landscape Unit 46 of the pTCDP, some may perceive the visible change as affecting sense of place to a minor extent. That is in the sense that this part of the sea, albeit beyond any ONF/L, would be somewhat more trammelled by human activity and less available for recreational activity. However, in terms of the matters in pt 2 and related policy directions in the RMA instruments, we are satisfied that those effects would not be so significant as to go to consentability nor even to warrant any change to the design or scale or nature of the Proposal.

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Overall findings as to effects and RMA statutory instruments[226]

Conclusion

[294] On the matters addressed by this decision, our overall findings concerning the RMA instruments (leaving aside biosecurity matters and subject to being satisfied of the final form of relevant consent conditions) are as follows.

Marine mammals and habitats

[295] Subject to the need to make the noted changes to consent conditions:

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226 Refer Part C of the Annexure for a summary of objectives, policies and other provisions of relevant RMA instruments.

(a) the Proposal is properly consistent with WRCP Obj 3.2 and Pol 3.4.3 and WRPS Objs 3.1(c), 3.7, 3.13(a) and 3.19 and Pols 6.2 and 7.1 and 11.1-11.4;
(b) the Proposal is not in conflict with NZCPS Obj 1 or Pol 11; and
(c) granting consent on appropriate adaptive management and review conditions would not conflict with NZCPS Pol 3.

Environmental connections, values and associations

[296] The Proposal:

(a) is not in conflict with WRCP Obj 3.1 or Pols 3.1.1 or 3.1.4. It accords with Pol 3.1.4A;
(b) is not in conflict with WRPS Obj 3.7(a), 3.12(b), 3.13(a)(i) and 3.22 and Pols 7.1 and 12.2;
(c) would assist to achieve WRPS Obj 3.9 and it is not in conflict with NZCPS Objs 2 and 6 and Pols 13(1)(a), 13(1)(b), 13(2) and 18(a); and
(d) would not conflict with pTCDP Objs 7.3.1 and 7A.3 and related policies.

HGMPA and s5 RMA

[297] The Proposal does not conflict with anything in ss 7 and 8, HGMPA. Subject to being satisfied on biosecurity matters, and on the effectiveness of all conditions, the Proposal would:

(a) assist to enable the cultural and economic wellbeing of Ngāti Hei (s5, RMA);
(b) assist to recognise the historic, traditional, cultural and spiritual relationship of Ngāti Hei to its rohe within the Hauraki Gulf (s3(d), HGMPA); and
(c) thereby assist to promote the purposes of the RMA and HGMPA.

Directions

[298] Leave is granted to OAL to amend its Proposal on matters concerning:

(a) biosecurity management; and
(b) consent conditions on that matter and on adaptive management and condition review in response to our findings on the precautionary approach.

[299] That is subject to directions that, within 15 working days of the date of this decision, OAL must confer with Mr Wilson and WRC and file a memorandum of counsel proposing timetable directions as to the following:

(a) the filing of a further memorandum setting out the amendments it proposes; and
(b) the sequential filing of evidence on biosecurity management and any further expert conferencing;
(c) an estimated duration for a resumed hearing on these matters;

[300] Leave is reserved to seek further or amended directions, provided any application follows due consultation with other parties.

[301] Costs are reserved.

For the court:

J J M Hassan
Environment Judge

Index to Annexure

Parts A – D and F draw from the evidence and Agreed Bundle documents.

Part A
Further explanation of 'spat' and how they are caught

What is meant by 'spat'?

[1] Dr Jeffs relevantly explained:[1]

(a) most mussel species are extended over "hundreds or thousands of kilometres of coastline" (including some 15,000km of New Zealand's coastline), and this requires "the ability for the young to disperse over considerable distances to replace mortalities within the range of the population, exchange genes, and … colonise suitable new locations";

(b) mussels form high density aggregations ("beds or reefs"), assisting in breeding (in essence, by sperm fertilising spawned eggs in the water column above a bed or reef), so as to form embryos;

(c) mussel embryos develop to larvae and then drift in coastal currents, typically for 5-6 weeks and over hundreds of kilometres of coastal or offshore waters, feeding on tiny food particles in the water column. The larva reaches a stage of maturity known as "settling" in essence, whereby it has a preference for settlement, typically on suitable filamentous material. A natural such example is seaweed. A spat catching device replicates this by means of "filamentous ropes … hung in the water column … to catch settling mussel larvae, which are then moved onto mussel farms for on-growing".

[2] The application AEE[2] explains that mussel larvae typically spawn during Autumn (generally April, May) and Spring (generally August – October), often triggered by changes in weather. The spat farm 'culture ropes' that serve to catch

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1 Jeffs EIC, at [15]-[20].

2 Ohinau Marine Farms – Whauwhau, Whitianga Resource Consent Application – Assessment of Effects on the Environment, October 2017.

the spat are "looped pile", and particularly "hairy", so as to be a suitable substrate for the larvae to attach to.

[3] The times and densities of attachment can be highly variable. Samples are taken for examination under a microscope. When this reveals that a rope has not caught spat, it is removed and re-set.

[4] Dr Jeffs explained that, from a scientific perspective, spat have been 'caught' (i.e. on a culture rope) when they are about 6mm in size, albeit that they can still migrate by crawling. He added that for the purposes of spat collection the ability to remove them after 6mm helps because, if they are moved before then they tend to let go and, hence, be lost due to "shock from the handling".[3] He explained that, from a biological point of view, once spat are larger than 6-7mm, the risk of "mucus drifting behaviour is dramatically reduced".[4] He further explained:[5]

> … when the larvae settles it first puts out a mucus thread, its a temporary attachment, … while it undergoes its transition into a spat so turning into a baby mussel basically. It can withdraw that thread at any time. Once it has decided it's going to stay there, it will put out a more permanent thread, but even though it has a permanent thread it can detach that at any time, it just simply snips it off and lets go and for that reason you can imagine if you were a drifting animal in the open sea and you arrive at a spot and you think this might be a good place to set up shop, you transition into a juvenile form and after two days you discover that that site was not so good, you know, you've got some – there's not enough food there or there's, you know, the environmental conditions are changing you can detach that cord, put out a mucus balloon and drift off so it is not caught in the sense that you – in the sense that it is there permanently, it is a temporary attachment and as I explained earlier the mussels will not put out a – or retain that ability to drift off up until around six to seven millimetres in size and at that size they lose the specific glands which produce that mucus and they also become too

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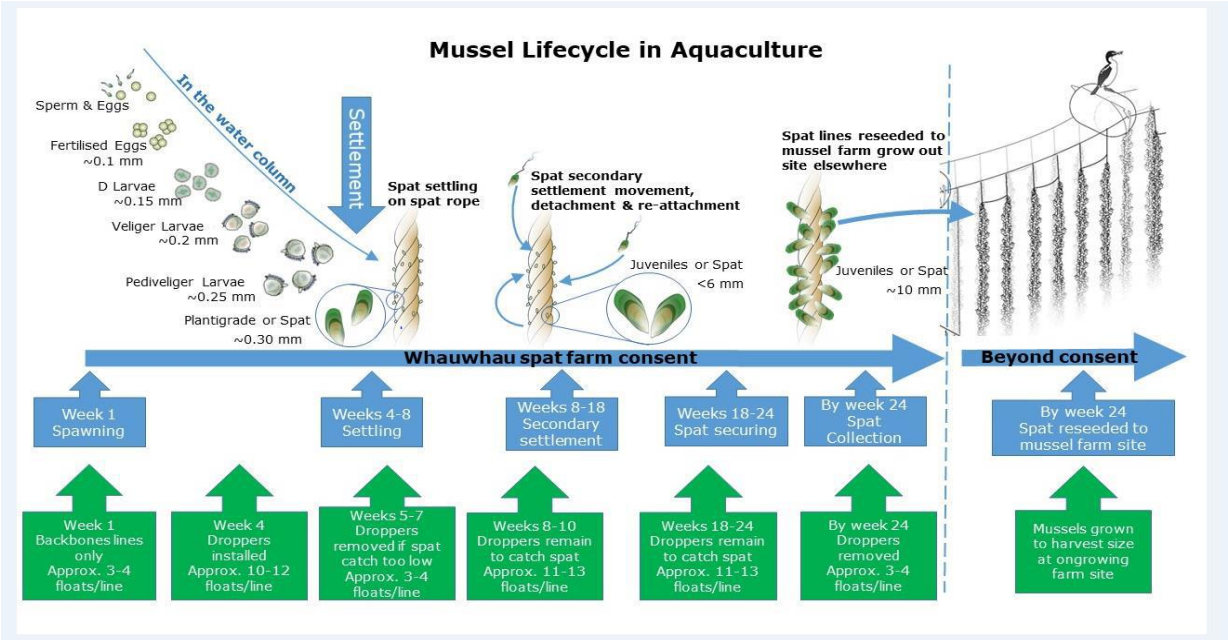
3 NOE, p 261, l 20-31.

4 NOE, p 263, l 11-13.

5 NOE, p 260, l 24 – p 261, l 14.

heavy for the mucus to actually have the buoyancy to float them in the water column, so at that point they are attached and you could say are caught. Having said that they still have the ability to detach and crawl and they have the ability to detach and drop to the sea floor so they are – people think of mussels, they see them on the rock shore and think they are a fixed species, but they're not, they're actually quite mobile, they are a snail, they're in the snail family and they have the ability to crawl actually quite quickly and a spat, they are very agile crawlers.

[5] In his rebuttal, Dr Jeffs provides the following illustration (prepared in conjunction with Mr Bull):[6]



6 Jeffs rebuttal, at [26], App AGJ1.

Part B

Further description of threatened or at-risk marine mammals[7]

Orca[8]

[1] This species is listed as 'Nationally Critical' by the New Zealand Threat Classification Scheme on account of its very small population size (*Baker et al., 2019*).[9]

[2] Orca are known to utilise habitat at Mercury Bay on a relatively frequent basis. That habitat is likely to support feeding behaviour and, possibly, some breeding behaviour.[10]

[3] The New Zealand population of orca is believed to comprise at least three sub-populations based on geographic distribution – North Island only, South Island only and North/South Island. The overall population is small – in the range of 65-167 individuals (*Visser, 2006*). They range widely – some whales being estimated to travel on average 100-150 km per day. Their presence on the east coast of the North Island peaks between August – October and is relatively high during November (with a secondary peak in May/June) (*Visser, 2000, 2007*).

[4] Benthic foraging for ray is common around the New Zealand coast and appears unique to the New Zealand orca (*Visser, 1999*, *Duignan et al, 2000*). The North Island only and North/South Island groups are understood to be "generalist" opportunistic foragers. They forage extensively inside enclosed harbours and estuarine areas (*Visser, 2000*).

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7 The following background information is from the evidence of Dr Visser and Ms McConnell and references cited therein.

8 McConnell EIC, at [31]-[34].

9 McConnell EIC, at [31].

10 McConnell rebuttal, at [41].

Bottlenose Dolphins[11]

[5] Bottlenose Dolphins utilise habitat in Mercury Bay on a reasonably frequent basis. They are part of the "Northland population of inshore dolphins"[12] and number some 418 – 487 individuals.[13] This group has an extensive home range, extending from Doubtless Bay to Tauranga. They have a varied diet of fish and squid and carry out foraging dives in both shallow and deep habitats (to depths over 500m).

Southern Right Whales[14]

[6] Southern right whales are categorised as being "At Risk – Recovering.[15] That is from its decimation during 19th and early 20th century whaling. During the pre-whaling period, it is understood that there would have been a seasonal abundance along much of the New Zealand coastline, including the Mercury Bay area and the AOI (*Gaskin, 1968*).[16] The pre-exploitation population is estimated to have been some 28,800 – 47,100 whales. The current New Zealand population is estimated to be less than 12% of that (*Jackson et al, 2016*).[17]

[7] Southern Right Whales migrate thousands of kilometres from sheltered coastal wintering grounds around the New Zealand mainland and Subantarctic islands to offshore summer feeding grounds in Antarctic waters (*Carroll et al., 2011*). All sightings of cow and calf pairs around mainland New Zealand have occurred in winter or spring (*Patenaude, 2003*).

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11 McConnell EIC, at [26]-[27].

12 The other population groups inhabiting Marlborough Sounds, Fiordland and Otago/Stewart Island. In addition, Dr Visser points out that a pelagic (oceanic) population are known to use the AOI: Visser EIC, at [20].

13 McConnell EIC, at [26].

14 McConnell EIC, at [39]-[41], App HMM1 Table 1.

15 Visser EIC, at [69] ref *Baker et al., 2019*.

16 Visser EIC, at [107].

17 Visser EIC, at [106].

[8] The species utilises shallow coastal waters as their winter calving and nursery grounds (*Patenaude, 2003*). Coastal waters around mainland New Zealand represent a historic calving ground for this species. Recent evidence suggests a slow recolonization of this breeding range (*Carroll et al., 2014*).

[9] Habitat modelling indicates that bathymetry, namely water less than 20m, is a strong predictor of suitable winter breeding habitat for this species around the New Zealand mainland (*Torres et al., 2013*).

Bryde's Whales[18]

[10] In New Zealand, Bryde's Whales are known from the north-eastern coastal region between East Cape and North Cape (*Gaskin*, *1963*). There are few places worldwide where Bryde's Whales are frequently sighted, with the Hauraki Gulf and Northland region supporting one of the few known resident populations (*Constantine et al., 2012*).

[11] *Tezanos-Pinto et al. (2017)* estimated there to be a resident population of 135 Bryde's Whales in the Hauraki Gulf. Due to the year-round availability of fish and zooplankton, Bryde's Whales can feed year-round in the Gulf, reducing the necessity for migrations (*Wiseman et al., 2011*). *O'Callaghan and Baker (2002)* found that most Bryde's Whales near the Hauraki Gulf occurred around the 40 m depth contour.

[12] Bryde's Whales in temperate waters are semi-migratory and make local seasonal movements (*Gaskin, 1968*) to take advantage of prey aggregations (*Carroll et al., 2019*). The species is known to feed on schooling fish (e.g. anchovies, herring, pilchards and mackerel) (*Omura, 1962*), krill and plankton (*Constantine et al., 2012*).

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18 McConnell EIC, at [43]-[44].

[13] Bryde's Whales are active during daylight hours foraging and travelling below the sea surface (*Constantine et al., 2012*). High activity levels usually occur when they feed on surface plankton (*Izadi et al., 2018*). At night the whales rest near the sea surface (*Constantine et al., 2012*; *Izadi et al. 2018*). The high proportion of time spent at or near the surface makes Bryde's Whales particularly vulnerable to ship strike (*Constantine et al., 2012*).

Humpback Whales

[14] Humpback Whales migrate northwards along coastal New Zealand from May to August (*Gibbs & Childerhouse, 2000*), and southward from September to December (*Dawbin, 1956*). During migrations, they typically use continental shelf waters (*Jefferson et al 2008*) and can approach closely to shore when passing headlands or moving through confined waters (*e.g. Gibbs et al., 2017*).[19]

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19 McConnell EIC, App HMM1, Table 1.

Part C
Summary of objectives and policies of relevant RMA instruments

Marine mammals, habitats and ecosystems

NZCPS

Obj 1

[1] This seeks to safeguard the integrity, form and functioning of the coastal environment and to sustain its ecosystems including maintaining the diversity of New Zealand's indigenous coastal flora and fauna.

Pol 11

[2] Pol 11 essentially pertains to our consideration of the sensitivity of the receiving environment concerning its taxa and habitats, and whether the Proposal represents an unacceptable risk. So as to "protect indigenous biological diversity in the coastal environment", it gives directions to:

(a) avoid adverse effects on, inter alia, indigenous taxa that are either listed as threatened or at risk in the New Zealand Threat Classification System or as threatened by the International Union for Conservation of Nature and Natural Resources (Pol 11(a);
(b) avoid significant adverse effects and avoid, remedy or mitigate other adverse effects of activities on, inter alia:[20]
    (i) habitats in the coastal environment that are important during the vulnerable life stages of indigenous species; and
    (ii) habitats, including areas and routes, important to migratory species.

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[20] Pol 11(b) makes similar directions in regard to areas of predominantly indigenous vegetation and ecological corridors but neither is significant on the evidence.

Pol 3

[3] Pol 3(1) relevantly directs that "a precautionary approach" be adopted "towards proposed activities whose effects on the coastal environment are uncertain, unknown, or little understood, but potentially significantly adverse.[21]

Waikato Regional Policy Statement

[4] Our summary of the key objectives and policies of this instrument ('WRPS') draws significantly from the evidence of Ms O'Rourke.

Obj 3.1(c)

[5] This recognises that natural and physical resources shall be managed in a way to meet the complex interactions between all living things.

Obj 3.7

[6] This seeks that the coastal environment is managed to recognise the dynamic, complex and interdependent nature of natural biological and physical processes.

Obj 3.9

[7] This refers to tangata whenua relationships with the environment, recognising the kaitiaki role of Ngāti Hei as tangata whenua and the role of tikanga (including mātauranga Māori) in resource use and enjoyment.

Obj 3.13(a)

[8] This seeks to provide for the health of marine waters through maintaining

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21 It also directs this approach "to use and management of coastal resources potentially vulnerable to effects from climate change" (cl 2).

the:

> … health and functioning of indigenous biodiversity, ecosystems and habitats.

Obj 3.19

[9] This seeks to maintain the full range of ecosystem types, their extent and the indigenous biodiversity that those ecosystems can support to exist in a healthy and functional state.

Pol 4.2 (together with method 4.2.11)

[10] This seeks a collaborative approach to resource management and requires local authorities to maintain or enhance indigenous biodiversity.

Pol 6.2 (with method 6.2.3)

[11] This addresses development of the built environment to ensure that it occurs in a way which protects indigenous biodiversity and allows for natural ecosystem functioning.

Pol 7.1

[12] This seeks that space be allocated to provide for ecosystem values as well as people's social, economic and cultural aspirations. Related method 7.1.1 is that the regional coastal plan establishes criteria that determine the appropriateness of activities in different locations. These criteria include to avoid adverse effects on indigenous biodiversity values.

Pols 11.1 – 11.4

[13] As Ms O'Rourke notes, Pols 11.1 – 11.4 specifically address indigenous biodiversity. We find it convenient to quote her summary of their relevant effect

(although we have broken this up somewhat for clarity):[22]

> Policy 11.1 seeks to maintain or enhance indigenous biodiversity with particular consideration given to a) achieving no net loss of indigenous biodiversity at a regional scale, [and] b) the continued functioning of ecological processes, [and] h) tangata whenua relationships with indigenous biodiversity including their holistic view of ecosystems and the environment and i) managing the density, range and viability of indigenous fauna.
>
> Method 11.1.2 requires the RCP to consider indigenous biodiversity effects through e) loss or disruption to migratory pathways in water and at h) loss of habitat for indigenous species listed as 'Threatened' or 'At Risk'.
>
> Policy 11.2 and method 11.2.2b) requires activities to avoid the loss or degradation of significant habitats of indigenous fauna in preference to remediation or mitigation.
>
> Policy 11.4b) specifically refers to indigenous biodiversity in the coastal environment and seeks to maintain or enhance areas used by marine mammals.

Waikato Regional Coastal Plan

[14] The Proposal is classified as a discretionary activity under rules of the WRCP. It provides relatively minimal associated direction for the exercise of our discretion. Again, we find this conveniently summarised by Ms O'Rourke (again, we have broken up her explanation for greater clarity).[23]

Objectives

[15] As Ms O'Rourke explains:

> RCP objective 3.2 'significant vegetation and habitat' requires at 3.2.1a) protecting areas of significant habitats of indigenous fauna and avoiding adverse effects from

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22 O'Rourke EIC, at [150], [151].

23 O'Rourke EIC, at [152].

> development, and at 3.2.2) protecting habitats that are important for commercial, recreational, traditional or cultural reasons from the adverse effects of development.

Policies

[16] As Ms O'Rourke explains:

> Policy 3.4.1 seeks that a precautionary approach be taken when considering effects on marine mammals.
>
> Policy 3.4.3 seeks to protect the functioning of the coastal ecosystem.

Natural character, features

NZCPS

Obj 2

[17] This seeks to:

> … preserve the natural character of the coastal environment and protect natural features and landscape values.

[18] That is through recognising the characteristics and qualities that contribute to natural character and by protecting these areas from inappropriate use and development.

Obj 6

[19] This seeks to enable people to use and develop the coastal environment recognising that:

> the protection of the values of the coastal environment does not preclude use and development in appropriate places and forms.

Pol 13(1)(a)

[20] This is:

> to preserve the natural character of the coastal environment and to protect it from inappropriate subdivision, use and development … avoid adverse effects of activities on natural character in areas of the coastal environment with outstanding natural character.

Pols 13(1)(b) and 13(2)

[21] Pol 13(1)(b) seeks:

> to preserve the natural character of the coastal environment and to protect it from inappropriate subdivision, use and development … 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.

[22] Pol 13(2) recognises that natural character can include many elements.

[23] Other relevant NZCPS policies are:

(a) Pol 4 which seeks the integrated management of natural and physical resources in the coastal environment;
(b) Pol 5 which requires consideration of activities on conservation land;
(c) Pol 6(1)(f) which considers where development resulting in a change in character would be acceptable; and
(d) Pol 18(a) which seeks that the location and treatment of public open space is compatible with natural character.

Waikato Regional Policy Statement

Obj 3.7(a)

[24] This seeks to preserve natural character and protect natural features and

landscape values.

Obj 3.9

[25] This refers to tangata whenua relationships with the environment, recognising the kaitiaki role of Ngāti Hei as tangata whenua and the role of tikanga (including mātauranga Māori) in resource use and enjoyment.

Obj 3.12(b)

[26] This objective for the built environment refers to:

> … preserving and protecting natural character…from inappropriate subdivision use and development.

Obj 3.13(a)(i)

[27] This seeks to maintain "the natural character and natural function" with regard to the mauri and health of marine waters.

Obj 3.22

[28] This seeks that "the natural character of the coastal environment, wetlands, and lakes and rivers and their margins are protected from the adverse effects of inappropriate subdivision, use and development".

Pol 7.1 'Interests in the coastal marine area' (with method 7.1.1(k)(vii)

[29] This seeks to avoid adverse effects on "natural character and landscape values" when allocating space within the CMA.

Pol 12.2 'Preserve natural character'

[30] This seeks to ensure that activities are appropriate in relation to the level of

natural character.

Method 12.2.1

[31] Method 12.2.1 requires activities to be appropriate with respect to the level of natural character. It requires that, where artificial elements are proposed to be introduced into an area, regard be had to the location, design and form of the artificial elements/structures and any mitigation measures necessary or proposed (12.2.1(d)(iv)).

Waikato Regional Coastal Plan

Obj 3.1

[32] This seeks to protect natural character from inappropriate use and development.

Pol 3.1.1

[33] This seeks to identify and then protect regionally and locally significant and representative features from the adverse effects of use and development.

Pol 3.1.4 'Inappropriate Use and Development'

[34] This requires an application to consider locating in an alternative environment where natural character is already compromised or modified.

Pol 3.1.4A

[35] This provides for activities to establish in the CMA, subject to specified provisos including that:

> … any adverse effects, particularly on natural character…are avoided as far as practicable.

Operative and proposed Thames Coromandel District Plan

[36] We accept Ms O'Rourke's overall explanation of the operative and proposed district plans ('oTCDP', 'pTCDP'):[24]

> The provisions in the TCDC Plans that address natural character relate to the land-based elements of an area and the assessment of potential activities and their effects on the natural character of the land. These provisions identify the natural character categories as being either 'High Natural Character' (HNC) or 'Outstanding Natural Character' (ONC).

[37] We also accept her following explanation of relevant objectives and policies:[25]

> Objectives and policies in the Proposed District Plan seek to "preserve the natural character, natural features and landscape values of the Coastal Environment" (obj 7.3.1).
>
> Objectives and policies in 7A.3 recognise "that there are different levels of natural character in the Coastal Environment and natural character is preserved and protected from inappropriate subdivision, use and development". Development in an area of HNC or ONC shall consider a) the values and characteristics of the natural character area, and if within an ONC shall avoid adverse effects, and if in a HNC shall avoid the significant adverse effects, on the values and characteristics of the natural character area. The areas of HNC and ONC apply to the terrestrial areas.
>
> Objectives and policies in the TCDC Operative Plan are consistent with those in the Proposed Plan.

Mapping and scheduling of values for ONCs and ONLs in the pTCDP

[38] Whilst we are dealing with a Proposal in the jurisdiction of the WRCP rather

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24 O'Rourke EIC, at [81].

25 O'Rourke EIC, at [82]-[84].

than in Thames Coromandel District, we are to have particular regard to relevant district plan provisions. Notably, that includes the mapping of ONC and ONL areas and related scheduling of their "characteristics and values". Whilst these are only in a proposed plan at this time, in its relatively formative stages, we find it appropriate to accord significant weight to these provisions as representative of the current policy position of Thames-Coromandel District Council ('TCDC') as the relevant planning authority.

[39] Our following discussion draws in particular from the evidence of Mr Mansergh on these matters.

Areas of ONC

[40] The pTCDP, at section 7A.1.1 describes the approach to identifying an area as an ONC. This required demonstration that the area exhibits:

> … a combination of natural elements patterns and processes (as per the RPS criteria) that are exceptional in their extent, intactness, integrity and lack of built structures and modifications.

[41] That compares with the pTCDP's classification of areas having 'High' natural character ('HNC'), by reason that they:

> comprise a predominance of natural elements, patterns and processes (as per the RPS criteria) with signs of 'subordinate' development and human modification to natural elements, patterns and processes.

[42] The pTCDP's planning maps (13, 14 14C and 18) identify areas of natural character in the terrestrial coastal environment that frames the Site. As Mr Mansergh explains, these are:[26]

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26 Mansergh EIC, at [180].

> Natural Character Area 64 | Sandy Bay to eastern Waitaia Bay coastline (planning maps 13, 14 and 14C). Classification| ***Outstanding***
>
> Natural Character Area 65 | Whauwhau Bay to northern Wharekaho Bay coastline (planning maps 13, 18 and 18D) Classification| ***High***
>
> Natural Character Area 66 | Round Island (Mahungarape) and Centre Island (Motukorure)(planning map 18). Classification| ***Outstanding.***

[43] Mr Mansergh also explains:[27]

> Table 7A.5 Table of the proposed TCDC district plan (Appeals Version updated August 2019) identifies the values and characteristics of the district's natural character areas, classifying each as either High or Outstanding. The table does not have regard to cultural and spiritual values for tangata whenua, as required by Policy 15(C)(viii) of the NZCPS or provide any guidance regarding the relationship between the adjacent CMA and terrestrial areas.

Landscape Unit 46: Maungatawhiri and Waitaia Coastal Hills

[44] The schedule for this mapped landscape unit describes its associated characteristics and values as follows.[28]

Physical characteristics – natural science

[45] The following description is given:

> ***Geology, geomorphology, topography***
>
> … Together, Maungatawhiri and Waitaia act as the 'anchors' for a sequence of coastal hills, ridges and escarpments that stretch over 8 kilometres east of Wharekaho Beach and Maungatawhiri – with their sequence of prominent headlands, white sandy beaches and rocky outcrops defining the northern edge of

---

27 Mansergh EIC, at [181].

28 Mansergh EIC, at Attch 20.

outer Mercury Bay.

… The headlands interact directly, and dynamically, with Mercury Bay – framing and enclosing its broad body of sea.

… Underpinned by a mixture of volcanic, andesite and dacite formations, the terrain of both this coastline and its foothill hinterland is, in places, both steeply incised and physically dramatic – especially so in relation to the conical profile of Maungatawhiri, near Wharekaho Beach, and at the coastal edge where sharply defined, headlands 'bookend' open, sandy beaches.

… A number of stream corridors and their tributaries scour both headlands and their foothill margins, the most significant of these comprising the Whauwhau, Woodcock, Waitaia, and Kohuraorao Streams.

Vegetation

… Regenerating, semi-mature, to mature, podocarp forest dominates most of the coastal edge and its hinterland – with species including kauri, puriri, tanekaha, rewarewa, manuka, kanuka, kawakawa, karaka, coprosma and nikau particularly evident.

… Around the coastal edge and up the lower flanks of Maungatawhiri, mature pohutukawa are especially prominent.

… Pasture occupies the mid to lower slopes of Maungatawhiri and is found in smaller pockets behind Whauwhau Beach.

… Wilding pines and several pine plantations are also apparent above, and just beyond, the upper catchment of Waitaia Bay, at the head of the Otama River, as well as on the western slopes of Waitaia (excluded from this unit).

Ecology

… Sea birds are an integral part of the islands' landscape character and values.

… This landscape unit is identified as being a Natural Area of National Significance, except for the pastoral 'pockets' on the side of Maungatawhiri –

which are not identified as being of ecological significance.

Physical characteristics – human

[46] The following description is given:

> … Baches are scattered through the native bush / forest behind Whauwhau Beach, as well as in a cluster within part of Waitaia Bay, but are generally subservient to their more natural, surrounds.
>
> … The eastern end of the unit also abuts the settlement and recent subdivision within Matapaua Bay – just outside the landscape unit.
>
> … A line of pines above Waitaia Bay mark the edge of a forestry block (outside the landscape unit) that lies within the adjoining headwaters catchment of the Otama River.
>
> … Pasture interrupts the sequence of forest and other natural elements on the lower to mid slopes of Maungatawhiri.
>
> … Most of this large landscape unit remains reasonably free of obvious human incursion and development

Sensory/aesthetic characteristics – expressiveness

[47] The following description is given:

> … The often jagged and steep-faced, topographic profile of most headlands and the pyramidal form of Maungatawhiri highlight the coastline's volcanic origins.
>
> … The stream courses and beaches between these features emphasise the more alluvial down-cutting that has occurred over more recent millennia.
>
> … Both the beach areas and headlands reveal the processes of weathering by sea and wind that have also helped to shape the coastline.

> … The rugged landforms at this edge, combined with the surf and open expanse of Mercury Bay, lend this stretch of coastline a powerful, elemental, quality that is reinforced by its eroded promontories and the windswept nature of much of its vegetation.
>
> … The sequence of vegetation above the beaches, headlands and stretches of rocky shoreline, progress from scattered coastal scrub and shrubland into wind-shaped forest, and then into more mature, developed forest canopies – all in close proximity to the edge of Mercury Bay: this highlights the natural successional processes at play along this coast.

Sensory/aesthetic characteristics – legibility

[48] The following description is given:

> … The visual engagement between the unit's coastal landforms, forest and the sea is often dynamic and dramatic.
>
> … This, together with the unit's limited physical access and modification, and direct exposure to the open waters of Mercury Bay, contributes to the feeling of being within a landscape that is remote and (at times) raw and wild.
>
> … The combination of landforms, forest and sea has very significant aesthetic appeal, and the land the landscape unit, as a whole, is distinctive and memorable.

Sensory/aesthetic characteristics – picturesque/composition

[49] The following description is given:

> … The unit reveals an array of natural elements and coastal features that display a high degree of cohesion, structure, and patterning, as well as considerable diversity.
>
> … The natural qualities of this unit's landforms are greatly enhanced by the unified swathe of native forest and coastal shrubland that carpets most of them.
>
> … The prominent headlands and stretches of rocky shoreline between Maungatawhiri and Matapaua Bay combine with the broad tract of coastal forest

behind the coastline to enclose local beachfronts – such as Whauwhau and Waitaia Bay – to add to the appeal, naturalness and drama of the wider coastal edge.

… The coastal landscape conveys a marked feeling of being natural, notwithstanding the presence of the housing near Matapaua Bay, as well as within both Waitaia and Whauwhau Bays, and the pines also near Waitaia Bay.

… Maungatawhiri is a very prominent and distinctive landmark at the northern end of Wharekaho, that is also exposed to motorists on SH25.

Sensory/aesthetic characteristics – coherence

[50] The following description is given:

… The layering of natural elements and features described above, together with the open plane of Mercury Bay creates a coastal edge and hill country landscape that displays a relatively high degree of cohesion and continuity.

… The pine forest touching on the edge of this unit is mostly concealed behind the coastal forest and ridges at the back of Waitaia Bay.

… The housing within, and on the edge of, this unit is subservient to its more natural features and elements.

Sensory/aesthetic characteristics – transient

[51] The following description is given:

… Sea birds and some forest bird life are apparent.

… The surf and tidal motion of within Mercury Bay is a key facet of the coastline from Maungatawhiri to Matapaua Bay that reinforces its dramatic and dynamic nature.

Associative values

[52] Notably, these are divided into two groups, 'Associative values – District

Community' and 'Associative values – tangata whenua' and the second set of values is shown essentially blank other than to signal it would be populated with descriptions of "values" pertaining to:

> Natural features / Elements … (Waahi Tapu / significant, meaningful)
>
> Sites / Places / Trails … (of cultural / heritage value & meaning).

[53] We infer this approach is so as to allow for this part of the schedule to be completed through the plan review process. Nevertheless, we give weight to the indication, at this stage that TCDC recognises a te ao Māori perspective on ONF values.

[54] The subset 'District Community' is as follows.

Sense of place/identity

[55] In terms of the 'District Community' subset of 'Associative Values' the following description is given of 'sense of place/identity':

> … A remote, relatively isolated, part of the Coromandel Peninsula, much of which conveys the feeling of being largely (albeit, not entirely) untrammelled by human activity.
>
> … This coastline comprises a large scale, natural coastal 'remnant' that links with the coastal headlands directly east of Matapaua Bay (LU45) and Motukoranga Island (LU43).
>
> … There are strong associations with both the open seas that batter the local coastline and the dramatic, volcanic headlands the define the northern 'edge' of outer Mercury Bay.

Natural heritage value

[56] In terms of the 'District Community' subset of 'Associative Values', the

following description is given of 'natural heritage value':

> … This unit reveals an important amalgam of coastline (addressing Mercury Bay) and coastal shrubland to forest: a sequence that retains a high degree of unity and cohesion for the most part.
>
> … It is a significant part of the wider 'remnant' / ONL coastline east of Wharekaho Beach.

Historic association and recreational values

[57] For the 'District Community' subset of 'Associative Values':

(a) 'historic association' is left blank; and
(b) 'recreational value' is given the following description:

> … A location used for swimming, tramping, recreational fishing and diving.

Part D

List of references relied on by the marine mammals experts and referred to in our findings

Note: Both experts listed a large number of references in their evidence. The list below is only of those references cited in this decision (not including those in Part B of this Annexure).

Bellazzi, G., Orri, R., and Montanelli, S. (2012). *Entanglement of Southern Right Whales (Eubalaena australis) in Gulf Nuevo, Chubut, Argentina.* Presented to the Scientific Committee. International Whaling Commission sc/64/bc1, 1-12.

Carroll, E.L., Rayment, W.J., Alexander, A.M., Baker, S., C, Patenaude, N.J., Steel, D., et al. 2013. Reestablishment of former wintering grounds by New Zealand southern right whales. Marine Mammal Science 30(1), 206-220.

Clement, D. 2013. *Literature review of ecological effects of aquaculture: effects on marine mammals (Chapter 4)*. A report prepared for the Ministry of Primary Industries. Cawthron Institute, Nelson.

Dawbin, W.H., 1956. *The migrations of humpback whales which pass the New Zealand coast*. Transactions of the Royal Society of New Zealand, 84(1): 147 – 196.

Hoyt, E. (2005). *Marine Protected Areas for whales, dolphins and porpoises. A world handbook for cetacean habitat conservation.* London: Earthscan.

Hoyt, E. (2011). *Marine Protected Areas for whales, dolphins and porpoises. A world handbook for cetacean habitat conservation and planning*. London:
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Laverick, S., Douglas, L., Childerhouse, S., Burns, D. 2017. *Entanglement of cetaceans in pot/trap lines and set nets and a review of potential mitigation methods.* Report prepared for the Department of Conservation by Blue Planet Marine. p 75.

Lindell, S. & Bailey, D. 2015. What Can We Learn from Entanglement Cases of Whales and Turtles in Mussel Farming Gear? Presentation at the Northeast Aquaculture Conference and Exposition in Portland ME, January 16th, 2015.

MacLeod, C.D. (2009). *Global climate change, range changes and potential implications for the conservation of marine cetaceans: a review and synthesis*. Endangered Species Research 7, 125-136.

MacLeod, C.D., Bannon, S.M., Pierce, G., Schweder, C., Laearmonth, J.A., Herman, J.S., et al. (2005). *Climate change and the cetacean community of northwest Scotland.* Biological Conservation 124, 477-483. doi:10.1016/j.biocon.2005.02.004.

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Rayment, W., Dawson, S.M., and Webster, T. (2014*). Breeding status affects finescale habitat selection of southern right whales on their wintering grounds.* Journal of Biogeography, 1-12. doi: 10.1111/jbi.12443.

Simmonds, M.P., and Eliott, W.J. (2009). *Climate change and cetaceans: concerns and recent developments.* Journal of the Marine Biological Association of the United Kingdom (89). doi: 10.1017/S0025315408003196.

Torres, L.G., Compton, T., Fromant, A., 2013. *Habitat models of southern right whales, Hector's dolphin, and killer whales in New Zealand. Prepared for Trans-Tasman Resources Ltd.* NIWA Client Report No: WLG2012-28, 61p.

Visser, I.N., 2007. *Killer whales in New Zealand waters: status and distribution with comments on foraging.* Paper SC/59/SM19 presented to the Scientific Committee of the International Whaling Commission, Anchorage, Alaska, USA.

Visser, I.N., and Hupman, K. (2018). *High incidence of boat strikes on orca (Orcinus orca) in New Zealand waters*, in: Society of Conservation Biology (Oceania). (Wellington, New Zealand).

Visser, I.N., and Hupman, K. (2019). *Entanglements in the 'Nationally Critical' population of coastal New Zealand orca* (*Orcinus orca*). 9-12 December, in *World Marine Mammal Conference.* (Barcelona, Spain).

Young, M.O. 2015. Marine animal entanglements in mussel aquaculture gear: documented cases from mussel farming regions of the world including first-hand accounts from Iceland. 45 ECTS thesis submitted in partial fulfilment of a Master of Resource Management degree in Coastal and Marine Management at the University Centre of the Westfjords, Suðurgata 12, 400 Ísafjörður, Iceland.

Part E
List of witnesses

Witnesses for OAL[29]

Joseph Davis	OAL intentions, Ngāti Hei cultural matters
Peter Bull	OAL intentions, marine farming
Peter Clough	Economist
Helen McConnell	Marine mammal ecologist
Dr Brett Beamsley	Coastal processes expert
Dr Carina Sim-Smith	Marine scientist (biosecurity)
Dr Andrew Jeffs	Marine scientist (mussel spat)
John Hudson	Landscape architect
Robert Greenaway	Recreation and tourism
Robin Britton	Planner

Witnesses for Warwick Wilson

Warwick Wilson	Appellant
Dr Ingrid Visser	Marine mammal ecologist
Dr Kate James	Marine scientist (biosecurity)
Bridget Gilbert	Landscape architect
Rebecca Ryder (under witness summons)	Landscape architect

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29 In addition, by consent, written statements of the evidence to the first instance hearing commissioners, Dr Peter Wilson (marine ecologist) and Dr Rachel McClellan (orthinologist) were provided to the court.

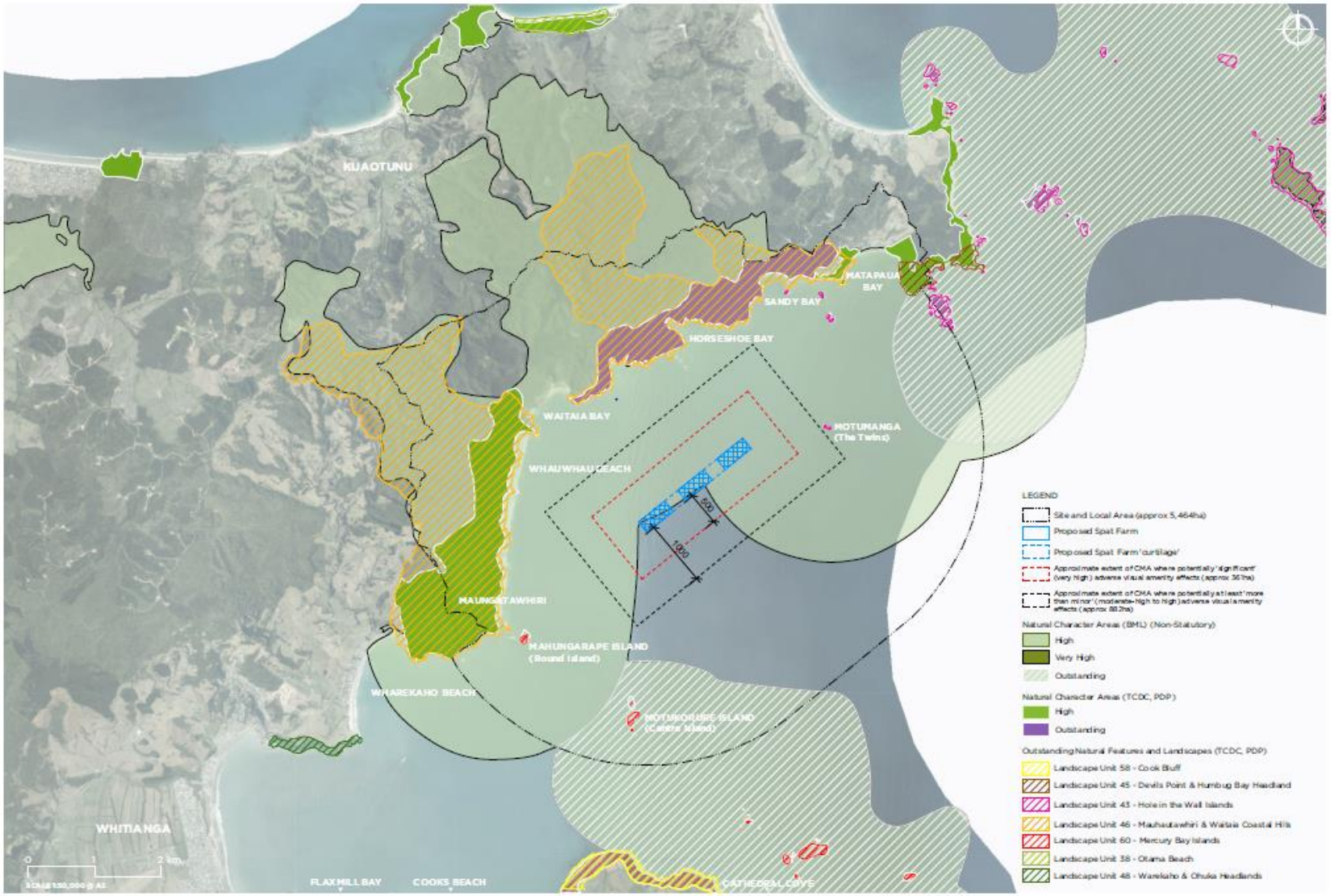
Sarah Oxford	Lay witness
Matt Collicott	Lay witness
Fraser Lampen	Lay witness
Avon Hansford	Lay witness
Georgie Hackett	Lay witness
Charles Hackett	Lay witness
Nick Wilson	Lay witness
Simon Rawlinson	Lay witness
Chris Severne	Lay witness
Amy Hyde	Lay witness
Helen Vivian	Lay witness
James Wilson	Lay witness
Peter Reaburn	Planner

Witnesses for Waikato Regional Council

David Mansergh	Landscape architect
Peter Head	Harbourmaster
Suzanne O'Rourke	Planner

Part F

Map showing areas recognised as having Outstanding or High Natural Character and as Outstanding Natural Features or Landscapes



bridgetgilbert

Appendix I. Extent of CMA with (Potential) Visual Amenity Effects

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