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

Decision No. [2018] NZEnvC 88

IN THE MATTER	of the Resource Management Act 1991
AND	of appeals pursuant to s120 of the Act
BETWEEN	CLEARWATER MUSSELS LIMITED
	(ENV-2016-CHC-40 and 41)
	Appellant
AND	MARLBOROUGH DISTRICT COUNCIL
	Respondent

Court:	Environment Judge J J M Hassan Environment Commissioner K A Edmonds Environment Commissioner J A Hodges
Hearing:	at Christchurch on 4-7 December 2017
Appearances:	Q Davies and A Hills for the appellant M Radich and S Wadworth for the respondent J Ironside for Friends of Nelson Haven and Tasman Bay and Environmental Defence Society C Marchant in person M Marchant for the Marchant Family and others
Date of Decision:	8 June 2018
Date of Issue:	8 June 2018

INTERIM DECISION OF THE ENVIRONMENT COURT

A: The appeal is declined and the decision of the Council is confirmed, so that resource consent is refused for Sites 8165 and 8166.

B: Directions are made as to decommissioning.

C: Costs are reserved.

THE SEAL OF THE ENVIRONMENT COURT OF NEW ZEALAND

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REASONS

Introduction

[1] Under expired consents, Clearwater Mussels Limited ('Clearwater' / 'appellant') operates two marine farms at Pig Bay, Port Gore/Te Anamāhanga in the Outer Marlborough Sounds. Combined, the farms cover approximately 6 hectares. The smaller 2 hectare farm is for Green Shell Mussels (*Perna canalicus*), Blue Shell Mussels (*Mytilus galloprovincialis*) and Dredge Oysters (*Tiostrea chilensis*) ('Site 8165' / 'Northern Site'). The larger 4ha farm is for Green Shell and Blue Shell Mussels ('Site 8166' / 'Southern Site'). Clearwater applied to Marlborough District Council ('Council' / 'MDC') for new consents for further 20 year terms. Following a hearing, the Council declined them.

[2] Clearwater appealed the Council's decision.[1] It seeks that the court grant consent such that it can maintain and continue the marine farms for the 20 year terms sought (the 'Proposals').[2]

[3] Clifford Edgar Marchant, the Marchant Family and others (together 'the Marchants and others'), Friends of Nelson Haven and Tasman Bay Incorporated ('the Friends'), and Environmental Defence Society Incorporated ('EDS') are s274 parties to the appeal. In this decision, the Friends and EDS are referred to as the 's274 societies' and the Marchants, the Friends and EDS collectively as the 's274 parties'. All were submitters who opposed the application and seek that the appeals be declined.

[4] Port Gore/Te Anamāhanga is a large Outer Sounds bay facing Cook Strait/Raukawakawa Moana. The mouth of the bay is bookended by two slender peninsulas – Cape Lambert (to the west) and Cape Jackson (to the east). Pig Bay is an

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1 Statement of evidence of John Lynton Meredyth-Young for the applicant, dated 8 March 2017 at [18]. Clearwater's appeals are as successor to Swampy Mussel Company Limited as consent applicant. Clearwater explained that it took over operation of the farms in 2014 and acquired them from Swampy in 2016. We were informed of the purchase price on the basis that prior directions were made, and remain in place, under s42(2)(b) prohibiting parties, witnesses, counsel and representatives from publishing that information: Transcript at 82, Minutes dated 8 December 2017 and 10 April 2018. It is sufficient for our purposes to record that we have had regard to that evidence and it informs our findings.

2 Notices of appeal dated 14 July 2016 and associated consent applications.

embayment of Cape Lambert. As it is tucked between two points (Papatua and Taratara), it enjoys some shelter from prevailing nor' westers, although that is a relative concept in what is typically a wild and windy part of the Sounds.

[5] Outer Port Gore has a strong current, high food turnover, relative shelter, and deep water. Those attributes mean Pig Bay is a highly productive environment for mussel farming. The subject farms, which have been operating for many years, are amongst the most productive in the Sounds. They produce a combined annual tonnage almost three times the average (80 v 30 T/ha p.a.). We were told the farms generate a combined export revenue of around $1.5M p.a.[3]

[6] The two farms sit some 100m from each other. The northernmost (Site 8165) is the smaller of the two and is some 200m from shore. The larger farm (Site 8166) is about 220-225m from shore. After evidence exchange, Clearwater sought some modifications to the Proposals that were the subject of the Council's appealed decisions ('modifications'):[4]

Site	Prior layout	Modified layout
Northern (8165)	2 x 5 100m longlines each with 50m warps	1 x 5 140m longlines with 50m warps (reducing the total longline length from 1000m to 750m).
Southern (8166)	2 x 10 100m longlines each with 50m warps	1 x 5 250m longlines, each with 75m warps (reducing the total longline length from 2000m to 1250m).

[7] In closing, Clearwater clarified that it continues to seek the same extent of occupation as its application originally sought, despite the more confined extent of the lines. That is in order to exclude other marine farms from being consented for the physically vacated area. It submits that this approach has a further resource management purpose of freeing up space for benthos studies, as part of future proposed King Shag studies (a topic to which we return at [87]).[5]

[8] No party argued there was any jurisdictional impediment to treating the Proposals as so modified. The landscape experts accounted for the modifications in their expert

3 Statement of evidence of John Lynton Meredyth-Young for the applicant, dated 8 March 2017 at [19].
4 Memorandum of counsel for the appellant, dated 20 October 2017.
5 Closing submissions for the applicant, dated 16 February 2018, at [7].

witness conferencing. We are satisfied that the proposed physical modifications are within scope and, therefore, treat the Proposals as so modified.

[9] The applications are for discretionary activities under the Resource Management Act 1991 ('RMA')[6] as specified by r 35.4 of the existing Marlborough Sounds Resource Management Plan ('Sounds Plan' / 'Plan').

[10] There is another mussel farm nearby, not the subject of the appeals, just south of Papatua ('Site 8167'). Its term expires on 13 January 2019 and it is not presently known whether or not the consent holder will seek a replacement consent.[7]

Statutory framework

[11] It was not a matter of dispute that we apply that version of the RMA that pre-dates amendments made by the Resource Legislation Amendment Act 2017 ('Amendment Act') provisions.[8] We agree with Clearwater that nothing particularly turns on that.[9] In particular, while we do not have recourse to the new s104(1)(ab) on offsetting or compensatory measures for adverse effects, the pre-Amendment Act version of s104(1)(c) enables us to give due weight to those matters. The efficacy of Clearwater's proposed pest and predator management measures, however, is another matter. Our findings on it are from [94].

[12] The court has the same powers, duties and discretions in determining the appeals as the Council had in determining the applications (s290 RMA). As the Proposals are discretionary activities, the court must have regard to the relevant matters in s104(1) RMA "subject to Part 2" and may refuse or grant the applications (and impose conditions under s108 on a grant (s104B RMA)).

[13] Under s104(1) and (2A), we must consider:

(a) any actual and potential effects on the environment of allowing the activity (subject to our discretion to disregard an adverse effect of the activity on the environment if the Sounds Plan permits an activity with that effect);

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6 Submissions of counsel for the applicant, dated 14 December 2017, at [14].
7 Statement of evidence of Peter Dewar Johnson for MDC, dated 7 April 2017, at [35].
8 Resource Legislation Amendment Act 2017, Sch 12, pt 2, cl 16.
9 Closing submissions for the applicant, dated 16 February 2018, at [9]-[10].

(b) relevant provisions of the Sounds Plan, the proposed Marlborough Environmental Management Plan ('pEMP'), the Marlborough Regional Policy Statement ('RPS') and the New Zealand Coastal Policy Statement 2010 ('NZCPS');[10]

(c) any other matter the court considers relevant and reasonably necessary; and

(d) the value of the investment of the existing consent holder in the operating marine farms).

[14] If we allow the appeals, we must grant the permits for a 20 year duration unless we determine that a shorter duration is required to ensure that adverse environmental effects are adequately managed (s123A RMA).[11]

Council decision

[15] The Council hearings committee found that the Proposals would have no more than minor effects on recreational amenity and ecology (including for King Shag). They also found there would be no significant navigational concerns and that the Proposals offered positive economic benefits. However, they declined the consents. Primarily, that was because they found there would be undue adverse effects on visual amenity values, the natural character of the coastal environment, and landscape values. Related to those matters, the hearings committee concluded that granting the consents would be incompatible with related objectives and policies of the NZCPS.[12]

[16] We consider the issues on appeal afresh on the evidence before us, although we must have regard to the Council's decision (ss290, 290A, RMA). It will be observed that the outcome we reach is the same, albeit for somewhat different reasons.

Clearwater's proposed consent conditions

[17] Attached to its opening submissions, Clearwater proposed a set of conditions for inclusion in any coastal permits granted by the appeal. Apart from what might be termed

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10 There are no relevant national policy statements or national environmental standards.

11 That is in the context where there are no applicable national environmental standard allowing for a shorter term.

12 MDC decision attached to notice of appeal concerning Site 8165, at [45], [61], [74], [82], [89] and [96]; MDC decision attached to notice of appeal concerning Site 8166, at [44], [60], [73], [81] and [95].

'boiler plate' or standard conditions, these included:

(a) a 20 year duration (c. 1);
(b) a restriction against exclusion of the public from the permit area (c. 4);
(c) a set of conditions pertaining to terrestrial predator and pest control within a defined management area traversing part of Cape Lambert Scenic Reserve and adjacent private land (cc. 14-18);
(d) an obligation to remove structures and other specified equipment and restore the sites upon the expiration, forfeiture or surrender of the coastal permits (c. 19); and
(e) a condition enabling periodic review of the consent conditions for specified purposes and at specified intervals (c. 20).

Clearwater's predator and pest control proposals

[18] Immediately adjacent to Site 8165, an existing fence runs more or less perpendicularly between farm land (owned by the Moleta family) and Cape Lambert Scenic Reserve (administered by the Department of Conservation ('DoC'). It was once intended to be predator proof, but due to the costs of maintenance, is now being maintained as a stock proof fence only. Clearwater explained that it is prepared to spend money to reinstate the fence and manage pests and predators.[13] It proposes the following consent conditions to provide for an associated terrestrial predator and pest control and monitoring programme ('Predator and Pest Programme'):

> 14. Not later than [date three months after the consent commencement date], the consent holder is to supply to the Compliance Manager, Marlborough District Council a Baseline Study [*sic*] shall be undertaken by an independent suitably qualified and experienced ecologist to:
>
> (a) Assess the quality of the ecosystem, including the current state of native bird populations, native invertebrates and vegetation, in the terrestrial area bounded by the fence line at the eastern end of Certificate of Title number MB4D/1342 at approximately -41.005488, 174.15802 and the Cape Lambert Scenic Reserve or, if the Department of Conservation consents, in the terrestrial area to the east of the fence line at the eastern end of Certificate of Title number MB4D/1342 at approximately -41.005488, 174.15802, extending to the northern tip of the Cape Lambert Scenic Reserve ("the Management

13 Opening submissions for Clearwater, dated 1 December 2017, at [11].

Area"); and

(b) Establish the current pest and predator levels in the Management Area. A pest and predator, is at a minimum, wilding pines, deer, pigs, goats, possums, mustelids, cats and wasps and may include rodents.

15. Within three months of the completion of the Baseline Study, an independent suitably qualified and experienced ecologist shall prepare an Adaptive Management Plan reporting on the results of the Baseline Study, specifying the proposed predator and pest control and monitoring for the following year. The purpose of the Adaptive Management Plan is to reduce pest and predator numbers in the Management Area to a level comparable with other similar projects.

16. The consent holder shall undertake the actions identified in the Adaptive Management Plan.

17. At the end of each 12 month period from the date of lodgement of the Adaptive Management Plan, an Annual Assessment shall be certified by a suitably qualified and independent ecologist to assess the matters specified in condition 15. An Annual Report shall be prepared on the results of each Annual Assessment and shall compare the results with the Baseline Study and earlier Annual Assessment(s). The Annual Assessment may alter the Adaptive Management Plan.

18. A copy of the Adaptive Management Plan as it stands from time to time and each Annual Assessment shall be provided to the Compliance Manager, Marlborough District Council within one week of the date of their change or certification (as the case may be), in order that those documents might be made publicly available on the Marlborough District Council's website.

Preliminary issues as to consideration of relevant statutory instruments and Part 2

Relevant instruments

[19] The Council provided us with copies of the statutory instruments. As noted, these are the Sounds Plan, the pEMP, the RPS and the NZCPS.

Consideration of Part 2

[20] As to RMA principles, s104 directs that our consideration of various listed matters is to be 'subject to part 2'. In *Davidson,*[14] a case also concerning marine farming in the

14 *R J Davidson Family Trust v Marlborough District Council* [2017] NZHC 52, at [76] and [77]. For completeness, it is noted that a trustee of the R J Davidson Family Trust, Mr Davidson, gave evidence before us on behalf of the applicant and in his capacity as an expert witness. No issue was taken by

Sounds, the High Court found that the Environment Court did not err in not having specific regard to pt 2. That was in circumstances where the High Court was satisfied that the relevant provisions of the statutory instruments (including the NZCPS) "have already given substance to the principles of Part 2" and there were no issues of invalidity, incompleteness or uncertainty in the relevant statutory instruments. For completeness, we note that this aspect of the decision is before the Court of Appeal whose decision remains pending at the time of writing this decision.

[21] Neither the Council nor the s274 parties made submissions that we are bound by *Davidson*. However, in a joint memorandum by those parties as to the key issues[15] there is some suggestion that such an approach would be appropriate. That is in the fact that the memorandum does not refer to pt 2 but rather frames issues by reference to the plan provisions, including in its last-listed issue: "In an overall sense, what do the provisions of the relevant planning documents mean for the consideration of the proposal and its effects".[16]

[22] Clearwater submits that *Davidson* should be distinguished and we are not relieved of our obligation to consider and apply pt 2.[17] We agree. Specifically, we distinguish *Davidson* on the basis that the pEMP has now been notified. That was not the position at the time of the Environment Court decision to which *Davidson* relates. The significance of that change of circumstance is that the Sounds Plan can no longer be treated as giving substance to pt 2 or being complete in those terms.

[23] We address various relevant pt 2 provisions later in this decision.

Weight to be given to the Sounds Plan in light of the NZCPS

[24] Memoranda of counsel were filed by the parties, after evidence exchange, as to the key issues (together 'Issues Memoranda').[18]

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any other party and we are satisfied that Mr Davidson did so in proper accordance with the Environment Court's Practice Note and Code of Conduct for expert witnesses.

15 Memorandum of counsel for the respondent and the s274 parties in relation to key issues, dated 30 November 2017.

16 Memorandum of counsel for the respondent and the s274 parties in relation to key issues, dated 30 November 2017, at [25].

17 Submissions of counsel for the applicant, dated 1 December 2017, at [3]-[6].

18 Memorandum of counsel for the appellant dated 29 November 2017 ('Clearwater's Issues Memorandum'); joint memorandum of counsel for the respondent and s274 parties dated 30 November 2017 ('respondent's and s274 parties' Issues Memorandum').

[25] A point of difference between Clearwater and the other parties was as to the weight that should be given to provisions of the Sounds Plan. That was in particular as to their weight in regard to the key evidential issues concerning King Shag, natural character, landscape and amenity.

[26] Clearwater submitted "little weight" should be given to the Sounds Plan because it "does not give effect to the NZCPS". It characterised the NZCPS as "the determinative document" (subject to pt 2). It did not call a planning witness and its opening submissions did not scrutinize the Proposals by reference to the various objectives and policies traversed in the evidence of the Council's planner, Mr Johnson. Rather, it submitted that we should simply deal with the Proposals on their "merits". It added that the Environment Court has been consistently critical of the Sounds Plan in decisions since 2002, referring to *Port Gore Marine Farms,*[19] and *Kuku Mara.*[20]

[27] Also, in its Issues Memorandum, Clearwater raised the following issue:

> To what extent is the CMZ1 zone in the ... [Plan] relevant, given these farms are identified as exceptions and provided for as discretionary activities in Appendix D2?

[28] It also submitted that we should give "very little weight" to the pEMP. It pointed out that the pEMP is subject to some 17,000 submissions and a substantial number of further submissions then awaiting determination. It noted that many of these contest fundamental topics such as indigenous biodiversity, natural character and landscape, and use of the coastal marine area. It submitted that the pEMP "fails to directly address economic matters", and does not yet include its intended aquaculture provisions. In all of those respects, it characterised the pEMP as a document "in its infancy" that should not be a "determining factor" in the case.

[29] The Council and s274 parties identified the Sounds Plan, pEMP, RPS and NZCPS as having significant weight in the consideration of the Proposals and their effects.[21] The Council submitted that the instruments all give important guidance and

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19 *Port Gore Marine Farms v Marlborough District Council* [2012] NZEnvC 72.

20 *Kuku Mara Partnership Admiralty Bay West) v Marlborough District Council* (2005) 11 ELRNZ 466; *Kuku Mara Partnership (Forsyth Bay) v Marlborough District Council* W25/2002.

21 Issues memorandum for the Council and s274 parties, at [25].

direction on how we should approach the determinative evidential issues.[22]

[30] The Council and s274 parties also submitted that, in addition to its objectives and policies, the Sounds Plan's structural elements are important. They referred in particular to the Coastal Marine Area 1 ('CM1') and Coastal Marine Area 2 ('CM2') zones and the overlay maps that identify Areas of Outstanding Landscape Value ('AOLVs'). They submitted that these broader structural elements emphasise what the Sounds Plan is seeking to achieve strategically in terms of where marine farms should be located as opposed to where protection of landscape and natural character values is given higher priority.[23]

[31] Drawing extensively from the evidence of its planning witness, Mr Johnson, the Council submitted that the Sounds Plan and pEMP are "directive" in requiring the protection of indigenous biodiversity, the preservation of natural character and the protection of significant landscapes.[24]

[32] The s274 societies say this direction is indicated in the fact that, to date, all applications for re-consenting of marine farms within the CM1 zone have been declined (by Council and/or Environment Court decisions).[25] They point out that the main part of Port Gore (including the sites for the Proposals) is mapped CM1 and submit that this zone gives priority to environmental protection over continuation of marine farming.[26] They submit that this prioritisation is a "generally consistent theme running through the applicable planning instruments".[27]

[33] By contrast to its opening submissions, Clearwater's closing covered the provisions of the Sounds Plan in some detail in relation to the key evidential topics concerning King Shag, natural character, landscape and amenity values.

[34] As noted, s104 RMA requires that we have regard to "any relevant provisions" of its various listed statutory instruments but leaves the weight we ascribe those provisions as a matter for our discretion on the evidence.

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22 Closing submissions for the respondent, undated (filed 21 December 2017), at [5].
23 Summary of submissions for the Friends and EDS, dated 4 December 2017, at [11]-[14].
24 Closing submissions for the respondent, undated (filed 21 December 2017), at [6].
25 Summary of submissions for the Friends and EDS, dated 4 December 2017, at [14].
26 Summary of submissions for the Friends and EDS, dated 4 December 2017, at [14].
27 Summary of submissions for the Friends and EDS, dated 4 December 2017, at [5].

[35] All parties accept, and we find, that the NZCPS should be given significant weight in our determination. That is in part because the NZCPS's statutory purpose is to state objectives and policies in order to achieve the purpose of the RMA in relation to the coastal environment of New Zealand (s56, RMA). Further, several of its objectives and policies have a direct bearing on the relevant issues as to King Shag, natural character, landscape, amenity values, and enablement of appropriate marine farm use of the coastal marine area ('cma').

[36] We find that we should also give significant weight to various provisions of the Sounds Plan.

[37] Firstly, that is because we find no incompatibilities between the NZCPS and Sounds Plan that are material to what we must decide. Secondly, as the Proposals are discretionary activities,[28] we should give due weight to all relevant Sounds Plan objectives and policies. In particular, that is because a statutory purpose of r 35.4 (classifying the Proposals as discretionary) is to achieve the Sounds Plan's objectives and achieve and implement its policies (ss75, 76, RMA).

[38] We do not accept the s274 parties' submission that the CM1 zoning gives priority to environmental protection over continuation of marine farming. Nor do we accept Mr Johnson's description of the Sounds Plan framework as deeming marine farming inappropriate in the CM1 zone.[29] Neither position is supported by our analysis of the provisions.

[39] Chapter 35 sets out the rules for the three-mapped coastal marine zones, CM1, CM2 and CM3. As noted, CM1 encompasses most of the Port Gore/Te Anamāhanga cma (including the sites for the Proposals). The exception is Melville Cove, in the south-eastern corner of Port Gore, where there are several marine farms and which is zoned CM2. Within the CM1 zone, new marine farms are a prohibited activity. That is the effect of r 35.6. Clearly, therefore, the Sounds Plan intends that no more farms be put in Port Gore, other than in Melville Cove (under the CM2 provisions). For existing farms, however, the Sounds Plan implements a form of spot zoning whereby controlled or discretionary activity classification is assigned both through the Chapter 35 rules and

28 Submissions of counsel for the applicant, dated 1 December 2017, at [14].

29 Peter Dewar Johnson evidence-in-chief for the Council, dated 7 April 2017, at [62].

associated appendices that list individually identified farms.

[40] As was explained to us by Mr Johnson (the Council's planner) and Mr Marchant, App D2 came about through the settlement of Environment Court appeals against the then proposed Sounds Plan. Under that settlement, App D2 was inserted and the present discretionary activity status was effectively conferred for the Proposals and other specified farm sites in Port Gore.[30] As discretionary activities, they are intended to be considered on their merits under s104 RMA.

[41] On the other hand, we agree with the Council that the AOLV overlay maps are an important structural element of the Sounds Plan. We return to this later in this decision.

[42] By contrast, we recognise that the pEMP is in the very early stages of preparation. Submissions seek substantial revisions and the pEMP's aquaculture provisions have not been notified. We observe that Mr Johnson's planning opinion, on which we have relied, draws more on objectives and policies of the NZCPS and the Sounds Plan than those of the pEMP. That is appropriate.

[43] As for the RPS, while we have considered its provisions, we are satisfied that the Sounds Plan gives proper effect to it. Hence, it is not necessary to traverse it any further in this decision.

[44] Finally, as this was a matter of dispute between Clearwater and the Council, we record that Clearwater was not under a duty to call a planning witness and that the interpretation of applicable statutory instruments is for the court. However, as Clearwater properly acknowledges,[31] planning experts can provide considerable assistance to the court. That is particularly in their expertise in both evaluating technical evidence and interpreting statutory instruments (including how objectives, policies and other directions bear upon how technical expert evidence should be evaluated). Mr Johnson significantly assisted the court in those respects. *Bay of Plenty,*[32] a case cited by Clearwater, was considering a different matter. It was whether the Environment Court had erred in not

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30 Those subject to the appeals are listed as 'U950880 – Pig Bay North' and 'U950881 – Pig Bay Northwest'. The others listed are the existing other Pig Bay farm (U941457) and two then existing farms at East Pool Head (U950263, U941459) and Gannet Point (U941456, U941458); evidence-in-chief of Peter Dewar Johnson for the Council, dated 7 April 2017, at [20]-[32]; evidence of Cliff Marchant, a s274 party, dated 7 April 2017.

31 Closing submissions for the appellant, dated 16 February 2018, at [23].

32 [2017] NZHC 3080 (12 December 2017).

considering the NZCPS in circumstances where no planning evidence had been called.

Preliminary matters as to the meaning of 'structure' under the Sounds Plan

[45] A further preliminary issue is as to the proper interpretation of the Sounds Plan's definition of 'structure' and, in particular, its exclusion of marine farms.

[46] The relevant definition is as follows (emphasis added):

> STRUCTURE* means any building, equipment, device or other facility made by people and which is fixed to land, and includes any raft.
> **However, for the purpose of the Plan** includes sub aqueous cable but **does not include any marine farm or its ancillary structures**.

[47] Clearwater raised this issue in cross-examination of the Council's landscape expert, Mr Bentley, concerning his opinion on the relative impacts of floating structures.[33] The court also pursued it with the Council's planner, Mr Johnson.[34]

[48] The s274 societies point out that 'marine farm' and 'marine farming' are each separately defined (and we note, at this point, that the definition of 'marine farm' includes reference to structures, i.e. 'any form of aquaculture characterised by the use of surface and/or subsurface structures located in the coastal marine area'). They submit that the definitions are intended to reflect the separate regulatory treatment of marine farms under the Sounds Plan, rather than to exclude consideration of marine farms in the Sounds Plan's objectives and policies. They say that to interpret the exclusion to exclude the marine farm from Sounds Plan provisions that deal with surface structures on water would be non-sensical, unworkable and not what the drafting intends. They illustrate that point with various examples of references to 'structure' in provisions in Chapter 9 and in Issue 5.2.2 (as to 'Structures on Water').

[49] The principles for the interpretation of an RMA plan, as a subordinate statutory instrument, are well-established. We apply the purposive approach to interpretation specified in s5 of the Interpretation Act 1999 and as expressed in the Court of Appeal in *Powell.*[35] We consider the definition of 'structure' as a term that is defined in order to

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33 Transcript, p 284, l 1-33, p 285, l 1-10.

34 Transcript, pp 510-512.

35 *Powell v Dunedin City Council* (2005) 11 ELRNZ 144, [2004] 3 NZLR 721, [2005] NZRMA 174.

serve the proper interpretation of those Sounds Plan provisions that use that term.

[50] The fact that the definition purports to be for the Sounds Plan as a whole does not support the s274 parties' interpretation that it is confined only to the Sounds Plan rules. Further, various Sounds Plan's policies appear to treat marine farms as being distinct from structures as defined. Policies 8.3.1.2 and 3 relevantly provide (emphasis added):

> Adverse effects on public access caused by the erection of **structures, marine farms, works or activities** in and along the coastal marine area should as far as practicable be avoided. Where complete avoidance is not practicable, the adverse effects should be mitigated and provision made for remedying those effects, to the extent practicable.
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> To prevent the erection of **structures and marine farms** that restrict public access in the coastal marine area where it is subjected to high public usage.

[51] Policy 5.3.1.1 is drafted so as to allow for marine farms to be considered as 'activities':

> Avoid, remedy and mitigate adverse effects of ... use and development, including **activities and structures**, on the visual quality of outstanding natural features and landscapes, identified according to the criteria in Appendix One.

[52] Considering the definition of 'structure' in this context, we determine that the exclusion is intended to extend beyond the rules in Chapter 35 governing structures and marine farming. It is also intended to apply to related objectives and policies in the Sounds Plan.

[53] However, we find that this has little, if any, consequence. That is because key objectives and policies are framed so as to not rely on the definition of 'structure' (including a number that refer specifically to 'marine farms' or use other words such as 'works' and 'activities').

Evaluation of statutory instruments in the context of evaluation of expert evidence

[54] Our consideration of relevant provisions of the statutory instruments draws from

Mr Johnson's evidence. We find his analysis reliable (except where we say otherwise).[36] As Mr Johnson identified, the provisions of particular relevance include:

(a) NZCPS Objectives 1, 2, 4 and 6 and Policies 6, 8, 11, 13, 14 and 15;
(b) Sounds Plan objectives and policies in Chapters 2 (Natural Character), 4 (Indigenous Vegetation and Habitats of Indigenous Fauna), 5 (Landscape), 8 (Public Access), 9 (Coastal Marine) and 19 (Water Transportation); and
(c) pEMP mapping for and associated descriptions of identified areas of Outstanding Natural Character ('ONC') and Outstanding Natural Features and Landscapes ('ONF', 'ONL').

[55] It is convenient to deal with the guidance and direction given by various of the statutory instruments when we deal with the related evidence on each topic area.

Ecological effects: King Shag and its prey and habitat

[56] The court heard from several experts on ecological effects, particularly as to the nature of any potential effect (adverse or positive) that the Proposals would have for King Shag, including its prey and habitat. In addition, a joint witness statement was filed by orthonologists Dr Rachel McClellan (engaged by Clearwater) and Dr Paul Fisher (engaged by the Council and the Friends) and marine fisheries expert Mr Paul Taylor (engaged by Clearwater) ('Ecology Joint Statement' / 'Joint Statement').[37]

[57] The key issues for this topic, while differently expressed by the parties in their memoranda, were essentially:

(a) do the marine farms materially affect (or potentially affect) King Shag, either directly or through impacts on their prey or habitat?
(b) if so, would that effect or potential effect be materially adverse or beneficial?
(c) would declining the proposals maintain or improve King Shag habitat?

[58] Clearwater's Issues Memorandum also states the following related issue

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36 Mr Johnson is an experienced Council planning officer with responsibility for assessing and reporting on resource consent applications. As noted, he was the only planning expert called to give evidence and we found him a reliable and properly informed witness.

37 Joint Statement Paul Richard Fisher, Rachel Katherine McClellan, Paul Robert Taylor, dated 20 October 2017.

concerning its proposed Predator and Pest Programme:

22. Might the proposal to remove predators from the Cape Lambert headland enhance the habitat of Pig Bay for King Shags?

Relevant NZCPS provisions

[59] Objective 1 refers to safeguarding the "integrity, form, functioning and resilience of the coastal environment" and to sustaining "its ecosystems" by specified means including:

> protecting representative or significant natural ecosystems and sites of biological importance and maintaining the diversity of New Zealand's indigenous coastal flora and fauna.

[60] Policy 3.1 reads:

1. Adopt a precautionary approach towards proposed activities whose effects on the coastal environment are uncertain, unknown, or little understood, but potentially significantly adverse.

[61] Policy 11 reads:

> To protect indigenous biological diversity in the coastal environment:
> a. avoid adverse effects of activities on:
> i. indigenous taxa that are listed as threatened or at risk in the New Zealand Threat Classification System lists;
> ii. taxa that are listed by the International Union for Conservation of Nature and Natural Resources as threatened;
> iii. indigenous ecosystems and vegetation types that are threatened in the coastal environment, or are naturally rare;
> iv. habitats of indigenous species where the species are at the limit of their natural range, or are naturally rare;
> v. areas containing nationally significant examples of indigenous community types; and
> vi. areas set aside for full or partial protection of indigenous biological diversity under other legislation; and
> b. avoid significant adverse effects and avoid, remedy or mitigate other adverse effects of activities on:
> i. areas of predominantly indigenous vegetation in the coastal environment;
> ii. habitats in the coastal environment that are important during the vulnerable life stages of indigenous species;
> iii. indigenous ecosystems and habitats that are only found in the coastal

environment and are particularly vulnerable to modification, including estuaries, lagoons, coastal wetlands, dunelands, intertidal zones, rocky reef systems, eelgrass and saltmarsh;

iv. habitats of indigenous species in the coastal environment that are important for recreational, commercial, traditional or cultural purposes;

v. habitats, including areas and routes, important to migratory species; and

vi. ecological corridors, and areas important for linking or maintaining biological values identified under this policy.

[62] Policy 11 seeks an outcome that protects indigenous biodiversity by the ways it specifies. On the evidence, we find that to extend to seeking avoidance of adverse effects on the matters in (a) (i), (ii) and (iv) and avoidance of significant effects on the matters in (b) (ii) and (v).

Relevant Sounds Plan provisions

[63] Chapter 4 of the Sounds Plan concerns 'Indigenous Vegetation and Habitats of Indigenous Fauna'.

[64] Objective 4.3.1 concerns the protection of significant indigenous flora and fauna and their habitats from the adverse effects of use and development. On the evidence, we agree with Mr Johnson that this objective and related policies are relevant to our consideration of the King Shag and its habitat areas in Port Gore. In particular, we identify Policy 4.3.1.2 as relevant to our consideration of the evidence on these matters. It refers to avoiding, remedying or mitigating the adverse effects of water use on areas of significant ecological value.

[65] There are also various relevant objectives and policies in Chapter 9 (Coastal Marine) which encompass marine farming, as well as mirroring the approach of other Sounds Plan provisions concerning environmental effects.

[66] For example, Objective 9.2.1.1 is:

> The accommodation of appropriate activities in the coastal marine area whilst avoiding, remedying or mitigating the adverse effects of those activities.

[67] Policies 9.2.1.1.15 – 17 express various intentions on the enablement aspect of that objective as to marine farming, subject to various stated qualifications. One is Policy 9.2.1.1.14:

> To enable a range of activities in appropriate places in the waters of the Sounds including marine farming, tourism and recreation and cultural uses.

[68] The policies in 9.2.1.1 also deal with various dimensions of avoiding, remedying or mitigating adverse effects of activities. In particular:

(a) Policy 9.2.1.1.1 relevantly refers to:

> Avoid, remedy and mitigate the adverse effects of use and development of resources in the coastal marine area on …
> a) Conservation and ecological values;
> …
> e) Marine habitats and sustainability
> …

(b) Policy 9.2.1.1.2 colours Objective 9.2.1.1 by its directions that adverse effects "should as far as practicable be avoided" and that where "complete avoidance is not practicable" adverse effects "should be mitigated and provision made for remedying those effects to the extent practicable".

[69] Sub-chapter 9.4 concerns the alteration to the foreshore and seabed. Its objectives and policies follow a similar pattern to that in sub-chapter 9.2. Objective 9.4.1.1 seeks protection of the coastal environment by avoiding, remedying or mitigating adverse effects of activities that alter the foreshore and seabed. Policy 9.4.1.1.1 is very similar to Policy 9.2.1.1.1. It is to avoid, remedy or mitigate the adverse effects of activities that disturb or alter the foreshore and/or seabed on any of its listed matters including the same matters as are above-quoted in 9.2.1.1.1 a) and e).

[70] Somewhat oddly, Policy 9.4.1.1.9 is:

> Enable the adverse visual or ecological effects of particular farms to be addressed when the rules expressly provide for that.

[71] Mr Johnson offers that the discretionary activity status of the Proposals (under r 35.4 and App D2) means this policy applies. For what it is worth, we agree, although we

record that the policy does not appear to state more than what is required by s104 RMA for a discretionary activity.

Consideration of the ecology evidence

Evidence that is relatively uncontentious

[72] There are inherent limits to the consideration and testing of alternative scientific theories on ecological risk in the context of an adversarial appeal process. That is particularly the case here, given the present lack of any reliable scientific baseline for determining how further development, such as is proposed, would impact upon the Threatened King Shag. The evidence makes it abundantly clear that effective risk management, so as to avoid extinction of the King Shag, should be approached on a Sounds-wide strategic basis. There is a clear limit to how that risk can be addressed within the confines of this resource consent appeal for continuation of two marine farms covering 6 hectares at Pig Bay.

[73] There are first some matters of context which help put this issue in perspective.

[74] We start by considering some uncontentious evidence, which we primarily draw from the Ecology JWS.

[75] The King Shag (*Leucocarbo caruncalatus*) is one of three distinct species of *Leucocarbo* shags recognised as endemic to New Zealand. It is a 'Threatened' species under both the International Union for Conservation and Nature ('IUCN') and New Zealand threat classification systems and is restricted to breeding in the Marlborough Sounds. The 'Threatened' status is based on two classifications. The IUCN classifies the species as 'Vulnerable' (based on < 1000 mature individuals with a very restricted occupancy or number of locations). New Zealand's national threat classification system[38] classifies it as 'Nationally Endangered' based on a restricted range and a population of 250-1000 mature individuals. Those population numbers are generally backed by recent population counts. The JWS refers to an aerial survey on 11 February 2015 of all known colonies. It yielded 839 birds (including juveniles less than one year old).[39]

38 Ecology JWS dated 20 October 2017, p 4, citing Robertson *et al.* 2017.

39 Ecology JWS, p 4.

[76] The Royal Forest and Bird Protection Society of New Zealand Inc ('RFB') has a system of mapping sites of importance for bird conservation. Its mapped areas are each termed 'Important Bird Area' ('IBA'). IBAs recognise seabird areas of global significance.[40] The Sounds IBA is defined by the seaward extensions from King Shag colonies (seaward extensions recognising that seabirds spend a significant time of their lives at sea) and includes coastal congregations of non-breeding seabirds. It is defined by the foraging range (25km from each colony) and depth (50m) and is based on studies by Schuckard (1994, 2006) and a database of some 1000 sea sightings. Pig Bay (Port Gore) forms part of the Sounds IBA.

[77] Significant numbers[41] of breeding King Shag feed within the Sounds (as do Fluttering Shearwater, and Australian Gannet). However, the seabird marine habitat (and associated prey) in the Sounds, required for life sustaining traits and behaviours, is largely unprotected.[42] The King Shag 'Area of Occupancy' (as defined in the IBA) is significant habitat for King Shag, given its small and threatened population. As a soundly based area of importance to the future survival of the King Shag species, we find the IBA has significant weight when we come to consider related protection priorities in s6 RMA and the NZCPS and Sounds Plan objectives and policies.

[78] It is understood that there are only four main breeding colonies of King Shag. These are on very small islands, rendering the species susceptible to stochastic[43] natural events (e.g. severe weather) and human impacts. The ecology JWS also explains that those factors can impact pelagic[44] and benthic[45] communities in coastal feeding areas and bays, which are important for foraging seabirds (including King Shag).[46]

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40 Dr Fisher evidence-in-chief for the FNH and the Council, dated 4 April 2017, at [18] and fn 3 referring to Forest & Bird (2014). New Zealand Seabirds: Important Areas for New Zealand Seabirds. Sites at sea: seaward extensions, pelagic areas, The Royal Forest & Bird Protection Society of New Zealand, Wellington, New Zealand, 90 pp.

41 Ecology JWS, p 3 explains the IBA criteria for 'significant numbers' as being (i) Regular presence of the Threatened King Shag; (ii) More than 1% of world population of King Shag, Fairy Prion, Fluttering Shearwater and Australian Gannet.

42 Ecology JWS, p 3.

43 Stochastic: determined by random distribution of probabilities; characterised by a sequence of random variables: (*New Zealand Oxford Dictionary,* Oxford University Press (2005)).

44 Pelagic: belonging to the upper layers of the open sea (*New Zealand Oxford Dictionary,* Oxford University Press (2005)).

45 Benthic: *adj.* Benthos: *n.* the flora and fauna found at the bottom of a sea or lake (*New Zealand Oxford Dictionary* Oxford University Press (2005)).

46 Ecology JWS, p 4.

[79] The nearest of these main colonies to the Port Gore sites is Sentinel Rock (approximately 15km away). The White Rocks and Duffers Creek colonies are approximately 20km and 25km away respectively. Even so, the Proposals are within foraging range of those colonies.[47]

[80] The Proposals are within 1km of a known King Shag roosting site at Taratara and 2.5km of a small satellite breeding colony at Hunia Rock.[48] A June 2015 survey recorded 10 breeding pairs/nests and a summer count recorded 53 birds.[49]

[81] We note that Dr McClellan offered an opinion that the King Shag population has been stable over the past fifty or so years. She based that on papers she reviewed on population surveys as well as information on foraging departures and presence at colonies. However, she also noted that the survey data she relied on (from *Schuckard*, 2006)[50] did not disclose methods, dates and actual counts from the 1950s and 1960s, making it "difficult to evaluate them further". Nevertheless, she noted that this information was relevant in the context of the significant environmental and social change that has occurred during that period.[51]

[82] Whether or not Dr McClellan is correct in that observation, it is set against the consensus evidence we have described. That includes the evidence that King Shag have Threatened status and are vulnerable to stochastic natural events (e.g. severe weather) and human impacts. In that sense, whether the population is stable or otherwise, it remains at significant risk of decline (and, potentially extinction). Further considerations as noted, are that the proposed Pig Bay sites are within the King Shag IBA, and relevant King Shag have a local breeding presence at Port Gore.

The central points of dispute between the experts

[83] Against that backdrop, the central point of dispute between the experts is as to the significance for Threatened King Shag, if any, of enabling marine farming to continue at the proposed sites. As the Issues Memoranda signalled, those matters included differences as to:

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47 Ecology JWS, p 3.
48 Ecology JWS, p 3.
49 Ecology JWS, p 5 referencing R Schuckard et al 2015.
50 Schuckard R. 2006: Population status of New Zealand king shag (*Leucocarbo carunculatus*).
51 Dr McClellan evidence-in-chief for Clearwater, dated 10 March 2017, at [22] and [23].

(a) the risks or benefits, if any, that the marine farms would present for King Shag prey;

(b) the risks or benefits to King Shag prey in the event that removal of the marine farms increased the extent of dredging and/or trawling in the Pig Bay area; and

(c) what environmental compensation or enhancement, if any, would arise from the offered Pest and Predator Control Proposal [82]-[91].

[84] As to those points of difference, we heard opinions and counter-opinions as to the feeding habits of King Shag, including whether they are benthic or pelagic feeders, whether they are generalist feeders or prefer specific prey (e.g. witch flounder) and whether they avoid feeding in proximity to mussel farms.

[85] Much of that evidence was in the nature of contested hypotheses that can only be verified or rejected on the basis of a properly-designed scientific study. As such, this evidence does not provide a basis for making reliable findings as to whether the Proposals would or would not affect foraging by King Shag. As a measure of that, a common theme to the closing submissions for both Clearwater and the s274 societies was to emphasise the scientific unreliability of the opposing experts' theories.

[86] However, because the outcome in these appeals does not turn on whether the Proposals would have any material effect on foraging by King Shag, we do not need to traverse the substance of this evidence. On that evidence, we find:

(a) King Shag foraging mostly occurs in water depths of 20-40m. That correlates with the typical depth occupied by a marine farm (including those in issue in these appeals). However, there is a present lack of scientific knowledge of whether that correlation is adverse, positive or neutral for King Shag foraging;[52]

(b) the benthos of soft silt and clay substratum is conducive to the presence of flatfish, a prey of King Shag. The benthos beneath Sites 8165 and 8166 is dominated by such substratum. However, so is much of the benthos of Port Gore;[53]

52 Dr Fisher evidence-in-chief for the FNH and the Council, dated 4 April 2017, at [64].

53 R J Davidson, 2014A Appendix 1 to *Ecological report for the proposed renewal of marine farm site*

(c) the present state of scientific knowledge does not allow for any safe conclusions to be drawn as to:[54]

(i) whether King Shag are predominantly benthic feeders or are generalists; or

(ii) what the preferred benthic prey of King Shag are (e.g. plentiful witch flounder and/or other flat fish); or

(iii) in any case, what if any effect (adverse or positive) marine farm structures or shell debris and other waste has on that prey or on the success or otherwise of King Shag in catching it (although it would appear that the mere physical presence of marine farm structures of themselves do not preclude foraging).

[87] The Ecology JWS shows a strong consensus as to the need for further research on these matters and on the King Shag population stability (in its paras 30-39). The experts record:

> 43. There have been no studies of king shag dive profiles and limited information on their diet, and therefore it is difficult to quantify the effects of mussel farms on prey availability and prey abundance for king shags, and why there are so few sightings of king shags foraging under or within mussel farm structures.
>
> ...
>
> 61. No research exists that examines the effect of mussel farms on key king shag prey species.
>
> ...

[88] That joint acknowledgment of the research position confirms our view of the evidence.

8166 located in Pig Bay, outer Marlborough Sounds. Prepared by Davidson Environmental Limited for Swampy Mussel Company Limited, Survey and Monitoring Report no. 785.

54 Fisher P R and Boren L J 2012: New Zealand king shag (*Leucocarbo carunculatus*) foraging distribution and use of mussel farms in Admiralty Bay, Marlborough Sounds. *Notornis*, 59: 105-115, at Figure 2, page 108; evidence-in-chief of Dr McClellan for Clearwater, dated 10 March 2017, at [81] and [82]; evidence-in-chief of Mr Paul Taylor, for Clearwater, dated 26 April 2017, at [20], [31], [45]; rebuttal evidence of Dr Fisher, for the s274 parties and the Council, undated, at [13]-[26]; evidence of Robert Davidson, for Clearwater, dated 10 March 2017, at [46]; McKindsey, C W; Archambault, P; Callier, M D; Olivier, F 2011. Influence of suspended and off-bottom mussel culture on the sea bottom and benthic habitats: a review. (This review is part of a virtual symposium on current topics in aquaculture of marine fish and shellfish). Canadian Journal of Zoology, 89(7), pp 622-646.

[89] The Ecology JWS records that soft sediment/muddy substrate habitat is the predominant benthic habitat in Port Gore and other bays of the Sounds.[55] Bearing that in mind, even if it is correct that King Shag are a specialist benthic feeder, it is self-evident that the area represented by the farms is a tiny proportion of its foraging area.

Risk of disturbance from visiting vessels

[90] The evidence is much clearer that human activity (such as by vessel servicing, seeding or harvesting visits) poses a disturbance risk we find significant.

[91] In particular, the Ecology JWS records the following points of agreement between the experts:

> 71. Satellite king shag colonies such as the Pig Bay (~50 individuals, 2015) are potentially more vulnerable to failure/abandonment than large established colonies from natural and anthropogenic factors because of their low potential for recruiting breeding birds, because of the species' sedentary nature and relatively low production rates.
>
> ...
>
> 73. Coastal and open water aquaculture activities (shell and finfish farms) may cause disturbance of birds (foraging and at colonies) by vessel movements, and may affect habitat availability and prey abundance and distribution.
>
> 74. Commercial benthic trawling and dredging, and other commercial fisheries activities, throughout the Marlborough Sounds may cause changes to key king shag prey abundance and distribution.
>
> ...
>
> 77. The species is readily disturbed/flighty, which can result in adults prematurely departing nests when boats pass colonies. In these situations, eggs can be damaged or lost to the sea. The nervous behaviour of birds makes them difficult to approach at colonies to capture for tagging/detailed studies.
>
> ...
>
> 79. King shags established at colony at Port Gore after the commencement of operations of the two Pig Bay mussel farms.
>
> ...
>
> 82. In general there is insufficient monitoring and research information to quantify the environmental baseline for ecosystem health in the Marlborough Sounds and apportion cumulative effects from anthropogenic activities.
>
> ...
>
> 89. Analysis of the extent of benthic trawling and dredging in the Marlborough Sounds to determine the extent of disturbance to the king shag benthic habitat and prey. [this last

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55 Ecology JWS, at [58].

item, we interpret, as intending to express a consensus opinion in support of such analysis being done.]

[92] That evidence identifies that the continuation of marine farming activity at the two sites would pose a degree of disturbance risk to King Shag. That is as would be associated with regular maintenance, seeding and harvesting activities. There is some risk those activities could disturb the existing, small Hunia Rock colony, some 2.5km from the Proposals. There is an inherent risk in the fact that such activities would occur in the Sounds IBA. On the other hand, it is important to not overstate that risk insofar as the additional activity of continued marine farming at the sites is concerned. Vessels already travel regularly through Port Gore to service other established marine farms in Melville Cove. Occasional vessel visits can also be expected to be associated with recreation, commercial dredging and trawling. Furthermore, as noted, the Hunia Rock King Shag colony established after the two marine farm sites were operational. There are also other potentially disturbing human activities in the Port Gore area, including tourist diving excursions to the Mikhail Lermontov wreck and regular aircraft movements to and from the Marchant property.

[93] We do not give any significant weight to Clearwater's claims that allowing the farms to remain would offer the benefit of precluding commercial fishing or dredging in the same locality. We agree with the s274 societies that, on the evidence before us, commercial fishing and dredging has been relatively rare in this locality to date.[56] Accepting that this could potentially change (depending on how commercial operators see fit to exercise quota rights) we find it improbable that fishing and/or dredging would extend over the additional 6 hectare area to such a significant extent as to materially impact either King Shag foraging or breeding. That is particularly bearing in mind the relatively close proximity of the farms to the foreshore and a reef.

Clearwater's proposed Predator and Pest Programme

[94] In opening, Clearwater submitted that its Predator and Pest Programme ('Programme') (as specified in its proposed conditions 14-17) would help restore indigenous habitats and ecosystems and enhance the habitat of indigenous species by encouraging natural regeneration. It submitted that this would deliver a net improvement

56 Referring to Exhibits 1.2 RD and 3.6 CM and Mr Marchant's evidence on Transcript at pp 438-442.

in both natural character and landscapes.[57] It also submitted that the Programme is likely to have significant benefits for King Shag.[58]

[95] Mr Meredyth-Young explained that the existing fence was installed by the Department of Conservation ('DoC') in 1992, as a predator-proof fence. However, problems were encountered with the effectiveness of its electrification system. DoC ceased maintaining it after ten years or so. It is now being maintained by Mr Moleta (the landowner) as a stock-proof fence only under a cost-sharing agreement with DoC. The fence is effective in keeping out goats and pigs. Culling efforts mean possum numbers in the reserve are also presently low and regenerating bush is in good health.[59]

[96] Mr Meredyth-Young explained Clearwater's intentions for a "collaborative restoration project" on the reserve and part of Mr Moleta's land. His evidence on this was somewhat imprecise and short of specifics. However, he listed several things that he believed "could be achieved". Only some were identified as being Clearwater responsibilities. Those included re-establishing the predator fence and "taking the necessary steps to ensure that it is fit for purpose", removing wilding pines, and "taking measures" (specified as including a trapping programme) to remove feral cats, mustelids, possums, wasps, pigs, goats and deer. However, the proposed conditions refer to DoC "or another independent party" undertaking a baseline study to establish predator levels prior to Clearwater getting underway with the Programme. It was not made clear who would be responsible for other tasks, such as undertaking a native bird and invertebrate survey and publishing an independent report. We presume, however, that the intention of the offered consent conditions is to make the consent holder ultimately responsible.[60]

[97] Mr Meredyth-Young noted that Clearwater had discussed the viability of the Programme with 'a number of parties'. It would appoint an expert working team that he anticipated would include Mr Davidson, Mr Glasson, Dr McClellan, and two terrestrial and fauna ecologists. He referred to the lack of funding priority given by DoC to Cape Lambert and his expectation that a terrestrial restoration project was unlikely to happen without support from Clearwater including in terms of its ability to assist in providing access through use of its vessels.[61]

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57 Opening submissions for Clearwater, dated 1 December 2017, at [99]-[103].

58 Transcript, p 22 l 12-34, p 23 l 1-8, p 24 l 20-35.

59 John Meredyth-Young evidence-in-chief for Clearwater, dated 8 March 2017, attachment JLMY4.

60 John Meredyth-Young evidence-in-chief for Clearwater, dated 8 March 2017, at [27]-[34].

61 John Meredyth-Young evidence-in-chief for Clearwater, dated 8 March 2017, at [32].

[98] Dr McClellan noted the immense damage that pigs could cause generally and for seabird colonies in particular (including in eating chicks and eggs). She described similar destructive potential from mustelids. She said a well-designed programme would "almost certainly" have significant benefits to avifauna populations on Cape Lambert Peninsula, including for present, and any potential future, seabird colonies. In her opinion, an effective fence and well-designed and implemented programme would reduce predation and competition and improve habitat condition such as to result in population increases "of several bird species". It could provide protection for ground-nesting seabird and shorebird populations around Cape Lambert and, if King Shag re-established on the mainland, the Programme would make them less vulnerable to predation and disturbance.[62]

[99] In closing, the Council submitted that the Predator and Pest Programme was a "distraction" in that the evidence did not establish that it would mitigate or remedy any of the Proposals' adverse effects.[63]

[100] In closing, Clearwater referred to App 2, Vol 1 of the Sounds Plan. This describes natural character of various parts of the Sounds environment. The applicable part is what it termed 'Cook Strait and Stoke'. This specifies as a restoration priority for its ecosystems the 'maintenance of the predator-free status of islands and facilitation of eradication of predators from others'. Clearwater submitted that the Pest and Predator Programme would be consistent with that stated priority. It also refers to evidence in the Council hearing (referenced by Mr Meredyth-Young) to the effect that electric outriggers on the existing fence are no longer serving their intended purpose of keeping possums out of the reserve. While acknowledging that possum numbers are presently low on the Moleta land, it noted the evidence that the Moleta property is "prone to large numbers" of those pests. It also noted the presence of some wilding pines on the reserve.[64]

[101] For several reasons, we find that Clearwater's Pest and Predator Programme does not significantly weigh in favour of approval of the Proposals. Primarily, our concerns centre on the lack of certainty in what Clearwater has put forward. One aspect of this is the lack of clarity about DoC's position, as the agency responsible for

62 Dr McClellan evidence-in-chief for Clearwater, dated 10 March 2017, at [90]-[96], [105].
63 Closing submissions for the Council, undated, at [16].
64 Closing submissions for Clearwater, dated 16 February 2017, at [41], [115]-[116].

stewardship of the reserve. It is also unclear what position the Moleta family would take as the adjacent landowners on whose land the fence has been constructed. Mr Meredyth-Young emphasised collaboration particularly with DoC and the Moleta family. That is also a central aspect of the wording of the proposed conditions (e.g. 14(a)). Dr McClellan, as an ecologist, was notably guarded in her support. While she explained the benefits of "a well-designed programme", she did not attest that what Clearwater put forward was well-designed.

[102] The overall impression is that this well-intentioned initiative is more conceptual than something we can rely on to be implemented and maintained. Added to that, Clearwater's proposed conditions do not appear to offer much, if any, protection against the risk of the Programme failing. Aside from their reliance on collaboration with third parties such as DoC, the proposed conditions leave a great deal to the judgement of the appointed "independent ecologist" as to what is undertaken by way of the so-called "adaptive management plan". The failure of the DoC initiatives for predator protection serve to demonstrate the simple fact that ongoing funding and commitment would be necessary in order for the Programme to succeed. We do not have sufficient evidence of such ongoing commitment. Intentions and goodwill, whilst important, are insufficient.

[103] In any case, the evidence does not satisfy us that the Programme (were it to be implemented and maintained as intended) would be effective for its intended purposes concerning the effects of the Proposals. It would not avoid or mitigate the risks that disturbance from human activity associated with the operation and maintenance of the farms could have for local King Shag colonies. Nor would it materially compensate for, or offset, the loss of natural character values that we find would result from the Proposals.

[104] Even assuming this adaptive management plan would be effectively implemented, the evidence is vague as to whether and to what extent it would offer any material benefit for King Shag. It can be reasonably inferred that, if the adaptive management plan is effective, it would offer material benefits for indigenous fauna (and flora) there. Potentially, that would include seabirds. However, on King Shag, the only expert evidence we have that the Programme would offer potential benefits was Dr McClellan's qualified opinion that an effective programme would be beneficial in the event that a King Shag colony was ever to re-establish on the mainland. That is insufficient.

[105] Therefore, we do not accept Clearwater's submissions concerning the benefits of the Programme in relation to the Proposals.

Evaluation against relevant objectives and policies

[106] Against the background of those findings on the evidence, we now evaluate the Proposals against relevant NZCPS and Sounds Plan objectives and policies.

[107] In opening, Clearwater submitted that the Sounds Plan should be given little weight as it does not give effect to the NZCPS. It submitted that the case "turns on compliance with" NZCPS Policies 11, 13, 14 and 15. It submitted that the Proposals, including the terrestrial restoration aspect, would be consistent with those (and other) NZCPS policies.[65]

[108] Mr Johnson observed that Sounds Plan Objective 4.3.1 expresses a directive objective to 'protect' and Policy 9.4.1.1.1 is one of various policies that seek to avoid, remedy and/or mitigate effects on its listed values.[66] We accept that to be also correct, insofar as it goes. However, the influence of those directions is ultimately dependent on our findings on the evidence concerning how the Proposals could affect the Threatened King Shag and its habitat.

[109] On these matters, Mr Johnson relied primarily on the evidence of Dr Fisher (and Mr Bentley on related natural character matters). On his understanding of that evidence, he found that the Proposals would not accord with:[67]

(a) NZCPS Objective 1 and Policy 11, by reason that the Proposals would not avoid adverse effects on the habitat of King Shag or the species itself;[68]

(b) Sounds Plan Objective 4.3.1, by reason that the Proposals would not protect the habitat of King Shag from the adverse effects on use and development;[69]

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65 Opening submissions for Clearwater, dated 1 December 2017, at [16], [19] and [127],

66 Peter Dewar Johnson evidence for the Council, dated 7 April 2017, at [87].

67 Mr Johnson also concluded that the proposals would not accord with RPS 5.3.10 and related methods: Evidence of Peter Dewar Johnson for the Council, dated 7 April 2017, at [59]. However, for the reasons we have given, we find it unnecessary to traverse this matter, given that we are satisfied that the Sounds Plan already properly gives effect to the RPS. We also agree with Mr Johnson that nothing in the pEMP bears significantly on the evidence concerning ecological effects, and particularly effects on King Shag and its prey and habitat.

68 Peter Dewar Johnson evidence for the Council, dated 7 April 2017, at [55](c).

69 Peter Dewar Johnson evidence for the Council, dated 7 April 2017, at [74], [86](c).

(c) Sounds Plan Objectives 9.2.1.1 and 9.4.1.1 and 9.4.1.1.1, by reason that the Proposals would have adverse effect on ecological values and marine habitats (and also on natural character, amenity values, land/seascape and aesthetic values).[70]

[110] The s274 societies refer in particular to the direction given in NZCPS Policy 11 as to the protection of indigenous biodiversity including as to the avoidance of adverse effects on Threatened taxa and on habitats. Relevant to that, they submit that the court should give particular weight to the fact that Port Gore is mapped as being within the IBA. Relying on Dr Fisher's evidence, they emphasise the importance of considering the cumulative exclusionary effects of "unmonitored expansion of marine farming" in the Sounds "over the past 30 years" and the need to look for enhancement opportunities in light of this.[71]

[111] It is not a matter of contention that the King Shag is vulnerable to stochastic natural events and human impacts. That is in part due to its small population size. A further factor is the nervous nature of the species, making it vulnerable to disturbance from boat movements, including when foraging and at colonies. Boat movements are inherently part of marine farming activity. The Ecology JWS also indicates a need for added precaution in relation to satellite King Shag colonies such as at Pig Bay (50 individuals, 2015). That is in the sense that such small satellite colonies are potentially more vulnerable to failure/abandonment from natural and anthropogenic factors, given their low potential for recruiting breeding birds (and the King Shag's sedentary nature and relatively low production rates).

[112] In that context, the present inability to even identify an environmental baseline against which the effects of anthropogenic activities associated with marine farming can be reliably understood is of particular concern. In essence, it means there is no informed basis for properly targeted decision-making including potential RMA intervention. Of course, as the Ecology JWS identifies, effective decision-making on this goes further than simply regulatory intervention. It must involve all relevant stakeholders (including conservation, local authority and industry interests). It is encouraging that there are some initiatives underway in that respect. There is a clear risk that King Shag could become extinct without a strategic co-ordinated approach to its protection.

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70 Peter Dewar Johnson evidence for the Council, dated 7 April 2017, at [78]-[86].

71 Submissions in reply by the s274 societies, dated 22 December 2017, at [12]-[17].

[113] The issue concerning Policy 11 is how we weigh the present lack of knowledge of the cumulative effects of marine farms in the Sounds, in our consideration of the two farms the subject of the Proposals. We refer here to what the experts record in their Ecology JWS:

> In general there is insufficient monitoring and research information to quantify the environmental baseline for ecosystem health in the Marlborough Sounds and apportion cumulative effects from anthropogenic activities.

[114] It is of course the case that the additional disturbance that would be associated with the Proposals would be very small in the context of the existing disturbance that would occur from human activities within the King Shag IBA.[72] However, that does not mean we should put to one side the evidence that human activity, in and around marine farms and servicing boats would pose a risk in itself. That is a risk of disturbing King Shag, whether in foraging or roosting. Part of the receiving environment is the small satellite colony of King Shag at Hunia Point. To a small extent, the operation of the marine farms in question would add to the cumulative risk that human activities pose, at least for that colony. The Threatened status of King Shag means that this risk (albeit very small) is material to our consideration. The Proposals would add to the collection of human activities that occur in the King Shag IBA that pose a poorly understood, but potentially significant, cumulative threat to King Shag.

[115] On the evidence, we find that the NZCPS and Sounds Plan objectives and policies noted at [109] further count against the Proposals to some extent.

Precautionary approach

[116] We now turn to the weight NZCPS Policy 3 (as to the precautionary approach) has in our determination of the appeals. This Policy was referred to by Dr Fisher as relevant, but Clearwater disputed this. Ultimately, we find that NZCPS Policy 3 does not have significant weight on the evidence before us. That is because it is not scientific uncertainty as such that is influential (the evidence on that being essentially no more than competing hypotheses) but consensus evidence that human activity associated with the farms would present an actual disturbance risk.

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72 Closing submissions for Clearwater, dated 16 February 2018, at [95].

Overall findings concerning King Shag and ecological effects

[117] Therefore, we find on the evidence as follows:

(a) the Proposals would, in net terms, give rise to an adverse potential effect to King Shag and, hence, to ecological and biodiversity values (particularly in view of King Shag's Threatened status). The effect is one of disturbance from human activity associated with the maintenance and operation of the farms. While there may be a relatively small risk of such an effect, it is not an insignificant one;

(b) the Proposals cannot be relied upon to deliver any offsetting or other relevant ecological benefits, including from Clearwater's proposed Predator and Pest Programme;

(c) the Proposals would increase risk to, and not avoid, adverse effects on the King Shag as a Threatened species. That includes the satellite colony at Hunia Rock, close to the Proposals. The Proposals would not protect indigenous biodiversity. Hence, granting the coastal permits for Proposals would not be supported by NZCPS Policy 11, whereas declining them would, on the evidence, assist to achieve that Policy;

(d) similarly, granting the permits would not be supported by Sounds Plan Objective 4.3.1, Policy 4.3.1.2, Objective 9.2.1.1, Policies 9.2.1.1.14 – 17, Objective 9.4.1.1 or Policy 9.4.1.1.1, whereas a decision to decline the coastal permits would, in some respects, assist to achieve those objectives and policies (and would not, in any case, be inconsistent with them);

(e) a decision to decline the coastal permits for the Proposals would likely mean a net positive potential ecological effect, including on King Shag. That is in the sense that it would increase potential for undisturbed foraging and roosting opportunities for King Shag within its identified IBA (and in a relatively remote part of the Outer Sounds); and

(f) on the basis of those findings, we also find that granting the coastal permits would not recognise and provide for the matters in s6(c) RMA. Conversely, a decision to decline the permits would recognise and provide for those matters to some extent. Related to that, a decision to decline would also have particular regard to the intrinsic values of King Shag as a Threatened species and its ecosystem (as per s7(d) RMA). As for s5 RMA, on the same basis, we find that a decision to decline the permits would assist the

safeguarding of the life-supporting capacity of air, water, soils and ecosystems whereas a decision to grant the permits would not materially assist this.

[118] We note that those findings are not sensitive to those aspects of the ecology evidence that we found inconclusive (notably concerning the preferred prey of King Shag and the effects of the physical presence of the farms on benthic prey and foraging). Rather, they are based largely on the non-contentious ecological evidence, as stated in the Ecology JWS (on which we have set out our findings).

[119] There are, of course, several other provisions of these statutory instruments that bear upon the consideration of the Proposals. We address these in relation to the different topics before reaching our overall conclusions.

Natural character and landscape values

[120] On these issues, we heard from three landscape architects – Mr Christopher Glasson for Clearwater, Ms Diane Lucas for the s274 societies, and Mr James Bentley for the Council. In addition, Mr Johnson gave planning evidence.

[121] Ecological and biodiversity values inform the environment's natural character and landscape values. Our findings on the potential effects of the Proposals for King Shag, ecology and biodiversity also inform our findings on the issues we now address. We therefore deal with natural character and landscape matters together.

How to treat the presence of the existing farms in the environment

[122] It was not a matter of dispute that, in a context where Clearwater seeks new consents to continue to operate the marine farms, the assessment of natural character and landscape effects proceeds on the basis that the marine farming structures are not present (in that their continued presence relies on the appeals being allowed). Of course, the position is not quite the same for natural character effects, in that natural character will to an extent be impacted by marine farming to date (e.g. effects on the benthos).

Sections 6(a) and (b) RMA and related objectives and policies

[123] Sections 6(a) and (b) RMA direct us relevantly as follows:

> In achieving the purpose of this Act, ... recognise and provide for the following matters of national importance:
>
> (a) the preservation of the natural character of the coastal environment (including the coastal marine area), wetlands, and lakes and rivers and their margins, and the protection of them from inappropriate subdivision, use, and development.
>
> (b) the protection of outstanding natural features and landscapes from inappropriate subdivision, use, and development.

[124] The issues in relation to natural character and landscapes are strongly driven by the priorities set by objectives and policies of the NZCPS and the Sounds Plan. That is in the sense that those instruments, in response to ss6(a) and (b), assist both in identifying natural character and landscape values for the subject environment and in setting priorities for the protection of those values.

What is natural character and how is it valued?

[125] As a measure of the relative lack of contention on what constitutes 'natural character', Clearwater's opening submissions quote from a paper presented to an international conference by the Council's landscape expert, Mr Bentley. We accept Mr Bentley's evidence on this, which he said draws from guidance documents issued by DoC (on NZCPS Policy 13) and the Ministry for the Environment, as follows:

> ... natural character is the level of actual (abiotic and biotic) and perceived (perceptual and experiential) 'naturalness' within a geographical area and is part of landscape. It is a measure of the degree of human modification of a landscape/seascape or ecosystem expressed in terms of:
>
> i. Ecological naturalness (indigenous nature); and
>
> ii. Landscape naturalness (perception of nature).

[126] Appropriately, Mr Bentley's above description does not assume that natural character is necessarily a subset of landscape values. While that will often be so, s6(a) RMA refers to the natural character in broader terms, referring to the natural character of the coastal environment, wetlands, lakes and rivers and their margins. While those listed matters will often be part of a landscape unit, and appropriately assessed on that basis, they may also be somewhat separate entities that warrant separate assessment. A river, for instance, may traverse several landscapes but its natural character will derive significantly from its instream values.

Relevant NZCPS provisions

[127] NZCPS Objective 2 is to preserve the natural character of the coastal environment and protect natural features and landscapes. Amongst the approaches it specifies for this is:

> recognising the characteristics and qualities that contribute to natural character, natural features and landscape values and their location and distribution.

[128] We understand that this is primarily directed to how plans should address s6(a) and (b) RMA. Its relevance to our consideration of the evidence on natural character and landscape values is in the sense that it encourages us to test what contributes to those values. That is important for informing us as to whether the Proposals affect those values and, if so, what is needed to protect those values.

[129] Policy 13 is headed 'Preservation of natural character'. Policy 13(1) specifies an overall policy direction to preserve the natural character of the coastal environment and protect it from inappropriate subdivision, use and development. It then expands that by its directions in (a) and (b). If the natural character of an area is determined to be 'outstanding', the direction in (a) is that adverse effects of activities on it should be avoided. Otherwise, the direction in (b) to avoid "significant adverse effects" and avoid, remedy or mitigate other adverse effects applies. Our findings on the evidence on these matters inform our approach.

[130] Policy 13(2) is prescriptive in that it seeks to distinguish natural character from natural features and landscapes and enunciates what natural character can encompass. Again, we approach this policy in light of our evidential findings as to the natural character in the environment in issue.

[131] Policy 14 is as to the promotion of the restoration or rehabilitation of the natural character of the coastal environment. It recognises the potential role of consent conditions for this purpose.

[132] Policy 15 concerns natural features and natural landscapes (including seascapes). It specifies an overall policy direction to protect the natural features and natural landscapes.

Sounds Plan objectives, policies and other provisions

[133] As Mr Johnson explains, the Sounds Plan does not give effect to the NZCPS's directions that natural character areas be ranked according to the relative levels of character they exhibit (i.e. NZCPS Policy 13).

[134] Natural character is addressed across various chapters and provisions, including Chapter 2 (specifically on natural character), Chapter 5 (on landscape), Chapter 9 (on the coastal marine area) and associated App 2 (and, to some extent App 1 on landscape).

[135] In Chapter 2, Objective 2.2.1 simply paraphrases s6(a) RMA. Therefore, we look to the related policies.

[136] Policies 2.2.1.1 and 2.2.1.2 work as a pair in giving direction on the approach to consideration of use and development. Their direction is to avoid adverse effects within those areas of the coastal environment which are "predominantly in their natural state and have natural character which has not been compromised" and encourage appropriate development where that character is already compromised and effects can be avoided, remedied or mitigated. In essence, those policies rely on a prior evidential finding as to whether their described benchmark is crossed (i.e. as to whether the natural character of the area has been compromised and is no longer predominantly in its natural state).

[137] In assessing the appropriateness of a use or development in the coastal environment, Policy 2.2.1.6 directs that regard be had to the ability to "restore or rehabilitate natural character in the area the subject of the proposal".

[138] Policy 2.2.1.7 directs that a precautionary approach be adopted to the making of decisions where the effects on the natural character of the coastal environment are unknown. We do not consider this policy is triggered here as we have evidence enabling us to be properly informed on natural character effects.

[139] Policy 2.2.1.8 works in tandem with App 2 (see below) and is:

> To recognise that preservation of the intactness of the individual land and marine natural character areas and the overall natural character of the freshwater, marine and terrestrial environments identified in Appendix Two is necessary to preserve the natural character of the Marlborough Sounds as a whole.

[140] App 2 identifies and describes biophysical and ecological aspects of the natural character of eleven land and eight marine areas depicted on associated Map 106 'Appendix Two – Land & Marine Ecosystems'. The terrestrial component of Pig Bay is part of the terrestrial area notated '3 Cook Strait'. As that name suggests, this component includes the outer parts of Capes Lambert and Jackson and various other outer edges of peninsulas and islands of the outer Sounds that reach to Cook Strait. The waters of Port Gore are part of a large marine natural character area notated 'B D'Urville Island – Northern Cook Strait'. In essence, App 2 is intended to serve as a description of "known core biophysical and ecological components that make up the natural character of the Marlborough Sounds" to be considered in effects' assessments for plan change and resource consent application processes.[73]

[141] Turning to landscape, the planning maps identify Cape Lambert and its immediate waters, including Pig Bay, as an Area of Outstanding Landscape Value ('Cape Lambert AOLV') (Map 75). A similar outer reach of Cape Jackson on the other shore of Port Gore is also identified as an AOLV.

[142] The introduction to Chapter 5 on Landscape explains that the chapter responds to ss6(b) and 7(c) and RPS Policy 8.1.3:

> Avoid, remedy or mitigate the damage of identified outstanding landscape features arising from the effects of excavation, disturbance of vegetation, or erection of structures.

[143] The associated explanatory text that prefaces Chapter 5's objectives and policies and methods includes the following further statements:

> In addition, the dynamic landscapes and seascapes of the coastal environment are among the most important components of natural character and amenity values in the Sounds ... Many areas with outstanding landscape values are also areas of high natural character. The visual and scenic qualities of coastal landscapes and seascapes also contribute to amenity, recreational, and tourism values and thereby enhance the social and economic wellbeing of the community.

73 Sounds Plan, App 2, p 1.

> The Marlborough Sounds has landscapes which are unique in New Zealand and are valued for their semi-wilderness aspects, scenic beauty, recreational capability and their social, economic and cultural utility. This chapter ... establishes objectives, policies and methods to achieve the protection of these valued landscapes from inappropriate subdivision, use and development.

[144] Following this introductory text, under a heading 'Identification of Outstanding Natural Features and Landscapes' is an explanation of why particular landscape units have been so identified in the Sounds Plan. There is a statement that, in its entirety, the landscape of the Sounds Plan area has outstanding visual values. It lists examples of 'visual features' of the Sounds that contribute significantly to its outstanding character, including 'The curving coastline with a range of tidal estuaries and sandy and rocky beaches', 'Highly weathered coastal cliffs', 'Rolling ridgelines along the skyline', and 'Uninterrupted sequence from hilltop to seafloor'. The statement also explains that AOLVs are shown on the planning maps.

[145] At 5.2, there is a single 'Issue' set out as to the adverse effects of inappropriate subdivision, use and development on the outstanding natural features and landscapes. That is expanded on at 5.2.2, which states that the siting, bulk and design of structures and equipment located on the surface of water can interrupt the consistency of seascape values and detract from them.

[146] App 1 to the Plan explains how AOLVs were selected, drawing from work undertaken in 1989/90 by Earl Bennett *et al.* Mr Bennett was then an employee of DoC. In essence, that selection (including of the Cape Lambert AOLV) was by reference to its specified definition of 'outstanding landscapes' with reference to a list of thirteen indicators. The definition lists thirteen bullet points prefaced as follows:

> Outstanding landscapes = landscapes exhibiting high quality in one or more indicators which might be expressed as landscapes and which have the following characteristics.

[147] App 1 also specifies evaluation criteria, intended as a non-exclusive list of matters for assessment of resource consent applications. Those matters ('App 1 assessment matters') are:

(a) will it add a significant level of structures or roading to the landscape?
(b) will it compromise natural landform by modifying elements of the landscape?
(c) will it reduce the area or degrade the significance of any indigenous vegetation?
(d) will it compromise the natural character of the coastal edge through modification by artificial structures or land disturbance?
(e) will it alter the landscape in such a way that the landscape's unique status is compromised?
(f) will it introduce into the landscape a feature, activity, form, line, or texture which is incongruous with the dominant character and coherence of the landscape?
(g) will it introduce into the landscape a feature, activity, form, line, or texture which enhances or improves the overall coherence of the landscape?

[148] The Sounds Plan objectives and policies focus on the management of activities for the protection of visual quality of identified outstanding natural features and landscapes. Objective 5.3.1 refers more broadly to management of the visual quality of the Sounds and protection of outstanding natural features and landscapes from inappropriate subdivision, use and development. As set out at [51], Policy 5.3.1.1 is directed to avoiding, remedying and mitigating adverse effects of use and development on the visual quality of identified outstanding natural features and landscapes. Other policies are focused on terrestrial activities.

[149] In addition to Objective 5.3.1 and Policy 5.3.1.1 are the above-noted Chapter 9 objectives and policies. These encourage marine farms, but subject to various directions concerning the management of environmental outcomes. Those include policies as to enabling activities including marine farming in 'appropriate places in the waters of the Sounds' (9.2.1.1.14), identifying various values having priority, as to conservation and ecology, landscape and seascape and aesthetic values, marine habitats, natural character, public access and recreational values (9.2.1.1.1). There is a further policy expressing the extent of avoidance and mitigation intended "as far as practicable be avoided" and, if avoidance is not possible, for mitigation and remediation "to the extent practicable" (9.2.1.1.2).

pEMP natural character provisions

[150] The pEMP maps as Outstanding Natural Character ('ONC') the extremities of Cape Lambert (including Pig Bay) and Cape Jackson and the outer reaches of the waters of Port Gore and associated Cook Strait waters (Map 2). Capes and Cook Strait waters are also mapped as having Very High Natural Character ('VHNC'), with the intervening waters of Port Gore being mapped as High Natural Character ('HNC'). App 2 in Vol 3 of the pEMP describes the following contributing values to this VHNC character rating for the area it terms 'Cape Lambert – Cape Jackson':

> **Key values**
> Largely unmodified section of coast with exposed rocky bluffs, headlands and reefs.
> - Cape Lambert Scenic Reserve
> - Adjoins Coastal Marine Area G at Cape Jackson
>
> **Additional comments**
> Some commercial trawling offshore.
> Offshore areas in Waitui Bay are commercially dredged for scallops.

[151] The pEMP maps what it terms 'Inner Port Gore' as HNC. App 2 describes its key values as follows:

> **Relatively sheltered and largely unmodified intertidal and near-shore marine environment**
> - Cape Lambert Scenic Reserve.
> - Eastern and southern shores backed by regenerating scrub/forest.
> - Some ecologically significant marine sites.

[152] There are associated objectives and policies as to:

(a) establishing the degree of natural character in the coastal environment, lakes, rivers and their margins (Objective 6.1);

(b) recognising that specified natural elements, patterns, processes, and experiential qualities contribute to natural character (Policy 6.1.1) and identifying the extent of the coastal environment to establish areas of land and coastal marine area where management may be needed (Policy 6.1.2);

(c) determining the "degree of natural character in both the coastal marine and coastal terrestrial components of the coastal environment" by assessing the degree of human modification and assessing natural character at a range

of scales (being HNC, VHNC, ONC) (Policies 6.1.3, 6.1.4);

(d) preserving the natural character of the coastal environment (lakes and rivers and margins) and protecting them from inappropriate subdivision, use and development (Objective 6.2); and

(e) avoiding adverse effects on ONC areas of the coastal environment (Policy 6.2.1) and avoiding reduction in the degree of natural character in HNC and VHNC areas (Policy 6.2.3) and a range of other policies.

[153] We are mindful that the pEMP is in an early stage of formation and many submissions (which had not been determined at the date of the hearing) challenged fundamental aspects of them. As such, we treat the directions given by its objectives and policies as being as yet undetermined. Having noted that, we observe that they are broadly consistent in their direction to the NZCPS. We observe that the experts' common methodology for ranking degrees of natural character is broadly consistent with the pEMP's specified methodology, and that accords further weight to the experts' approach. We acknowledge that the pEMP's proposed classification of Outer Port Gore area as VHNC and in part ONC and of Inner Port Gore as HNC is a matter that is being contested in submissions. However, there is a high degree of consistency between those rankings and those of Mr Bentley and Ms Lucas and we find that to accord some further weight to those experts' opinions. That is similarly the position for the pEMP's proposed Outer Sounds ONL and Cape Lambert and Cape Jackson ONFs.

[154] The determination of the natural character values of an area involves a high degree of evaluative judgment. That is both as to the nature and degree of the natural character values of the environment and how an activity affects those values. Natural character assessment properly commences with consideration of the biophysical status of the area in question. As looks can deceive, this enquiry is an important first step in order to understand the degree of naturalness of (or degree of human modification to) the relevant area. It is both a factual and science-focussed enquiry. 'Character' is a perceived value. Hence, once the degree of naturalness in the receiving environment is accurately gauged, the second step in a natural character assessment is to evaluate how people would sense and experience the naturalness of that environment.

[155] The NZCPS provides for ranking of relative natural character. That includes identifying whether the natural character is outstanding. A natural character assessment endeavours to identify community-held values. It can also be assisted by what relevant statutory instruments (e.g. the RPS or a regional or district plan) identify and prioritise.

As we note at [140], the Sounds Plan App 2 is intended to serve as a description of "known core biophysical and ecological components that make up the natural character of the Marlborough Sounds". It includes description of those components for the Port Gore area notated 'B D'Urville Island – Northern Cook Strait'.

What spatial area(s) are appropriate for landscape and natural character assessments?

[156] In landscape assessment, the spatial area for the assessment is typically called a 'landscape unit'. In essence, a landscape unit represents the catchment within which there are shared biophysical, associative and perceptual landscape values. In this case, there is also a need to consider a relevant spatial area for the purposes of natural character assessment. Proper definition of the extent of these spatial areas for assessment is important for the reliability of both natural character and landscape assessments. If the spatial area is too broad, this can result in an inappropriate discounting of localised natural character or landscape values and dilution of associated effects of the Proposals on those values. Defining too small a receiving environment could have the opposite consequences.

[157] For those reasons, the court directed the landscape experts who undertook facilitated conferencing prior to the hearing to include in their joint witness statement "a map or maps delineating the boundaries of identified landscape areas and features, and natural character areas regarded as material".[74] As we have noted, in this case natural character informs landscape character. Further, despite some material differences in methodology, the landscape experts each treated their relevant spatial area for natural character assessment as essentially one in the same as their defined landscape unit. We find that appropriate. To avoid confusion in terminology, however, we use the neutral concept of 'spatial area' when we are considering both landscape and natural character assessment in this decision. For landscape assessment findings, we use the term 'landscape unit' to refer to that area.

[158] Ms Lucas and Mr Bentley used closely-similar spatial areas for their assessments. As we discuss shortly, Mr Glasson took a significantly different approach.

74 Minute dated 10 November 2018.

[159] The Sounds Plan and pEMP assist to some extent in this exercise. As noted, the Sounds Plan maps identify the outer parts of both Cape Lambert and Cape Jackson within what it terms the 'Outer Sounds' Area of Outstanding Landscape Value ('AOLV'). This mapped AOLV includes the relevant parts of Pig Bay, including both its land and sea components.[75] The pEMP assists in its mapping and ranking of natural character areas and the Outer Sounds ONL and Cape Lambert and Cape Jackson (as ONC, VHNC and HNC). It also defines geographic areas of the Sounds as natural character areas. The Proposals are within its mapped areas '3. Cook Strait' and 'B. D'Urville Island – Northern Cook Strait'.

[160] The Landscape JWS records that the landscape witnesses agree that the Sounds Plan's methodology for deriving its AOLV (in Sounds Plan App 1) is outdated.[76] We agree that it does not properly accord with the methodology that has been applied and refined in several Environment Court decisions (and loosely termed, after the leading case, the *Pigeon Bay* methodology or modified methodology). Of course, even that methodology is capable of being modified or indeed superseded, being in essence the product of evidential findings in relevant cases (and of then-current landscape assessment practice).

[161] Despite reflecting out-dated methodology, App 1 has weight simply in the sense that it is part of the operative Sounds Plan. Importantly, for our purposes, the Sounds Plan has identified outer Port Gore, including Pig Bay, as part of an AOLV. That is relevant for the purposes of our findings under s6(b) RMA and our evaluation and application of the Sounds Plan's related objectives and policies. App 1 also informs our assessment of natural character values within this landscape unit.

[162] The Landscape JWS records the following consensus amongst the landscape experts also relevant for our consideration of s6(b) and the NZCPS:[77]

> In terms of scale, we agree that in terms of landscape ... Pig Bay is part of the Marlborough ONL at a national level. In terms of a regional level, we all agree that Pig Bay forms part of the Outer Sounds Landscape and is part of the Outer Sounds Outstanding Natural Landscape. Map attached.

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75 Sounds Plan, Vol 3, Map 75.

76 Landscape JWS dated 20 November 2017, table, under heading 'Identifying and assessing attributes, characteristics and values'.

77 Landscape JWS table, under heading 'Identifying and assessing attributes, characteristics and values'.

[163] The Landscape JWS includes a map showing the full extent of the Outer Sounds ONL to encompass everything between the far eastern and western extremities of the Outer Sounds as well as a significant part of Cook Strait and the east coast Pacific border of the upper South Island. That assists insofar as it demonstrates that there are different scales at which landscape can be assessed. The local scale is the most relevant to our assessment of the effects of the Proposals, both for natural character and landscape matters, but assessment of effects on that local spatial area properly proceeds in the context of the wider mapped spatial area.

[164] As to the spatial extent of the local landscape unit, there was no material difference between Ms Lucas (for the s274 societies) and Mr Bentley (for the Council).

[165] Mr Glasson prepared a landscape assessment for Clearwater's original consent application to the Council. This assessment was for the purposes of considering the Proposals against landscape assessment criteria in App 1 of the Sounds Plan ('application landscape assessment'). It was entitled 'Pig Bay Marine Farm Proposal – Marlborough 1.4: Pig Bay Context' ('Pig Bay landscape assessment plan'). It included a map of Port Gore area depicting Capes Lambert and Jackson (and also Waitui Bay to the east of Cape Lambert) and identified the locations of Sites 8165 and 8166 in Pig Bay. Seaward of Cape Lambert, a black line was drawn from just south of Hunia Point to the tip of the cape. This was denoted 'Pig Bay Context'. The two farm sites are shown landward of the line, at approximately its midway point.

[166] Mr Glasson initially denoted the relevant part of Cape Lambert and the waters landward of his 'Pig Bay Context' line (including Pig Bay itself) as a single landscape unit. He explained his rationale was that landscape was experienced when travelling from the coastal waters of Waitui Bay (west of Cape Lambert) around into Port Gore.[78]

[167] However, he then qualified that by splitting off and assessing the landscape values of Cape Lambert separately from what he termed "the majority" of Pig Bay. He treated the predator fence as "an appropriate boundary"[79] between these two landscape components. As noted, the predator fence (or more precisely the stock-proof fence) marks a boundary between the Moleta land and the adjacent DoC scenic reserve on the

78 Christopher Glasson evidence-in-chief for Clearwater, dated 10 March 2017, at [72].
79 Christopher Glasson evidence-in-chief for Clearwater, dated 10 March 2017, at [99].

outer part of Cape Lambert. Our site visit clearly revealed it as a visual dividing point between grass and regenerating scrub, no doubt as a consequence of the effective role the fence plays in excluding stock, pigs and goats from the reserve. Somewhat confusingly, Mr Glasson then introduced the term "the site landscape", and he summarised his assessment of it (with reference to the thirteen indicators listed in App 1 to the Sounds Plan) as follows:[80]

> Averaging out the result of these 13 indicators, the common trait is that the site landscape has a 'moderate' value for the majority of the [sic] Pig Bay (predator fence to Hunia) as follows. However, I recognise that Cape Lambert is an Outstanding Natural Feature (ONF). The area behind site 8165 is considered to be ONF while the landscape behind site 8166 is considered to be non-ONL.

[168] When tested in cross-examination, he initially confirmed that his 'site' (i.e. spatial area for assessment purposes), was Pig Bay *as well as* Cape Lambert reserve through to Hunia Point.[81] Some confusion arose when he was asked to explain how this approach reconciled with his evidence. On a copy of his Pig Bay landscape assessment plan (Exhibit 1.4CG), he initially marked the spatial area (in yellow) as extending from Taratara Point, west of the farms, down to Papatua.[82] Later in cross-examination, he corrected that answer by replacing his yellow line with a blue one that terminated much further south at Hunia Point (being the southernmost extent of the Pig Bay Context line in his Pig Bay landscape assessment plan).[83]

[169] He acknowledged the conceptual difficulties with his approach, explaining:[84]

> Well it's a matter of determining where the exact site is and I had widened it to include the area to the Hunia point, because the main reason was that from a plan view, sure you could have Papatua as a southern or western help [*sic*][85] point to Pig Bay but when you get out on the boat that doesn't read at all and therefore you look at – you see the southern boundary, western boundary as Hunia Point. So I did – was a little bit divided as to which, or we could define the exact southern boundary to that bay.

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80 Christopher Glasson evidence-in-chief for Clearwater, dated 10 March 2017, at [95].
81 Transcript, p 190, l 1-8.
82 Exhibit 1.4CG, yellow line.
83 Transcript, p 194, l 15-20.
84 Transcript, p 192, l 31, 32, p 193, l 1-6.
85 We take the word 'help' in the Transcript to intend 'most', i.e. westernmost.

[170] The net result, as we understand it, is that Mr Glasson started initially with a single landscape unit (i.e. as denoted by his Pig Bay Context line) but then subdivided this into separate units, even insofar as keeping distinct the landscape "behind" farm 8165 (ONF) from the landscape behind farm 8166 (non-ONL). Nevertheless, he then treated the landscape as a single unit again for the purposes of his overall conclusion that the Proposals would not impact on "the landscape or features as a whole".[86]

[171] Both Ms Lucas and Mr Bentley applied the landscape scales that are used in the Sounds Plan and pEMP, in their landscape assessments. In essence, their consideration of the broader Outer Sounds scale is in order to consider the local Pig Bay landscape unit in its wider Sounds landscape context. We find that approach properly reflects the intention of the Sounds Plan (and pEMP) and good practice. As to the latter, it is inherent that a person will perceive and respond to landscape values in a local setting in terms of the values they remember of that setting's wider context. The appreciation of Milford Sound is clearly enhanced by its Fiordland context, and similarly Pig Bay is part of Port Gore which is part of the Outer Sounds and wild Cook Strait context.

[172] Ms Lucas identified the landscape context, for the purposes of assessing the Proposals, as being the "land and waters of Te Anamāhanga/Port Gore". She also described Pig Bay as "well-separated from" the Melville Cove part of Port Gore by Hunia and as "an enclave in the inner bay".[87] She concurred with Mr Bentley's 2016 report to the Council hearing which she surmised to be that "Pig Bay and Port Gore" are "appropriately recognised as ONL/ONF".[88] Part of her reasoning for that was that the Sounds Plan and pEMP treatment of natural character and landscape values for Pig Bay and Port Gore are relatively consistent. She noted that the Sounds Plan AOLV classification of the area includes the relevant land and sea of Pig Bay. As for the pEMP, she noted its various proposed natural character and landscape classifications. Those she noted include the proposed "Outstanding Natural Character" classification "across Cape Lambert and the outer Te Anamāhanga waters", the proposed identification of Cape Lambert, Cape Jackson and Alligator Head as Outstanding Natural Features ('ONF') and the proposed inclusion of the "balance of Port Gore (excluding Melville Cove)" as part of the Outer Marlborough Sounds ONL".[89]

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86 Christopher Glasson evidence-in-chief for Clearwater, dated 10 March 2017, at [103].
87 Diane Jean Lucas evidence-in-chief for the s274 societies, dated 7 April 2017, at [22]-[24].
88 Diane Jean Lucas evidence-in-chief for the s274 societies, dated 7 April 2017, at [29].
89 Diane Jean Lucas evidence-in-chief for the s274 societies, dated 7 April 2017, at [26].

[173] Similarly, Mr Bentley's landscape unit was Te Anamāhanga/Port Gore as part of an Outer Sounds ONL. He then assessed Te Anamāhanga/Port Gore as a single landscape unit and the Pig Bay/Cape Lambert area as part of it.[90] As with Ms Lucas, he did not seek to split off part of that local area from another.

[174] We find the methodologies applied by Ms Lucas and Mr Bentley are properly consistent with the Sounds Plan and pEMP and Mr Glasson's is not.

[175] Mr Glasson quite rightly noted that it is important "that the scale of landscape must be credible and must not be diced up into too small components".[91] Conversely, as Ms Lucas put it, stepping back too far results in the specific attributes associated with that landscape becoming a blur.

[176] We find that Mr Glasson's method of treating the Pig Bay landscape as being divided by the stock fence would not accord with how an ordinary person would experience it, whether from the deck of a boat or standing on the reserve. Rather, they would treat the Cape as a single entity despite the somewhat discordant effect of the straight fence line edging to the regenerating bush and pasture. Their perception would also treat the land and waters of this part of Port Gore as connected and integrated and as a part of the wider landscape of Te Anamāhanga/Port Gore. We find the landscape units chosen by Ms Lucas and Mr Bentley properly accord with how the landscape would be experienced, whereas Mr Glasson's does not.

[177] A person experiencing the Pig Bay landscape would do so in the context of their memory of how Port Gore sits within the wider Outer Sounds, an environment of water and land extending to and merging with the wild waters of Cook Strait. We find that Ms Lucas and Mr Bentley have treated the wider landscape setting in such a properly contextual way. Mr Glasson has not.

[178] Those findings have a significant bearing on our preference for Ms Lucas' and Mr Bentley's overall landscape assessment over that presented by Mr Glasson on this occasion.

90 James Arthur Bentley evidence-in-chief for the Council, dated 7 April 2017, at [7.29]-[7.34].

91 Christopher Glasson evidence-in-chief for Clearwater, dated 10 March 2017, at [70].

[179] We apply the same spatial areas in our consideration of natural character and landscape effects as were applied by Mr Bentley and Ms Lucas.

Evaluation of the evidence on the effects on natural character

[180] In their natural character assessments, each landscape architect focussed on the Pig Bay area, as noted in the Landscape JWS as follows:[92]

> In terms of the extent of the Pig Bay area (and scale/extent) we all agree that this includes water between the two headlands (Papatua and Taratara) and the terrestrial backdrop up to the ridge of the bay.

[181] The landscape architects also helpfully applied a common seven-point scale to rate natural character, on a before and after basis, so as to measure the effects of the Proposals on natural character. They described these to be Very Low ('VLNC'), being highly modified (e.g. Picton, Havelock Harbour), Low ('LNC'), Moderate – Low ('MNC/LNC'), Moderate ('MNC'), relating to the level of removal of vegetation and land/water-based structures (e.g. Melville Cove), Moderate – High ('MNC/HNC'), High ('HNC') and Very High ('VHNC'), being virtually unmodified (e.g. upper parts of Mt Stokes/Tennyson Inlet). They explained that they assessed Outstanding Natural Character ('ONC') separately.[93]

[182] In his evidence-in-chief, Mr Glasson touched on biophysical effects, fundamentally relying on what he termed "the Davidson Report" (by Clearwater's witness, Mr Davidson) to conclude there would be "little effect". He commented that aquaculture "has no, or trivial, effects on a biotic [sic] process (hydrology, geology, land form, soils, climate etc.) and there is no effect on terrestrial ecology." He offered the view that, in a comparative sense, aquaculture "has a higher natural character" than terrestrial farming in the sense that it involves farming of indigenous species rather than introduced monoculture. He concluded that the farms do not affect natural patterns and processes or geomorphology. Rather, their effects were only of the perceptual element of natural character.[94]

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92 Landscape JWS, table, under heading 'Identifying and assessing attributes, characteristics and values'.

93 Landscape JWS, table, under heading 'Identifying and assessing attributes, characteristics and values'; 2nd part under 'methodology'.

94 Christopher Glasson evidence-in-chief for Clearwater, dated 10 March 2017, at [127], [128], [132].

[183] In terms of the perceptual element of natural character, Mr Glasson focussed primarily on the terrestrial environment, rather than the sea. He rated Pig Bay as MNC/HNC, with the Cape Lambert Reserve from the headland to the stock-proof fence as having ONC and VHNC, and the balance MNC. He acknowledged the hilly backdrop has "a degree of natural character" although this land form was either in pasture or had patchy native cover in a state of recovery and improving but "not at the high end".[95]

[184] Given that backdrop, he assessed that farm 8166 would not adversely affect natural character. He assessed that farm 8185 (being the farm closer to the Cape Lambert Scenic Reserve) would have only a minor effect that would, to some extent, be only transient. That was in the sense that on "rare calm days" where the farm was immediately in view and "backlit" there would be an increase in "visual effect" (whereas the farm would have a "less than minor effect" when it was in shadow). Hence, he concluded that there would be "minor or transient effects" on experiential and sensory elements.[96]

[185] The Landscape JWS records that, in addition, Mr Glasson considers the natural character of the marine environment to be HNC or MNC, depending on "the condition of the seabed".[97]

[186] Mr Bentley ascribed a relatively higher natural character rating to the terrestrial environment. He noted 'Outer Port Gore' as predominantly natural and wild and scenic. The unmodified open waters of Cook Strait and the outer embayments were the dominant seascape feature (which he rated as ONC, VHNC). He noted that his ONC rating is consistent with the rating given by 2014 report by Boffa Miskell on the natural character of the Marlborough Coast. He contrasted this with the relatively greater degree of modification in the inner Port Gore area. His overall rating for the collective terrestrial components of Te Anamāhanga/Port Gore was HNC.

[187] His overall rating of the terrestrial components of Pig Bay was of HNC. That took account of the advanced regenerating natural species predominantly within the reserve (which part he rated as VHNC) and the predominantly pastoral land on the Moleta side

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95 Christopher Glasson evidence-in-chief for Clearwater, dated 10 March 2017, at [118]-[122].

96 Christopher Glasson evidence-in-chief for Clearwater, dated 10 March 2017, at [124]-[127].

97 Landscape JWS, table, under heading 'Identifying and assessing attributes, characteristics and values'.

of the stock proof fence, which had relatively few structures, and which he rated as having MNC/HNC natural character.[98]

[188] For the marine component (without the farms), he ascribed a VHNC rating. That was in terms of the fact that Pig Bay is "currently free of surface modification" (i.e. on an assumption that the marine farms are not treated as being in that environment). However, he also recognised that the marine farms have altered the benthos to varying degrees and that another mussel farm is located to the south, beyond Papatua.[99]

[189] His overall conclusions were as follows:

> Perceptual elements of naturalness are amplified where there is least modification. The relatively remote setting of the bay away from areas of habitation and principal transportation routes coupled with the well-advanced nature of regeneration of the bush to part of Pig Bay, limited or subservient modification to the pastoral lands, and no water-based modification (apart from the one marine farm to the south) means that Pig Bay rates highly for experiential aspects of naturalness. The darkness of the sky and its transitory allure through weather and seasonal changes further endorses this high experiential rating. ...
>
> Overall, I consider that the marine component of Pig Bay (north of Papatua) holds very high levels of natural character (appraised with the farms not in place) tending to Outstanding Natural Character within the eastern part.

[190] Ms Lucas agreed with Mr Glasson that, from the tip of Cape Lambert through to the stock-proof fence, the terrestrial part of the cape is properly rated as having ONC. However, she identifies as a deficiency in Mr Glasson's assessment that he has not properly accounted for the biophysical and experiential attributes of the waters. She took issue with his conclusion that there are no biophysical effects as being unjustified and incorrect. In her opinion, without the marine farms, ONC and VHNC would extend beyond the pEMP mapped area to encompass the whole of Pig Bay. She noted that, in terms of the biophysical aspects of natural character, it was important to consider what lies beneath the waters of Port Gore, as well as "what pokes out". As to that, she pointed out that there is a drowned ridge complex that links the South and North Islands and is a geomorphic feature that "is prominent in and important to" the Cape's environs and to Port Gore's "unique natural character". Associated with those abiotic attributes, she

98 James Bentley evidence-in-chief for the Council, dated 7 April 2017, at [7.15], [7.16].

99 James Bentley evidence-in-chief for the Council, dated 7 April 2017, at [7.17], [7.23], [8.4]; Landscape JWS, table, under heading 'Identifying and assessing attributes, characteristics and values'.

noted the visiting and resident wildlife and their natural patterns and processes, including their associations with each other and with the abiotic attributes she described. She agreed with Mr Bentley that the waters of the outer bay and Cook Strait have natural character that is VHNC and ONC.[100]

[191] She considers that the Proposals would significantly adversely affect the natural character of the Cape Lambert and Pig Bay terrestrial and marine environs in various ways. They would introduce "non-natural, man-made structures" and disruptions and changes to abiotic characteristics and values associated with the seabed. They would also adversely affect the biophysical marine environment through their "artificial concentration of crop and the shell deposition". She also referred to the transitory, although regular and "predictable", activities of servicing and harvesting vessels and related activities as affecting the naturalness of these remote waters. She described the rows of buoys as detracting from the naturalness of the water surface, noting that the navigational lighting would also mean a night time visual detraction.[101]

[192] There is a degree of artificiality in the methodologies of each of the landscape architects, in that they split the coastal environment into discrete terrestrial and water 'components'. This was most pronounced in Mr Glasson's methodology. He predominantly focussed on terrestrial natural character and gave only limited consideration to the waters of Port Gore and Pig Bay. In reality, there are no such divisions in how a person would typically perceive the natural character of the coastal environment. In terms of s6(a) RMA and related NZCPS, Sounds Plan and pEMP objectives and policies, "the natural character of the coastal environment" is more properly to be assessed holistically. However, we acknowledge that Policy 6.1.3 of the pEMP also invites the approach taken by the experts.

[193] Having noted that, we accept Mr Bentley's and Ms Lucas' approach of first rating the existing natural character of Te Anamāhanga/Port Gore as a whole, and then rating the natural character of Pig Bay in that context. We find that it sits well with the fact that Pig Bay is approximately at the mid-point along Cape Lambert.

100 Diane Lucas evidence-in-chief for the s274 societies, dated 7 April 2017, at [42]-[46].
101 Diane Lucas evidence-in-chief for the s274 societies, dated 7 April 2017, at [19]-[21], [53]-[57].

Our findings as to existing natural character

[194] We are also mindful that the experts' rankings of terrestrial natural character were based on somewhat limited biophysical evidence. However, given the effectiveness of the stock proof fence, we infer that there is a very high biophysical value in the regenerating indigenous vegetation that is clearly evident beyond the fence line (as is also noted in the 2015 Boffa Miskell report to which we shortly refer). As such, we are satisfied there is sufficient biophysical justification for the ONC and VHNC values ascribed to the Outer Port Gore component. Our ratings of HNC/MNC for the Inner Port Gore terrestrial components includes a rating of MNC for the Melville Cove environs and that portion in the vicinity of the Marchant property and the monocultural pasturelands here. Given the extent of those pasturelands, we have ascribed an overall ranking of MNC here (although we find that the substantial extent of the Inner Port Gore waters, outside of Melville Cove, would be HNC).

[195] We accept the evidence of Mr Bentley as to the geomorphological significance of Cape Jackson as a drowned ridge crest. We also accept Ms Lucas' point that this significance, as a contributor to biophysical values, does not stop at the water line. Mr Bentley correctly acknowledged that the benthos has been modified by the history of aquaculture in the vicinity of Pig Bay. As the ecology evidence explained, it is also degraded from siltation from decades of terrestrial farming (as is the case for much of the Sounds). On the other hand, we agree with Ms Lucas that visiting and resident wildlife are a further important contributor to the natural character of the land and waters of Port Gore. The ecology evidence focussed primarily on King Shag. Given its Threatened status, we find that the existing, albeit small and vulnerable, satellite King Shag colony at Hunia is one such important contributor to Port Gore's natural character. We agree with Ms Lucas that Mr Glasson's assessment was deficient in not properly accounting for the biophysical attributes of the waters of Port Gore and Pig Bay. On the matter of marine biophysical values, we generally find the evidence of Ms Lucas and Mr Bentley reliable, but not that of Mr Glasson.

[196] In other respects, we rely on the expert opinions given by Mr Bentley and Ms Lucas as to the experiential and perception values that are associated with Pig Bay and the wider Port Gore environs.

[197] For those reasons, applying the experts' seven-point ranking system, we find existing natural character for the various noted components of Port Gore is as follows:

Existing natural character (assuming the two marine farms are not in place)

Components of Port Gore environment	Terrestrial rankings	Waters rankings	Overall existing rankings
Outer Port Gore (for terrestrial including stock fence to outer tip Cape Lambert; for waters including Cook Strait and outer embayments)	ONC & VHNC	ONC & VHNC	VHNC
Inner Port Gore (including Moleta land from stock fence)	HNC & MNC	HNC & MNC	MNC
Pig Bay	HNC	HNC	HNC
Land and waters of Port Gore as whole			**HNC**

[198] The only material respect in which we differ from Mr Bentley and Ms Lucas is that we derive an overall ranking of MNC for Inner Port Gore, as a consequence of the findings we make as to the exotic monoculture of the areas in pastoral farming. However, that does not materially affect our overall rankings of Pig Bay and Port Gore as a whole of HNC.

Our findings as to the Proposals' effect on existing natural character

[199] Sounds Plan Policy 2.2.1.1 on avoidance of effects is not triggered unless the relevant area of coastal environment is 'predominantly' in its natural state and does not have compromised natural character. On the basis of our finding that the natural character in Pig Bay and Port Gore as a whole is HNC (rather than ONC), we find this policy is not triggered.

[200] Therefore, we find the relevant priority (in terms of the objectives and policies of the Sounds Plan) is whether the intactness of the relevant natural character areas (i.e. '3. Cook Strait', 'B D'Urville Island – Northern Cook Strait') would be preserved and whether there would be effective management of the proposed development so as to avoid significant degradation of natural character. Essentially consistent with that, the relevant emphasis of the NZCPS is on whether the natural character of the coastal environment would be preserved and protected from inappropriate development.

[201] There were significant differences about these matters between Mr Glasson and the other landscape architects:

(a) Mr Glasson considered that farm 8166 would cause "less than minor" effects and farm 8165 would cause mostly minor and otherwise transient (depending on weather conditions) adverse effects on his rankings of existing natural character.[102] If we were to accept those opinions, it would lead us to conclude that the Proposals would be supported by the Sounds Plan and not offend either the Sounds Plan or the NZCPS. Those conclusions would also lead us to conclude that the Proposals would not offend s6(a) RMA;

(b) Mr Bentley considered that the Proposals would have significant adverse effects such as to reduce the overall natural character "at this part of the coast" (which we understand to refer to the Pig Bay area) from HNC to MNC.[103] Similarly, Ms Lucas considered that the Proposals (whether the farms were considered separately or together) would significantly adversely affect the natural character of both Pig Bay and the Cape Lambert environs.[104] If we were to accept those opinions, it would lead us to conclude that that the Proposals would offend the Sounds Plan, NZCPS and s6(a) RMA.

[202] Mr Glasson's opinion was fundamentally based on his different rankings of existing natural character, these being generally significantly lower than those of Mr Bentley and Ms Lucas. As we do not accept Mr Glasson's opinion on this (for the reasons we give at [194]-[198]), we do not accept his overall conclusions on the effects that the Proposals would have on natural character. However, we find some strength in Mr Glasson's observations concerning the effects of typical weather conditions in Port Gore on perceptions of natural character, as we now discuss.

[203] Mr Bentley gave particular emphasis to how he considered the Proposals would impact visually, on people's perceptions of naturalness. His discussion on this commenced with an observation that the "unnatural form" of surface mussel farms can adversely change and alter the natural character of an area. He offered the view that

102 Christopher Glasson evidence-in-chief for Clearwater, dated 10 March 2017, at [133].
103 James Bentley evidence-in-chief for the Council, dated 7 April 2017, at [8.13].
104 Diane Lucas evidence-in-chief for the s274 societies, dated 7 April 2017, at [57].

such an effect could be significantly adverse for up to 500m from standard farm structures. He went further to suggest that someone at this distance "in otherwise pristine waters" (which we presume means dead calm waters) would be "highly likely to consider that the natural character of the area they are in has been compromised". His overall conclusion was as follows:[105]

> Based on this and collectively (i.e. marine and terrestrial areas of natural character) it is considered that the natural character effects will be locally high. The unnatural patterns and elements created by the number of visible buoys in straight, geometric lines will reduce the coastal natural character values from high, to moderate at this part of the coast. Remnant natural character where terrestrial and marine coastal processes interplay will be further reduced in this bay. There will also be ongoing adverse effects on the ONC, prohibiting the ONC to extend into the northern part of Pig Bay.

[204] Mr Bentley included with his evidence (as App 3A) a 'Natural Character, Landscape and Visual Amenity Graphic Supplement' pertaining to his assessment of effects of the Proposals on those matters.[106] This included seven photographic images from viewpoints at various noted distances from the existing farms (4km, 3km, 1.5km, 850m, 400m, and one from a farm track on private land above the farms). A common feature of the photographs is that the sea conditions were dead calm. When cross-examined about this, he explained that those were the conditions on both his site visits, although he accepted the area is notoriously rough, given its proximity to Cook Strait.[107] He noted that the farms were clearly visible to his naked eye from 850m and reaffirmed his opinion that the farms would be "highly visible" within 500m.[108]

[205] In contrast, Ms Lucas based her opinion more on how the Proposals would disrupt biotic and "abiotic characteristics and values" including, as noted, the submerged ridge.[109]

[206] In reaching his overall conclusion that the Proposals would degrade natural character at Pig Bay from high to moderate, we find that Mr Bentley exaggerated to some extent the visual perception of an observer. We suspect that was largely as a

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105 James Bentley evidence-in-chief for the Council, dated 7 April 2017, at [8.13].

106 James Bentley evidence-in-chief for the Council, App 3A, Pig Bay Marine Farms Natural Character, Landscape and Visual Amenity Graphic Supplement to accompany the Environment Court evidence of James A Bentley, dated 7 April 2017.

107 Transcript, p 326, l 25-33, p 327, l 1-16.

108 Transcript, p 332, l 20-32.

109 Diane Lucas evidence-in-chief for the s274 societies, dated 7 April 2017, at [53]-[57].

consequence of the unusually calm sea conditions that prevailed during his site visits (when he also took his photographs). In the relatively more boisterous, but not uncommon, conditions that prevailed during the court's visit, the buoys of the existing farms were more concealed by the choppy sea. While the court noticed the buoys from a distance of some 400m-500m, that would have been in part because we were searching for them.

[207] However, on the evidence, we are not satisfied that the Proposals would keep intact the relevant natural character areas under the Sounds Plan (i.e. '3. Cook Strait', 'B D'Urville Island – Northern Cook Strait'). Related to that, we find that the mitigation offered in the Proposals (namely reduction in the area of the farms) would not effectively manage the development so as to avoid significant degradation of natural character. That is partly because of the findings we reach at [90]-[93], concerning the risk that human activity associated with the operation of the marine farms would pose for King Shag. The Sounds Plan identifies King Shag as part of the biological environment of the '3. Cook Strait Natural Character area'. The Sounds Plan also identifies King Shag roosts as part of this area. Our evidential findings are consistent with that. In a direct sense, human activity associated with the operation of the farms poses a degree of risk of disturbance to King Shag roosting and foraging. There is an associated risk of significant degradation to natural character, albeit to a small cumulative extent. Further, it is inherent that the presence of the marine farming structures, on the seabed, through the water column and at the surface, will of themselves degrade the relative naturalness, and hence, the natural character of the area. That is in addition to the degradation that would arise from their operation, including in their depositing of shell debris and detritus onto the seabed.

[208] Coupled with those actual and potential adverse effects on biotic and abiotic attributes that inform natural character, we find that there would be a localised degradation to natural character arising from how people would perceive the presence of the uniform grid of lines and buoys and, to a small extent, the night time navigation lighting. In particular, from closer views (in the region of 400m-500m), these physical changes to the environment would disrupt the relationship between landform and seascape at Pig Bay. That would have a consequential degrading effect on perceptions of Cape Lambert, as well as the relationship of that cape to the Outer Port Gore waters and Cape Jackson. Again, we find that reducing the number of lines for each farm would not sufficiently mitigate these adverse effects in that the remaining geometric lines of buoys would be discordant with the perceived coherence of the highly natural forms of

the capes, bays and sea. The perception would be of a wild and scenic character being tamed at Pig Bay for commercial usage.

[209] Hence, while we consider Mr Bentley to have overstated the visual effect, we still find that, at closer views (i.e. out to about 400m-500m seaward), there would likely be a perception that the natural character of the area (by which we mean both the waters and land of Pig Bay and also Cape Lambert) has been compromised to a small but significant extent. There would be a similar perception for a person viewing the waters from the land above the Bay, although we acknowledge that such views would usually only be experienced rarely by visitors to that private land.

[210] For those reasons, we find that the Proposals would:

(a) offend the natural character objectives and policies of the Sounds Plan and the NZCPS;
(b) fail to recognise and provide for the matters in s6(a) RMA; and
(c) therefore, would have a significant adverse effect on the natural character of Pig Bay and Port Gore.

Landscape: Whether the Proposals would adversely affect that ONL and/or ONF

[211] The Landscape JWS helpfully records the following points of agreement between the landscape architects:[110]

> In terms of scale, we agree that... Pig Bay is part of the Marlborough ONL at a national level. In terms of a regional level, we all agree that Pig Bay forms part of the Outer Sounds Landscape and is part of the Outer Sounds Outstanding Natural Landscape. Map attached.
>
> We all agree that the proposals sit within an ONL in the coastal environment and are therefore subject to Policy 15(a) of the NZCPS. Therefore the pertinent question is whether or not the effects of the activity are adverse. JB and DL considers [*sic*] that the farms are adverse and CG considers that they are not.

[212] NZCPS Policy 15(a) reads:

110 Landscape JWS, table, under heading 'Identifying and assessing attributes, characteristics and values'.

> To protect the natural features and natural landscapes (including seascapes) of the coastal environment from inappropriate subdivision, use, and development:
>
> a. avoid adverse effects of activities on outstanding natural features and outstanding natural landscapes in the coastal environment;

[213] We accept the landscape architects' consensus opinion that Pig Bay is part of the Outer Sounds ONL and NZCPS Policy 15(a) applies to it.

[214] The Landscape JWS appears to indicate that the landscape witnesses regarded this policy as having force as a mandatory standard or rule. That is not its legal effect as a policy. Rather, we must have particular regard to it. On that basis, we now consider the question of whether or not the effects of the Proposals would be adverse on this identified ONL.

[215] As Mr Bentley noted, we need to understand the *attributes* and *extent* of the ONL (or ONF) in question in order to make properly informed findings on how the Proposals would affect it.[111] We accept the consensus opinion of the landscape architects that landscape encompasses biophysical, sensory/perceptual and associative attributes.[112] Also as Mr Bentley noted, landscape is informed by natural character (natural character itself including biophysical and sensory components).[113]

[216] The AOLV mapping of Cape Lambert (including Pig Bay) is a helpful starting point for understanding the attributes of the identified ONF and its related ONL. The AOLV has force in the fact that it remains the current and operative Sounds Plan expression of a landscape protection priority for the purposes of s6(b) RMA. Its focus is primarily on outstanding visual aspects of landscapes, and the associated App 1 assessment matters are primarily directed to whether a proposal would degrade or compromise the landscape in visual perception terms. That is valid insofar as it pertains to sensory/perceptual attributes of the landscape. However, it does not account for biophysical attributes of a landscape and is unduly narrow in its approach to associative values. Also, as the landscape architects noted, it is a somewhat outdated (in terms of current New Zealand practice, as guided by various Environment Court decisions) and narrow in terms of what

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111 James Bentley evidence-in-chief for the Council, dated 7 April 2017, at [7.27].

112 Landscape JWS, table, under heading 'Identifying and assessing attributes, characteristics and values'.

113 James Bentley evidence-in-chief for the Council, dated 7 April 2017, at [7.3].

it specifies for the identification of ONLs. It was, therefore, appropriate that Mr Glasson and Mr Bentley each undertook both an AOLV assessment (by reference to the thirteen indicators of 'outstanding landscapes' in App 1 of the Sounds Plan) and a wider assessment by reference to the factors now more typically considered in assessment of whether a landscape is an ONL or landscape feature is an ONF.

[217] Key points of difference between Mr Glasson and Mr Bentley, on their AOLV assessments, are as shown in the following table:

AOLV App 1 indicators of 'outstanding landscapes'	**Mr Glasson**	**Mr Bentley**
Very distinct natural character	Moderate (Inner) High (Outer)	High
The coastal segment is unforgettable and remains distinct in the memory	Low-Moderate	High
Many visually sensitive areas or large areas that are visually sensitive	Moderate	Moderate – High
Uniqueness with no or very few similar landscapes within the region	Moderate - Low	High
Very clear harmony in the landscape	Moderate - Low	Moderate – High
Strong coherence in the landscape	Moderate	Moderate – High
Very few negative, or out of character, deviations from overall coherence	Moderate	Moderate – High

[218] Mr Glasson also assessed the landscape by application of what are termed the modified *Pigeon Bay* factors (named, in essence after the case where such factors were originally enunciated to be applied and refined in subsequent cases).[114] In essence, applying those factors, he concluded as follows:[115]

114 *Pigeon Bay Aquaculture Ltd v Canterbury Regional Council* [1999] NZRMA 209.

115 Christopher Glasson evidence-in-chief for Clearwater, dated 10 March 2017, at [96].

Natural science factors (geomorphology)	Pig Bay exhibits the core features of the Sounds' geomorphological landscape and regenerating shrubland
Aesthetic values	Those of Pig Bay and surrounding area are typical of the Sounds, i.e. views an important value, long distance views filled with water expanse, rocky coastline, steep hillsides with regenerating and indigenous shrubland and pasture; value based on indented coastline and regenerating native shrubland to east including Reserve; small existing mussel farm does not diminish aesthetic value.
Legibility	Moderate compared to Cape Lambert (which is itself High, as entrance to Port Gore)
Transient values	Port Gore highly memorable embayment facing Cook Strait, associated with weather, sea patterns, signs of farming and habitation and short visitation periods

[219] His overall conclusions, with reference to these factors and NZCPS Policy 15, were in summary as follows:[116]

> ... Cape Lambert is an ONF. ... the ONFL and AOLV boundaries relate to geomorphological foundation and vegetation and therefore the predator fence is an appropriate boundary. ...
>
> In terms of landscape the 6 ha of marine farms is small, and tucked into the landform of the embayment. This aspect of the farm [*sic*] is south facing. Consequently the farms or [*sic*] the land behind will generally be in shade, which reduces their visual appearance.
>
> These farms (particularly 8166) are viewed in the context of terrestrial farming. Terrestrial farming with associated vegetation clearance, tracking and erosion causes a rugged intervention in the landscape. The fence dividing the indigenous vegetation from the farm can from certain views appear as a stark line. The hut and other modifications are less visible but all contribute to a landscape of varied quality. The marine farm is another element in that mosaic, cumulative with those other elements as well as marine farm 8167.
>
> Marine farms have no direct impact on landform or vegetation. Consequently the perception of landscape values is the key aspect. Those values, both as I have found them and as they have been expressed in the Boffa Miskell reports, relate to the Cape Lambert peninsula. These farms are not visible from the Cape or the surrounding waters because of the intervening Taratara landform. Due to their positioning beyond the southern edge of the feature, they do not interrupt the legibility of the feature.
>
> Marine farms are not solid on the water. They appear translucent at distance, only resolving to a string of buoys at close quarters. The Colmar Brunton and Corydon Consultants results suggests [*sic*] that New Zealanders do not find the visual effects of aquaculture adverse.

116 Christopher Glasson evidence-in-chief for Clearwater, dated 10 March 2017, at [96]-[106].

> Overall, in terms of the Pig Bay landscape and the Cape Lambert ONF, I infer from this and it is my assessment that farms will not cause an impact on the landscape or feature as a whole.
>
> ...
>
> It is my opinion that the marine farms will be part of a small incursion that is occurring in Port Gore and that this incursion is a small part of a greater landscape that appear [*sic*] overall to be highly natural.

[220] Mr Glasson also referred to comments by another landscape architect in another case (the *King Salmon* board of inquiry) in essence supporting his above views as to the effective absorption of marine farms into seascape other than when "almost inside" the ONF or on fine days with flat seas.

[221] Each of the landscape experts referred to independent assessments by Boffa Miskell Limited ('BML') of Marlborough's landscapes. The initial assessment was undertaken in 2009, updated in 2015 and then published by the Council. The 2015 BML report is the one that identifies the Outer Sounds, including Pig Bay and Port Gore, as ONL (as is now reflected in the pEMP). Mr Bentley explained that this report's methodology properly accorded with current best practice in New Zealand (as guided by various Environment Court cases) and internationally.[117]

[222] In regard to the Outer Sounds ONL as a whole, the 2015 BML report notes the open waters, series of islands and exposed peninsulas, headlands and bays that extend out into Cook Strait and Tasman Bay. It describes its wide variety of rugged, often windswept landforms with "rich cultural and historic associations". It identifies the perception value of its uninterrupted open seascape vistas "of the very end of this drowned landscape". Compared to the Marlborough Sounds as a whole, it says this ONL is "the least modified" part.[118]

[223] In regard to Te Anamāhanga/Port Gore specifically, the 2015 BML report includes the following evaluation, quoted and adopted by Mr Bentley:[119]

> Steep eroded cliffs and rocky shores, dominated by high energy waves, define this exposed landscape. This is a largely unmodified section of the coast, with exposed rocky bluffs, headlands and reefs. Cape Jackson, Cape Lambert and Alligator Head retain wild and

117 James Bentley evidence-in-chief for the Council, dated 7 April 2017, at [7.29].

118 James Bentley evidence-in-chief for the Council, dated 7 April 2017, at [7.29].

119 James Bentley evidence-in-chief for the Council, dated 7 April 2017, at [7.30], quoting from the 2015 report.

rugged forms that are extremely legible, which assist in defining the two outer Sounds bays of Port Gore and Waitui Bay. Cape Jackson is a superb example of a drowned ridge crest and is a listed geopreservation site. Exceptional biodiversity is exhibited at Cape Lambert and in the threatened plants, remnant forest and regenerating native vegetation of Cape Jackson.

The night skies here are some of the darkest in the country and add to the sense of remoteness. Access is primarily by boat, and the area is popular for fishing in the more exposed open waters. A privately maintained track (known as the Outer Queen Charlotte Track) extends from Ships Cove to the Cape Jackson lighthouse, providing direct land access with this exposed coastline where expansive open ocean vistas are experienced. Cape Jackson lighthouse is very memorable and used as a reference point, marking the western entrance to Queen Charlotte Sound. An impressive ridgeline of forested high peaks above Guards Bay and Port Gore, leads to Mount Stokes, a prominent feature to this ONF. Due to the factors listed above, the outer peninsulas hold very high experiential and associative values.

[224] Mr Bentley, having undertaken his own assessment of Pig Bay and the mapped extent of the broader landscape, concurred with that analysis in the 2015 BML report.

[225] Ms Lucas has a similar view to Mr Bentley. She agreed with the pEMP proposed treatment of Pig Bay and its landscape context as ONL/ONF. She also generally agreed with the pEMP's specifications (in its App 1), subject to some additions.[120]

[226] We observe, at this point, that the specifications for the Outer Sounds and Cape Jackson, Cape Lambert and Alligator Head ONL and ONF, as listed in pEMP App 1 are extensive and closely resemble what is identified in the 2015 BML report. Notable aspects for Cape Jackson, Cape Lambert and Alligator Head include:

Biophysical values	Geopreservation site: Cape Jackson ridge crest. Cape Lambert headland vegetation, exceptional biodiversity on both Cape Lambert and Cape Jackson. Steep eroded cliffs and rocky shores, dominated by high energy waves define this exposed landscape. Cape Jackson, Cape Lambert and the interconnecting outer waters hold outstanding levels of natural water.
Perceptual values	Cape Jackson, Cape Lambert and Alligator Head have wild and rugged farms that are extremely legible and assist in defining the two outer Sounds bays of Port Gore and Waitui Bay.

120 Diane Lucas evidence-in-chief for the s274 societies, dated 7 April 2017, at [31].

	Largely unmodified coast. High experiential values, which are due to remote and expansive seascape vistas of a wild and exposed nature. The darkness of the night sky adds to the sense of remoteness.
Associative values	Popular area for open ocean fishing. Headlands act as navigational landmarks for boaties.
Overview	Based on the above values, Cape Jackson, Cape Lambert and Alligator Head have been identified as ONF's [sic] due to their exceptional biophysical and associative landscape values and very high sensory landscape values. ... Due to the factors listed above, the outer peninsulas hold very high experiential and associative values. Modifications include: a lighthouse (Cape Jackson); vegetation clearance; tracks; power lines; buildings and moorings. There are marine farms in Pig Bay.

[227] Of the pEMP's listed attributes of the Outer Sounds ONL, Ms Lucas noted in particular the expansive views of the open sea, exposed remote and rugged seascape, the high legibility and visual coherence of the grasslands around the drowned ridge coastline, limited modification and thus high perceived naturalness and the highly transient conditions. She observed that all of these are clearly evident, and contribute to the ONL attributes of the Pig Bay sites for the Proposals. She observed that the ONL's associative values of the open waters, exposed peninsula and rugged and windswept state are also all evident at those sites. She said the pEMP is deficient in its lack of acknowledgement of the biophysical aspects of landscape. She considered that the ONF attributes identified for Cape Lambert in App 1 were also present in and relevant to Pig Bay, noting in particular the biophysical, perceptual and associative values in the natural diversity of the drowned ridgeline, including the more sheltered coastal interface of Pig Bay. She observed:[121]

> The lands and tidal waters of this more sheltered semi-enclave are an important contributor to the outstanding classification of the Cape Lambert ONF.

[228] Ms Lucas then made the following observation concerning Mr Glasson's methodologies, and conclusions:[122]

121 Diane Lucas evidence-in-chief for the s274 societies, dated 7 April 2017, at [34].

122 Diane Lucas evidence-in-chief for the s274 societies, dated 7 April 2017, at [36]-[38].

> I agree with Mr Glasson (para 70) that landscape assessment should not address only small components. However, I consider the assessment of Cape Lambert as a feature in the Te Anamāhanga/Port Gore landscape (para. 73) to not be an adequate approach. Effects should be assessed at the Port Gore scale and at the more focused, Application site scale. This is consistent with the layered approach to ONL identification in the Proposed Plan. If one steps back too far from the landscape or seascape the specific attributes associated with that landscape become a blur.
>
> I agree with Mr Glasson (para.70) that the bio-physical, aesthetic, and socio-cultural attributes should be addressed. However Mr Glasson focusses on views (para. 75) and visual prominence (para. 79-80), and so anthropocentric experiential factors. He has not, in my view, adequately considered effects on other attributes, in particular bio-physical attributes and the marine environment.
>
> Mr Glasson provides information regarding viewer numbers to the Application sites. However in my view, assessing effects on outstanding areas is 'not a numbers game'.

[229] We accept most of those observations concerning Mr Glasson's landscape assessment methodology. As we find Mr Glasson's methodology was deficient in those terms, we do not accept his ultimate conclusions on this occasion.

[230] Mr Glasson effectively derived two landscape units, subdivided at the stock-proof fence. On that basis, he applied the thirteen AOLV indicators to derive a 'moderate' landscape value for the Pig Bay site (being the majority of Pig Bay from stock proof fence to Hunia) and ONF for Cape Lambert itself. He considered this was appropriately based on what is termed 'natural science factors' (in terms of the modified *Pigeon Bay* factors). However, as Mr Glasson himself acknowledged, a landscape should not be too finely sliced and diced in assessment terms. We find he has erred in that regard by artificially distinguishing Cape Lambert, as ONF, from the majority of Pig Bay. Pig Bay is an embayment of Cape Lambert. For the reasons given by Ms Lucas, the landscape (including seascape) needs to be read as a single unit, for context, in order to then consider Pig Bay as a part of that landscape unit and, hence, reliably assess the effects of the Proposals on the identified landscape values of that landscape unit.

[231] On this aspect, we find that the methodologies of Ms Lucas and Mr Bentley reflect both appropriate landscape practice and the layered approach taken by the pEMP to ONL/ONF values and attributes. Conversely, we find Mr Glasson's methodology is not reliable in those respects. We also find that the survey information relied on by Mr Glasson to conclude that "New Zealanders do not find the visual effects of aquaculture

adverse" is not a reliable foundation for conclusions to be drawn concerning visual effects, or more precisely the perceptual values of the landscape in question. That is simply because people surveyed for those views are unlikely to be either sufficiently informed of localised landscape effects or qualified to assess them. Conversely, we find the listed biophysical, perceptual and associative values in the pEMP App 1 are well supported by the 2015 BML report, and the associated expert opinions of Mr Bentley and Ms Lucas.

Landscape determinations

[232] Therefore, on those evidential findings, we determine as follows:

(a) the Outer Sounds as mapped in the pEMP (of which both Cape Lambert and its embayment, Pig Bay, are part) is an ONL;

(b) Cape Lambert, including Pig Bay, is an ONF;

(c) those ONL and ONF encompass both land and waters including those enclosed by the headlands to Pig Bay;

(d) the Proposals would degrade several key identified values of that ONL/ONF at Pig Bay. In terms of biophysical values, it would degrade the natural character of Cape Lambert and its interconnecting waters. It would render that natural character less exceptional. In terms of perceptual values, it would modify a largely unmodified coast and render it significantly less remote and wild, and disrupt the legibility of Cape Lambert's wild and rugged form. All such intrusions would combine to degrade the very high experiential values associated with Cape Lambert, including Pig Bay. Those impacts would not be so significant as to disqualify either the Outer Sounds from being ONL or Cape Lambert from being ONF, in that the pEMP already acknowledges the farms as existing modifications. However, on the basis that we make this assessment on an assumption that the farms are not in existence, we find the extent of degradation nevertheless significant for the purposes of our consideration of related objectives and policies;

(e) returning to NZCPS Policy 15(a), those findings lead us to also find that the Proposals would fail to avoid their adverse effects on the Outer Sounds ONL and Cape Lambert ONF. The effects we have identified would not be materially mitigated either by the reduction in the number of lines proposed by Clearwater nor by a decision to allow for only one farm. In essence, given our finding that the landscape needs to be treated as a holistic unit

(rather than artificially split by the stock proof fence), we find that even one farm would significantly degrade the values we have described, albeit to a lesser extent. By contrast, a decision to decline the appeals would assist to achieve NZCPS Policy 15(a);

(f) as for the Sounds Plan, we find that allowing the appeals would be inconsistent with relevant objectives and policies on natural character and landscapes and enablement of appropriate marine farming or other activities in the coastal marine area. In particular:

(iv) the continued presence of the farms (individually and collectively) would not preserve the intactness of identified natural character areas ('3 Cook Strait', 'B D'Urville Island – Northern Cook Strait') and, so would be inconsistent with Policy 2.2.1.8; and

(v) the nature and quality of the natural character and landscape values of Pig Bay and its wider landscape setting mean that consenting the continuance of the Proposals at Pig Bay would not be supported by, and would be inconsistent with, Objective 9.2.1.1 or associated Policies 9.2.1.1.1, 9.2.1.1.2, 9.1.1.1.14 or Objective 9.4.1.1 or associated Policy 9.4.1.1.1.

Amenity values and public access

[233] In the Port Gore context, amenity and public access are closely related and there is also a significant overlap with natural character and landscape values.

[234] Section 7(c) RMA directs us to have particular regard to the maintenance and enhancement of amenity values. This is a significant overlap between 'natural character', 'landscape' and 'amenity values' given the RMA's broad definition of the latter term:

> means those 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.

[235] Natural character includes perception of naturalness and landscape includes aesthetic values. Both of those constructs go to people's appreciation of pleasantness, aesthetic coherence and cultural and, in this case, recreational attributes. The overlaps are reinforced by the approach taken by the Sounds Plan, for example in the fact that Policy 9.2.1.1.1(d) is to avoid, remedy or mitigate the adverse effects of use and

development of resources in the coastal marine area on "landscape, seascape and aesthetic values". Policy 9.2.1.1.1 also gives the same direction in relation to effects on natural character of the coastal environment, and public access to and along the coast.

[236] As for public access, s6(d) RMA directs us as a matter of national importance to recognise and provide for 'the maintenance and enhancement of public access to and along the coastal marine area, lakes, and rivers'. There is a similarly worded Sounds Plan Objective 8.3.1 and related policies. Policy 8.3.1.2 sets benchmarks for the consideration of adverse effects in relation to the erection of marine farms and other structures in the cma. It relevantly seeks that, as far as practicable, adverse effects on public access be avoided (and if that is not practicable, mitigated and remedied to the extent practicable). Policy 8.3.1.5 seeks continued assessment of the need for enhancing public access to and along the cma (and lakes and rivers). Related Policy 8.3.1.8 is to the effect that public access to and along the cma (and lakes and rivers) should be maintained and enhanced except where depriving the public of that access is necessary for one of its stipulated purposes (these relating to protection of natural or cultural values, public health and safety, ensuring security for the purpose of a resource consent or designation, defence purposes or other exceptional circumstances).

[237] On the matter of amenity values, we heard evidence from Ms Karen Marchant and Mr Cliff Marchant of a personal experiential nature. Ms Marchant (also giving evidence for other family members) attested to the amenity values she experienced in Port Gore, for example "wild, raw, remote, hard to get to, but worth the reward".[123] She also noted the recreational value others saw in Port Gore, including some 500 people who dived the Mikhail Lermontov wreck each year. On the other hand, she described marine farming as having a detrimental effect on amenity values for "those living [at] and visiting Port Gore", referring in particular to "noise from vessels, lights at night, and various rubbish that originates from the farms". Her father, Mr Marchant, described how he and his wife (Mrs Diane Marchant) have lived full-time at Cockle Bay, Port Gore for the past 31 years. He described having fulfilled their dream of raising and educating their children "in a truly special environment that epitomises the raw beauty and nature of the outer Marlborough Sounds". He described Port Gore's key attributes as being remoteness, peacefulness, lack of people, small numbers of visitors, and marine farming activity centring on Melville Cove. It was to him a "last bastion in the Marlborough Sounds

123 Karen Marchant evidence for the Marchant family and others, dated 7 April 2017, at [44].

for wilderness recreation".[124]

[238] We do not refer to cross-examination of those witnesses because we accept their evidence on these personal perceptions of amenity values was plainly sincere and not refuted. The obligation in s7(c) is to have particular regard to those values, rather than recognise and protect them. What is more significant to the weighting we give to this evidence is the extent to which these personally experienced amenity values is consistent with the priorities that are accorded protection under the Sounds Plan. We find there is a high degree of consistency, particularly with the protection priorities accorded by the natural character and landscape objectives and policies to which we have referred.

[239] On the matter of recreational amenity values, we heard from Mr Robert Greenaway, a witness on behalf of Mr Marchant. Mr Greenaway described himself as a "consultant leisure and open space planner".[125] Mr Greenaway's experience in those matters extends over some thirty years and encompasses several recreational planning aspects of projects for a range of public and private sector agencies. His overall theory of evidence focused on what he described as "the effects of the farms at Pig Bay on the natural character of Port Gore – as part of the coastal environment and from a recreational perspective – and on the amenity value of the area".[126] He prefaced his evidence with his theory of understanding of certain provisions in pt 2 RMA and some of the relevant Sounds Plan provisions (notably those of Chapter 2). He used the concept of the Recreational Opportunity Spectrum to assist his assessment. Mr Greenaway explained that it is an internationally accepted planning tool.[127] The purpose of the tool is to assist in integrating the management of open space with visitor expectations.[128] He described various recreational amenity values associated with Port Gore, including remote and scenic fishing, boating and tourism, and recreational diving.[129] He also reported on survey data as to the popularity of various recreational activities amongst respondents living in the Sounds and nationwide. He evaluated this data as demonstrating that the Sounds (of which Port Gore is a component) has nationally significant recreational amenity. As to the relatively few numbers of recreational visitors to Port Gore, he opined that this was a remoteness value in and of itself.[130] He derived

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124 Clifford Marchant evidence of a s274 party, dated 7 April 2017, at [1], [70].
125 Robert Greenaway evidence for Mr Marchant, dated 7 April 2017, at [1.2].
126 Robert Greenaway evidence for Mr Marchant, dated 7 April 2017, at [3.1].
127 Robert Greenaway evidence for Mr Marchant, dated 7 April 2017, at [6.1].
128 Robert Greenaway evidence for Mr Marchant, dated 7 April 2017, at [6.3.]
129 Robert Greenaway evidence for Mr Marchant, dated 7 April 2017, at [4.5]-[4.35].
130 Robert Greenaway evidence for Mr Marchant, dated 7 April 2017, at [4.36]-[4.51].

the relatively obvious conclusions that the more natural and attractive backdrop of the eastern side of Port Gore (absent marine farms) would be more attractive than would the Melville Cove area for recreationalists and that marine farms "severely restrict the opportunity to experience a remote or relatively remote recreation setting".[131] He offered the further opinion that allowing the appeals would "increase the restriction on regional, if not national, recreation amenity". He went further by offering the opinion that:[132]

> A prudent recreation manager would seek to ensure that a spectrum of recreation opportunity is provided for in the Marlborough Sounds. This opportunity has largely been lost as a result of the regional proliferation of marine farming and holiday home development in Queen Charlotte Sound. Port Gore is the last major bay in the Sounds with proximate anchorages (Melville Cove and Cockle Bay) and the opportunity for a remote experience.

[240] He also referred to various surveys on how people felt about marine farming.

[241] For the Council, Mr Johnson expressed the view that, associated with the detriment to landscape as identified by Mr Bentley, there would be a detriment to visual amenity values. He also offered that the presence of the marine farms would be a detriment to drift fishing as a recreational amenity impact. However, overall he considered the effect, including for recreational fishers, would be mainly a visual one, namely having travelled so far for a wild and remote fishing experience a fisher would see the farms as disrupting the visual coherence of Pig Bay.[133]

[242] Whilst Mr Greenaway was the only specialist witness called on the topic of recreational amenity, we say with the greatest respect that we do not find his evidence assists us to any great extent. The difficulty with it is it was based on Mr Greenaway's presumption that a prudent recreation manager would seek to ensure the spectrum of recreation opportunity that he has described. By giving priority to recreational opportunity, Mr Greenaway has not approached his evaluation in accordance with pt 2 or relevant directions under the various statutory instruments. For example, he does not appear to have considered whether enhancing recreational opportunity at Port Gore would be at the cost of causing greater disturbance to the Threatened King Shag. The ecology evidence suggests it could well be. That brings us back to the proper means by which resource management priorities (particularly those in pt 2 RMA) are identified and

131 Robert Greenaway evidence for Mr Marchant, dated 7 April 2017, at [6.24], [7.1].
132 Robert Greenaway evidence for Mr Marchant, dated 7 April 2017, at [7.2].
133 Peter Dewar Johnson evidence-in-chief for the Council, dated 7 April 2017, at [114]-[115].

managed, namely in this case the NZCPS, RPS, Sounds Plan and pEMP. On our evaluation, none of the objectives and policies of those instruments demonstrate a bias in favour of enabling and protecting recreational opportunity in Pig Bay that Mr Greenway would seek.

[243] However, we accept the personal experiences of amenity values expressed by Mr and Ms Marchant as being consistent with the protection priorities accorded by the relevant statutory instruments. In particular, we refer to the Sounds Plan AOLVs and natural character areas (and related objectives and policies), the pEMP's proposed identified ONLs, ONFs and ONC areas, and the aforementioned objective and policies of the NZCPS.

[244] For those reasons, we find that:

(a) allowing the appeals would not maintain amenity values but assist to degrade them; whereas
(b) declining the appeals would maintain and enhance amenity values and better respond to related NZCPS and Sounds Plan objectives and policies.

Value of Clearwater's investment and economic and social benefits

[245] We must have regard to the value of Clearwater's investment as consent holder (s104(2A)).

[246] In addition, it is relevant for us to consider economic and social wellbeing at a broader community scale. One aspect of this is that the definition of 'sustainable management' in s5 refers to 'enabling people and communities to provide for their social, economic and cultural wellbeing'. Further, s7(b) RMA directs that we have particular regard to the efficient use and development of natural and physical resources. Finally, as we address from [263], there are related NZCPS and Sounds Plan objectives and policies.

The value of Clearwater's investment in the two farms

[247] Given the commercial sensitivity of information sought to be elicited by cross-examination of Mr Meredyth-Young, the court made an oral confidentiality order prohibiting publication (including in social media) of questions and answers in that cross-

examination.[134] The order did not extend to the evidence that was pre-exchanged as that was not sought by Clearwater and the nature of that evidence did not of itself appear to disclose anything that was commercially sensitive. However, at the request of Clearwater following the filing of closing submissions, the oral order is replaced by the further confidentiality order set out at [276] of this decision.

[248] In his evidence-in-chief, Mr Meredyth-Young quantified the annual production of the two farms as 160 tonnes per annum ('TPA') for 8165 and 330 TPA for 8166. He explained that the two farms are "capable of generating export revenue of $1.5M per year".[135] Under cross-examination by Ms Radich, he explained that by 'capable' he did not mean that they were actually that productive at this time (the farms also being used for spat at this time). He further explained that his calculation was on the basis that the export revenue return is some $4,000 per tonne. He later clarified that the revenue figure was closer to $1.36M p.a if the assumption is 100% were exported.[136]

[249] In cross-examination by Mr Ironside, Mr Meredyth-Young confirmed that, when Clearwater purchased the farms from the former consent applicant, in 2014, the consents had expired, the consent holder was "a failing company" and the farms were "derelict". However, there was a crop on the farms at the time, and Clearwater purchased both crop and lines on the basis that it took over as the consent renewal applicant. That was prior to the application being lodged in the former owner's name. Mr Meredyth-Young noted that the former owner determined that it would be a big expense to go through re-consenting and was, therefore, happy to walk away from it.[137]

[250] In addition, during cross-examination, Mr Meredyth-Young explained details concerning the price Clearwater paid for the farms and other commercial arrangements. We do not need to traverse the specifics of those commercial arrangements in this decision.

[251] Undoubtedly, a decision to decline the appeals would result in unwelcome financial cost and loss of investment value by Clearwater.

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134 Transcript, p 82 l 1-15.
135 John Linton Meredyth-Young evidence-in-chief for Clearwater, dated 8 March 2017, at [65].
136 Transcript, p 66, l 9-30, p 68, l 15-24, p 70, l 1-11.
137 Transcript, p 52, l 1-32, p 53, l 1-33.

[252] The answers given by Mr Meredyth-Young during cross-examination indicate to us that the level of Clearwater's investment in the farms was relatively modest (given the circumstances that prevailed at the time for the vendor, in particular). Nevertheless, it would be wrong for us to be dismissive of that investment, or of the associated loss of revenue from declining the appeals, and we do not dismiss those matters. For Clearwater, they represent a financial cost and setback. Similarly, that pain would be suffered by employees or contractors who work on the farms (although the evidence indicates to us that mercifully very few would be so impacted).

[253] However, we find nothing in the RMA or the objectives and policies of the NZCPS, Sounds Plan (or pEMP) as would direct that we protect against any loss of that investment by Clearwater in the farms. That is in contrast to what we have traversed in relation to ecology, natural character and landscape protection values. There would be some difference in that position if the evidence demonstrated that declining the appeals would have a significant detrimental consequence for the regional or national economy. However, as we shortly traverse, the evidence does not demonstrate that to be the case.

[254] Even so, we find that Clearwater's investment in the farms makes it important that we provide, insofar as practicable, for reasonable decommissioning arrangements. We refer there to the capacity to recover lines, buoys and crop. There may also be capacity to set arrangements in place to minimise unnecessary expenditure on removal of the anchor blocks. We return to these matters, and make related directions on them, at [268] and [275].

Effects on social and economic wellbeing and economic efficiency

[255] Mr Meredyth-Young's evidence demonstrated that relative contribution of the farms to Clearwater's marine farming business, and economically, is comparatively small.

[256] As one measure of this, the farms' combined production capacity of 490 TPA. compares to some 9,500 TPA across all of Clearwater's Sounds' farms and 1,400 TPA. for its Golden Bay farms. That also compares with a combined industry production figure of approximately 65,000 TPA.[138] Another measure is in the relative contribution of the

138 Mr Meredyth-Young evidence-in-chief for Clearwater, dated 8 March 2017, at [20]; Transcript, p 49, l 29-34, p 50, l 1-4.

farms to Clearwater's export revenues. Mr Meredyth-Young explained that some 80 – 90% of Clearwater's produce is exported. From that, we surmise that the export revenue from the farms at full production (if as mussel farms) would be in the vicinity of $1.08M-1.36M p.a. However, even if we assume the originally offered export revenue figure of $1.5M p.a., that is clearly a relatively small percentage (i.e. some 0.75%) of the figure given for Clearwater's total (we presume annual) export sales revenues of $208.2M.

[257] Further, Mr Meredyth-Young confirmed in cross-examination that Clearwater has interests in areas recently opened up for marine farming in Golden Bay and Tasman Bay (some 1250 hectares of space in 250 hectare blocks). As can be expected of any commercial enterprise, Clearwater actively looks for opportunities for the development of further marine farming space.[139]

[258] Mr Meredyth-Young also explained the economic and social importance of Clearwater to Marlborough. He informed the court that the company accounts for some 15% of the region's mussel production, has some 170 employees working on marine farms, and some 605 in processing. He explained that the company produced (presumably in the previous financial year) some $208.2M in export sales revenues (80-90% of its product being exported) and that it accounted for 5.2% of Marlborough's GDP (or $146.7M in farming and processing). He explained the supply chain importance of Clearwater, noting that it supported some 165 separate suppliers.[140] He also detailed the various ways in which the company and its employees contributed to the community.

[259] His evidence on the benefits that Clearwater provides, in terms of social, economic and cultural wellbeing, was not materially challenged, and we accept it. However, the obvious point here is that the two farms contribute in a relatively small way to Clearwater's business and, hence, to the wellbeing of people and communities.

[260] We have not lost sight of the evidence as to the highly productive value of the water resource in this locality. However, we find that would readily be substituted by the capacity to shift investment elsewhere, either in the Sounds or Golden Bay and Tasman Bay.

139 Transcript, p 50, l 15-34, p 51, l 1-26.

140 John Linton Meredyth-Young evidence-in-chief for Clearwater, dated 8 March 2017, at [55]-[64].

[261] As the only economist called, Dr Martin O'Connor has significant credentials in research including in environmental valuation. He presently holds the post of Professor of Economics at the University of Paris-Saclay in France. Part of his evidence was his opinion that:[141]

> ... the key evaluation question is not the technical quality nor the commercial viability of the proposed mussel farming operations (which are both probably rather good), but, whether the proposal satisfies the non-commercial environmental performance requirements set out under law.

[262] From his perspective as an economist, he fairly characterised Clearwater's evidence on environmental values as "of very uneven quality". In essence, what he referred to there was the point that quantifying commercial productivity loss is only one aspect of the task of assessing whether any decision on the appeals would assist the efficient use and development of resources. Other values that Clearwater has not quantified but are relevant to informing that assessment include the economic opportunity costs for other uses of the water resource (e.g. tourism), ecology, natural character and landscape.

[263] The objectives and policies of relevant statutory instruments serve to assist how we should account for those values.

[264] In the NZCPS, Objective 6 and Policies 6 and 8 are relevant. As Mr Johnson assisted us to understand, these provisions guide us to recognise the various 'wellbeing' benefits of enabling use and development of the cma. Policy 6 extends that to recognising and providing for activities with a functional need to locate in the cma. Policy 8 also encompasses taking into account the social and economic benefits of aquaculture (in addition to direction in this policy on how regional policy statements and regional coastal plans are to provide for aquaculture activities). However, those directions sit with priorities and directions given to the protection of ecological, natural character and landscape values that we have traversed earlier in this decision.

[265] In the Sounds Plan, various objectives and policies in Chapter 9 provide guidance on how to assess the Proposals as an intended development of the public space of the cma. The overall theme is one of encouraging appropriate use and development

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141 Martin Paul O'Connor evidence for the Council, dated 7 April 2017, at [10.2].

including of marine farms, but qualified by reference to proper effects' management. In particular:

(a) Objective 9.2.1.1 refers to the "accommodation of appropriate activities" whilst "avoiding, remedying or mitigating" adverse effects;
(b) Policy 9.2.1.1.14 refers to enabling various uses, including marine farming "in appropriate places";
(c) Policy 9.2.1.1.15 refers to enabling the renewal of controlled activity marine farm consents but is careful to exclude the "exceptions in Appendix D2 of the Plan";
(d) Policy 9.2.1.1.2 is to the effect that the adverse effects of use and development in the coastal environment should "as far as practicable be avoided" and where complete avoidance is not possible "should be mitigated and provision made for remedying those effects to the extent practicable"; and
(e) Policy 9.2.1.1.1 refers to avoiding, remedying or mitigating effects of use and development of cma resources on several identified values, including as pertaining to conservation and ecological values, landscape, seascape and aesthetic values, marine habitats, natural character, public access and recreational values.

[266] Specifically, as noted those give qualified direction concerning the accommodation of marine farming *in appropriate places.* In a general sense, we agree with the Council that these objectives and policies give direction on thresholds for acceptable or unacceptable effects on this "sensitive environment".[142] That is particularly in the sense of what is to be considered 'appropriate' should be informed by the Sounds Plan's resource management priorities for ecology, natural character and landscapes.

[267] The evidence does not enable us to quantify how allowing or declining the appeals would compare in terms of economic efficiency. However, that is not important in that the evidence enables us to safely find that any loss of economic efficiency through declining the appeals, would be very small and insignificant for the purposes of s5 RMA (including for the wellbeing of people and communities). We also find that any such loss would be strongly outweighed by the benefit of better consistency with the priorities set by the NZCPS and Sounds Plan in relation to the protection of ecological, natural

142 Opening submissions of the respondent, undated, at [7].

character and landscape values as we have traversed.

Decommissioning arrangements

[268] Ms Marchant submits that the court should require the immediate removal of all structures (i.e. lines, buoys and screw anchors) and make no provision for the applicant to harvest its crop. She submits that the circumstances here are different from those that prevailed in *Port Gore Marine Farms*[143] where the court allowed eighteen months to grow and harvest crop.

[269] Clearwater submits, in reply, that such an approach would be inappropriately punitive and, in terms of any premature removal of crop, an inefficient use of resources. On those matters, it submits that the fact that the farms are several kilometres from the Marchant dwelling means there would be minimal associated amenity impacts from allowing for an eighteen month window for crop removal.

[270] In terms of the court's principal findings as to ecology, natural character and landscape protection, there is no compelling requirement for the stringency sought by Ms Marchant. Rather, the protection imperatives can tolerate sensible transition. We also find that to be the case for our findings on amenity values, including for Ms Marchant.

[271] We find it would be sufficient and appropriate for the anchor blocks to remain in situ, provided that all other structures are removed and the method of severing the lines from the blocks does not result in any adverse impact on the marine environment, including health and safety issues for divers and others using the coastal marine area.

[272] As for crop harvesting, we find that Clearwater should be allowed to harvest crop seeded on the lines prior to the date of this interim decision.

[273] Those arrangements are anticipated to be effected by a staged issuance of our decisions. We make directions for sequential further submissions on these decommissioning arrangements. A second decision will issue, following our consideration of those submissions, and that decision will complete our determination of the appeals.

143 *Port Gore Marine Farms Limited v Marlborough District Council* [2012] NZEnvC 72.

Conclusion

[274] For the reasons we have given, we overwhelmingly find that the appropriate outcome is to decline these appeals.

[275] As to our findings from [268] on decommissioning, we direct as follows for the purposes of the court's final decision in these appeals:

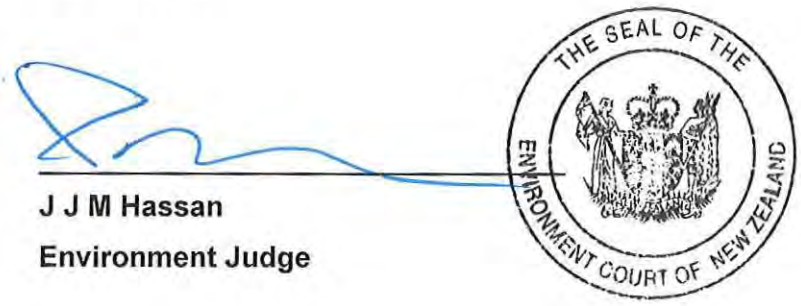
(a) by 27 June 2018, Clearwater is to file a memorandum of counsel proposing a timetable for decommissioning of the farms, including removal of all structures (other than the anchor blocks, if Clearwater so prefers) and harvesting of any crop seeded prior to the date of this decision;
(b) within a further five working days, the Council is to file a memorandum of counsel responding to Clearwater's decommissioning proposals (and any other party that wishes to must also file any memorandum responding to those proposals by that same date); and
(c) within a further five working days, Clearwater must file a memorandum of counsel in reply.

[276] Under ss277 and 42 RMA, and for the purposes of protecting the commercial sensitivity of information disclosed in answer to questions, it is ordered:

(a) no party, witness, party representative, counsel or any other person may publish or communicate electronically (including social media) anything that discloses the evidence given by Mr Meredyth-Young, during cross-examination and in answer to the court, regarding the terms and conditions of its sale and purchase agreement for the two farms the subject of the appeals (including as to the purchase price paid for the farms or other commercial sale and purchase details);
(b) for the avoidance of doubt, these orders apply to any record taken by any person including by way of notes of questions and answers, the transcript/notes of evidence taken by the court, the relevant parts of the closing submissions by Ms Marchant and any other submissions or memoranda as may be filed by or on behalf of any party; and
(c) these orders replace the confidentiality orders previously made in this proceeding and apply pending any further direction or orders.

[277] Costs are reserved and a timetable for any costs applications and reply will be set in our final decision.

For the court:



J J M Hassan
Environment Judge