IN THE ENVIRONMENT COURT
AT AUCKLAND

I TE KŌTI TAIAO O AOTEAROA
KI TĀMAKI MAKAURAU

Decision No. [2021] NZEnvC 021

IN THE MATTER	of an appeal pursuant to clause 14 of the First Schedule of the Resource Management Act 1991 (**the Act**)
AND	to the Proposed Northland Regional Plan and in relation to SEA and MPPZ Northport and reclamation (part Topic 11)
BETWEEN	ROYAL FOREST & BIRD PROTECTION SOCIETY OF NEW ZEALAND INCORPORATED (ENV-2019-AKL-127) Appellant
AND	NORTHLAND REGIONAL COUNCIL Respondent
AND	NORTHPORT LIMITED PATUHARAKEKE TE IWI TRUST BOARD CEP SERVICES MATAUWHI LIMITED s 274 parties

Court:	Judge J A Smith Commissioner S K Prime Commissioner R M Bartlett
Hearing: Latest case event:	Whangarei on 3 February 2021 Hearing on 3 February 2021
Appearances:	W D Jennings for Royal Forest & Bird (**Forest & Bird**) M J Doesburg and E S Lake for Northland Regional Council K R M Littlejohn and T J Baker for Northport Limited, s 274 party S T Shaw for Patuharakeke Te Iwi Trust Board and as agent for CEP Services Matauwhi Limited, s 274 parties
Date of Decision:	5 March 2021

Date of Issue: 5 March 2021

DECISION OF THE ENVIRONMENT COURT

A: The area in question marked in bold on the Map annexed as **C** is to be reclassified as SEA.

B: It is to retain its zoning as MPPZ and other further underlying zonings that already exist, if any (such as SEA).

C: There are no further alterations to the plan required or directed by this Court, with the intent that works within the SEA zone, even in the MPPZ, will require a consent as a non-complying activity.

D: Costs are reserved. Any application for costs is to be made within 20 working days, any reply within 10 working days and a final reply, if any, five working days thereafter.

REASONS

Introduction

[1] This issue was originally part of a general appeal in respect of biodiversity issues known as Topic 11 under the Northland Regional Plan (**Plan**) hearings. Under particular scrutiny was an area of Whangarei Harbour adjacent to the existing port facility at Marsden Point marked in bold in Annexure **C**. This was listed as part of a Significant Ecological Area (**SEA**) when the proposed plan was notified. Part of the SEA area became a Multi-Purpose Port Zone (**MPPZ**) in the Decisions Version of the plan and the SEA designation over that part was removed. It transpired at the Topic 11 hearing in November 2020 that there was agreement that that part should be SEA in accordance with Forest & Bird's appeal.

[2] The question then became what approach should be adopted to the area, in particular:

(a) Whether it should remain MPPZ, which was a position supported by the parties; and,

(b) What varied controls over the use of the area might either be within scope or appropriate.

[3] The matter was adjourned for further evidence and submissions on those matters. By the time of the hearing, all parties agreed that it could retain multiple overlays, including SEA, MPPZ and, according to the diagrams, at least Significant Bird Area (**SBA**) if not Significant Marine Mammal and Seabird Area (**SMMSA**) as well.

[4] Also, Forest & Bird did not pursue its application that a change to the status of the controls over this particular sub-zone (where the SEA is within the MPPZ) was not available on the appeals. Accordingly, the question turned to one on the merits.

Zoning as SEA

[5] As originally notified, the District Plan showed this area as SEA. This is shown in Annexure **A**. Forest & Bird supported its zoning in this way, and Northport sought to extend the MPPZ over this area and consequently remove it as SEA. Although this may not have been fully explicit in the submission, it was clear by the time of the Commissioners' hearing on the Plan. The Plan Commissioners considered that the creation of the MPPZ over this SEA area could create difficulties in the Port expanding into this area, given that activities in the SEA were non-complying. In fact, the Commissioners strengthened the SEA provisions by making reclamation non-complying even within Regionally Significant Infrastructure (**RSI**) areas, which provision had not been included previously. The Commissioners' mapping decision is shown on Annexure **B**.

[6] Forest & Bird filed an appeal seeking only the reinstatement of the SEA in this area, marked black on Annexure **C** and did not seek the removal of other overlays, including the MPPZ or the SEA, for example. It did appear to the Court that, given the original notified version had no port zoning over it, it must be within the scope of this Court's powers to reinstate the position in the original notified decision.

The area is SEA

[7] Although one of the witnesses, Mr Hood, made suggestions that the marked area in **A** may only have values under Policy 11(b) of the New Zealand Coastal Policy Statement (**NZCPS**) he has apparently overlooked the fact that the Northland Regional Council provisions treat areas under Policies 11(a) and 11(b) in the same way. Thus, areas that display 11(b) values and attributes attract the same avoidance requirement as those that are in Policy 11(a) of the NZCPS.

[8] The undisputed evidence of both Dr Lohrer and Mr Kerr was that this area displays values consistent with those of the balance of the 198ha adjacent, meeting the criteria of Appendix 5 of the Plan, and thus constituting **SEA**. Given the Plan treats both in the same way, there is no way to further differentiate these categories, and the requirement under this Plan is that adverse effects on such areas must be avoided.

[9] That being the case, we must conclude that this area is appropriately classified as SEA and that it is necessary to reinstate the SEA delineation over the area marked black on Annexure **C**. That status was not in dispute by the parties, and the issue was rather whether or not alternative controls might be adopted within the MPPZ zone for reclamation within the SEA.

Evaluation of SEA status

[10] It would be trite to say that the Forest & Bird appeal sought only the reinstatement of the SEA and no other outcomes. Nevertheless, it is arguably available to the appellant to seek to have controls somewhere between those that were originally notified and those that are currently in place over the site. Furthermore, some of those outcomes were directly sought by Forest & Bird and Northport themselves.

[11] On the other hand, we recognise that the Commissioners, in their decision, strengthened the provisions in relation to reclamation work within RSI areas and SEA. They specifically provided at rule D2.16 that such activities were non-complying. Other activities that have less impact have differing status, generally discretionary. Having turned their minds specifically to this issue of reclamation within an RSI area, we must

see the reasoning for the Commissioners' overall approach as being appropriate in the context of this Plan decision.

[12] Essentially, if reclamation is allowed within the SEA for the MPPZ at Northport, this small SEA would constitute an exception to the generality that reclamation is a non-complying activity, even in RSI areas.

Cultural considerations

[13] Ms Shaw appeared before us for Patuharakeke Te Iwi Trust Board and made submissions as to the relationship of tangata whenua in this particular area. She noted that the area in question is at the eastern extent of a large area of particular cultural significance to Patuharakeke, and in fact that one of their significant marae is adjacent to this coastal feature.

[14] It is clear that they actively maintain a relationship with this area, including around Marsden Point and One Tree Point, and that it constitutes part of their ancestral lands, waters, sites, waahi tapu and other taonga. We note that there is a Treaty claim in respect of the area. We also acknowledge that, as the eastern extent of the harbour, it would have some particular values. The extensive cultural areas exist both to the east and the west of the 190ha of SEA. To the west of the SEA, the harbour edge is noted as an area of cultural significance. From a cultural perspective, the harbour edge forms part of the cloak between the shoreline and the harbour, which is unbroken for a number of kilometres along the southern edge of the harbour. It is also reinforced by large sandbank areas comprising pipi and the like.

[15] In our view, these parallel forms of value (cultural and ecological) coalesce in the values that are seen on the southern side of Whangarei harbour, and particularly around One Tree Point. Whilst the existing port is of great significance to the Northland economy, and it provides national necessities, including oil and freight, this is in the context of an area that has significant ecological values.

Activity status for reclamation

[16] The argument for Northport and the Council was that these values would be

recognised in a discretionary consent application for reclamation. There is no doubt Northport has plans to extend into the area marked on Annexure **C** by reclamation and dredging. No application has yet been filed, but recent pressure on Northland during the COVID-19 crisis has accelerated design planning.

[17] This is an issue that has been covered several times by the Court, particularly in *Royal Forest & Bird Protection Society of New Zealand Inc v Bay of Plenty Regional Council*,[1] and also in *Cabra Rural Developments Ltd v Auckland Council*.[2] Mr Littlejohn, for Northport, was anxious to correct the Court when we suggested that our approach in using discretionary applications had been denounced in the Superior Courts as not avoiding adverse effects on priority matters under the NZCPS (Policies 11, 16 and 15).

[18] In this regard it is clear that the Northland Regional Plan takes a graded approach in its response to avoiding adverse effects within an SEA, ranging from controlled to discretionary and non-complying depending on circumstance. By way of summary:

(a) unlawful public road reclamation in the coastal marine area used for a public road and in a legal road reserve existing at 1 September 2017 may be a controlled activity under certain circumstances (C.1.6.1);

(b) unlawful reclamation of the foreshore and seabed and the use of a reclamation in a coastal marine area which existed at September 2017 may be a discretionary activity under certain circumstances; and

(c) more broadly reclamation may be a discretionary activity outside of significant surf breaks, ecological areas, outstanding natural features, areas of outstanding natural character, historic heritage, sites or areas of significance regionally, and significant anchorages (C.1.6.4). This follows from C.1.6.3, which provides for reclamation for RSI as a discretionary activity.

[19] Again, however, this is subject to the controls that it must be outside a significant

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[1] *Royal Forest and Bird Protection Society of New Zealand Inc v Bay of Plenty Regional Council* [2017] NZHC 3080.
[2] *Cabra Rural Developments Ltd v Auckland Council* [2020] NZEnvC 153.

ecological area or an outstanding natural feature or an area of outstanding natural character. However, it appears that, if it is a historic heritage area or a site of significance to tangata whenua or a regionally significant anchorage, reclamation may still be a discretionary activity (we ignore surf break) as we assume this would not occur within a regionally significant infrastructure area. In significant areas reclamation is a non-complying activity (C.1.6.6). The issue is whether discretionary or non-complying activity status is appropriate, given the competing outcomes sought.

[20] In response to the position for Northport and the Council, Forest & Bird cites various aspects of the decision of the Supreme Court in *Environmental Defence Society Inc v NZ King Salmon Company Limited*,[3] including:

> [129] … So, "avoid" is a stronger direction than "take account of". That said however, we accept that there may be instances where particular policies in the NZCPS "pull in different directions". But we consider this is likely to occur infrequently, given the way that the various policies are expressed and the conclusions that can be drawn from those differences in wording. It may be that an apparent conflict between particular policies will dissolve if close attention is paid to the way in which the policies are expressed.
>
> [130] Only if the conflict remains after this analysis has been undertaken is there any justification for reaching a determination which has one policy prevailing over another. The area of conflict should be kept as narrow as possible. The necessary analysis should be undertaken on the basis of the NZCPS, albeit informed by s 5. As we have said, s 5 should not be treated as the primary operative decision-making provision.

[21] Further, at paragraphs [153] and [154], the Supreme Court rejected the plan change proposals that would have changed salmon farming from a prohibited to a discretionary activity because of the significant adverse effects on the outstanding natural character and that the discretionary activity did not give effect to the NZCPS Policies 13 and 15.

[22] Similar points were made, including cultural issues bearing upon this, by Ms Shaw for Patuharakeke.

[23] There are a number of relevant cases, for example the more recent decision of the High Court in *Environmental Defence Society Inc v Otago Regional Council*:[4]

> [55] That submission, however, does not easily fit with the decision in *King Salmon*. In that decision, the Supreme Court confirms that Avoidance Policies will inevitably result in prohibited activities. The

[3] *Environmental Defence Society Inc v New Zealand King Salmon Company Ltd* [2014] NZSC 38.

[4] *Environmental Defence Society Inc v Otago Regional Council* [2019] NZHC 2278 at [55].

> prohibition is not just of an activity that breaches the Avoidance Policies, but also of a potential breach. Most significantly, such a prohibition does not allow the use of adaptive management whereby predicted effects that carry an element of risk are avoided or managed by having monitoring and changing behaviour in accordance with that monitoring.

[24] We acknowledge that the *Otago* decision is subject to appeal, with the hearing due later this year.

[25] From all the cases cited, and submissions, we conclude that the question of avoidance under 11(a) of the NZCPS needs to be evaluated in relation to other policies within the Plan, considering:

(a) The nature of its relationship with the other policies, and whether there is any conflict;

(b) The question of avoidance, which will depend on the adverse effects which might be identified are actual or possible, in this case, in the event of reclamation;

(c) The Court is limited by the provisions that are before the Court on appeal, as it has no power to impose a different status than those argued under the original notified application and the various submissions of the parties under this appeal.

[26] In this case, that relates to a difference between full discretionary activity status or non-complying status. For clarity, it is not open to us to impose a prohibited status on reclamation within RSI and MPPZ on this site, given that is not an outcome that was either notified or sought by any party.

The status of the policies

[27] The agreed position of parties before this Court was that biodiversity Policy 11 of the NZCPS took priority over Policy 9. Given the comment of the High Court in *Forest & Bird*[5] as to not relying on the position of parties when undertaking the analysis, we are reluctant to rely entirely upon that as conclusive.

[5] *Royal Forest and Bird Protection Society Inc v Bay of Plenty Regional Council* [2017] NZHC 3080 at [89] – [92].

[28] The Court has had reference to the various objectives and policies of the NZCPS. We conclude that those most relevant in the current circumstances are Policy 9 relating to ports, Policy 10 relating to reclamation and de-reclamation, and Policy 11 relating to indigenous biological diversity. We look at the language of each of these, and in relation to the ports, notice that there is a need to:

> …recognise… including by:
>
> (a) ensuring that development in the coastal environment does not adversely affect the efficient and safe operation of these ports, or their connections with other transport modes; and
>
> (b) considering where, how and when to provide in regional policy statements and in plans for the efficient and safe operation of these ports, the development of their capacity for shipping and their connection with other transport modes.

[29] In this regard, the policy is focussed firstly on competing development under Policy 9(a), which does not apply in this case. In relation to Policy 9(b), the requirement is to consider how and when to provide for ports in Regional Policy Statements and in Plans. This is not a mandatory requirement, but one would be looking to the provisions of the Plan to see whether it has provided, and if so in what way. Neither of these policies can be seen as overriding provisions that provide any absolute requirements. In particular, Policy 9(b) cannot be seen as an absolute requirement.

[30] In relation to NZCPS Policy 10, this commences with the words at 1:

> Avoid reclamation of land in the coastal marine area unless;
>
> (a) land outside the coastal marine area is not available for the proposed activity;
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> (b) the activity which requires reclamation can only occur in or adjacent to the coastal marine area;
>
> (c) there are no practicable alternative methods of providing for the activity; and
>
> (d) the reclamation will provide significant regional or national benefit.

[31] Even where it meets those criteria, subparagraph Policy 10(2)(c) notes:

> Considering its form and design, have particular regard to:
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> …
>
> (c) the use of materials in the reclamation, including avoiding the use of contaminated materials that could significantly adversely affect water quality, aquatic ecosystems and indigenous biodiversity in the coastal marine area;
>
> …
>
> (e) the ability to remedy or mitigate adverse effects on the coastal environment;
>
> …

> (f) whether the proposed activity will affect cultural landscapes and sites of significance to tangata whenua.

[32] We note that NZCPS Policy 10(3) notes the "ability of the reclamation to provide for efficient operation of infrastructure, including ports…". From this, it is clear that the wording of this is essentially to avoid reclamation. The exception, however, does not make it an absolute requirement that provision be made. NZCPS Policy 10(2) provides a whole series of matters that need to be considered in the event that the reclamation does meet the requirements of (1).

[33] In this case, there was no dispute and nor are we able to see any evidence to suggest that the reclamation would not meet the criteria within 10(1) in respect of an RSI, being Northport. The question as to whether or not a particular reclamation would be allowed would be a matter to consider in a whole series of issues, some of which relate to the environment and others that relate to the other factors listed in NZCPS Policy 10(2) and (3).

[34] It was agreed, and there was no doubt at all in our minds, and it is reinforced in a series of Superior Court decisions, that the requirements of Policy 11(a) of the NZCPS require the avoidance of adverse effects. NZCPS 11(b) only requires the avoidance of significant adverse effects. The SEA in this case is identified under a single requirement and may meet the requirements of Policies 11(a) or 11(b) or both. Normally this would be a matter of some importance, but as we will discuss shortly, the approach of the Northland Regional Policy Statement and relevant Plan subsumes both of these categories and requires the avoidance of adverse effects.

[35] As we have already held, we are satisfied that the SEA in question, including under the MPPZ, meets the criteria of 11(a) or 11(b) or both. To some extent the answer to that question may turn upon whether or not indigenous taxa, in this case birds and sea life that are listed as threatened or at risk, habitually use the SEA or not. There is currently an appeal to give SBA areas and at least some of the Significant Marine Mammal Areas (**SMMA**) the same status as SEA under NZCPS Policies 11(a) and 11(b).

[36] At this stage the other features, including shellfish and benthic elements, may include species within the categories of 11(a) but the position has not been finalised. It

was not necessary for the purpose of this hearing, given the Regional Policy Statement and Plan appeal.

[37] Overall, there can be no doubt that the requirements of Policy 11 are clear, and there is no contradiction with Policies 9, 10 or any of the other policies in the NZCPS. If anything, the policies relating to tangata whenua, Policy 2 in particular, would reinforce issues surrounding the priority of indigenous biological diversity, particularly where those create the cultural significance and taonga, the subject of concern. We recognise that there are other policies relating to development, including Policy 6, but these policies do not derogate from the other key policies, Policy 11 in this case. We record again that this was a position common to all parties, although we have independently confirmed the same position.

The Regional Policy Statement and Proposed Plan

[38] The Regional Policy Statement has taken a strong stand on indigenous biodiversity. RPS 5.3.2 recognises that regional infrastructure and ports are of particular significance to Northland. However, RPS 5.3.3 and its explanation do not seek to derogate from the avoidance required by NZCPS Policy 11(a). RPS Policy 4.4.1 requires the avoidance of adverse effects on significant ecological areas and habitats identified under an Appendix 5 criterion. The method by which the NZCPS 11(a) and (b) matters are identified is left to the regional plan, but clearly it is intended to cover all matters under Policy 11. This includes not only vegetation and benthic elements, but also species identified under Policy 11(a) or (b), including birds, fish, mammals (including sea mammals) as may be relevant.

[39] The Proposed Regional plan the subject of this appeal has settled provisions in respect of the matters under the SEA. In this regard, Appendix 5 criteria are used to identify the matters covered under the SEA. Similar criteria are also used for the SMMA and the SBA, but the consequence of that is yet a matter to be resolved on appeal. We note that the SBA underlies part of the MPPZ, including most of the relevant site. The MPPZ may also constitute part of the SMMA, although the diagrams we have been shown to date do not make this clear.

Reclamation and avoidance under the Proposed Regional Plan

[40] Where such features as SEA are identified they are subject to Policy D.2.16 and the consequent rules (such as C.1.6.3) that apply the subject of this appeal. Works within an SEA could include a range of activities from replacement of important harbour safety signs through to dredging for channelization, and in the extreme to reclamation. We say "in the extreme to reclamation" because this is the conversion of SEA seabed into land. The extent of reclamation is a final and total revocation of the benthic and habitat values and attributes of the area to the extent that the reclamation involves it.

[41] We are unanimous in our view that reclamation involves the total loss of the values and attributes of the SEA underneath the footprint of any such reclamation. Whatever new values might be established, they are not those recognised in respect of a SEA, being a benthic element of a harbour. This is reflected in the fact that other structures, dredging, minor works, are approached differently in terms of the regional plan, and have different status.

[42] The Plan was modified at hearing by the Commissioners to include a reference to discretionary status, including for RSI as discretionary only for reclamation. Where reclamation is within a SEA, an ONF or ONL, it became non-complying. This reflects the pre-eminence of Policies 11, 13 and 15 of the NZCPS as discussed in the decisions we have already referred to.

[43] Accordingly, the Commissioners' decision on this matter is largely not the subject of appeal. The only exception sought in this case is that this small part of the MPPZ be treated on a different basis to the rest of the RSI within Northland. Accordingly, we are not dealing with a general rule but whether there is proper basis for exception for part of this site based on the fact it has an underlying SEA.

[44] The SEA underlying an RSI is recognised directly in the relevant Rule C1.6.3, and therefore was within the contemplation of all the parties, including Northport, when the decision was released. Of course, at that time, the decision removed the SEA from the particular area in question and included the area within the MPPZ. Thus, Mr Littlejohn is quite right to say that Northport was satisfied with the outcome, and thus

the reason for the dispute before the Court.

Which outcome is better?

[45] We have concluded unanimously that the status of the MPPZ and SEA should require reclamation works within an RSI where there is an SEA to be a non-complying activity. This is consistent with the rest of the Northland region, and in our view properly meets the "avoid" requirement of the relevant regional plan, RPS and Policy 11 of the NZCPS.

[46] We reach this decision largely based upon our analysis that the degree of intervention required will depend on the actual and potential adverse effects that might occur. In some cases it may be possible to avoid adverse effects entirely. We mentioned the *Forest & Bird* case[6]. There was the potential, in that case, for electric lines to be underground or to span across the top of an indigenous biodiversity area with minimal or no intervention within it.

[47] However, reclamation by its very nature means the total loss of value and attributes of the area in question, the subject of the reclamation application. There was a suggestion that there could be a trade-off in such circumstances with improvements to the balance of the SEA. How the loss of habitat or Significant Areas can be justified under PRP D.2.16 or RPS policy 4.4.1 was not explained. Ms Sitarz gave evidence that such offsets cannot be used due to RPS policy 4.4.1(5) in relation to the avoidance of adverse effects under Policy 11 in a SEA.[7] This also seems to follow from the superior court decisions.

[48] In addition, the relationship of tangata whenua is documented in the Patuharakeke Hapu Environmental Management Plan (**HEMP**). Sections 9.2 and 9.6 of the HEMP identify potential issues with the port, and issues objectives, policies and methods to avoid dredging and opposing reclamation.

[49] That being the case, the purpose to avoid of effects is absolute, and we conclude

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[6] *Royal Forest and Bird Protection Society Inc v Bay of Plenty Regional Council* [2017] NZHC 3080 at [136] – [142].
[7] Transcript, page 68.

that reclamation cannot be regarded as transitory or minimal. We can see no way, nor was any way suggested to us by the experts, that the reclaimed area could be reinstated to the same or similar state subsequent. This is a very different case to one where tracking through mangroves, for example, could be repaired, and over a short period of time the area reinstated to its original condition.

[50] Here, those values are lost for all time unless there is a de-reclamation. In our view, that would still mean either an artificial reinstatement of values or a re-evaluation as to whether any values could be re-established at all.

[51] Although we accept that there might be circumstances where another activity status than non-complying or prohibited might be appropriate for certain activities within a SEA, we do not consider reclamation to be one of those. Given that the most restrictive provision we can impose in terms of these appeals is non-complying and given that this was the position of the Commissioners, we confirm the Commissioner's decision in this regard.

[52] No subsequent changes are required by us to the Plan and accordingly the new overlay of SEA will simply underlie the MPPZ and change the status of any activity within that area for reclamation to non-complying. It may have other consequences, but these have not been addressed by the parties.

Outcome

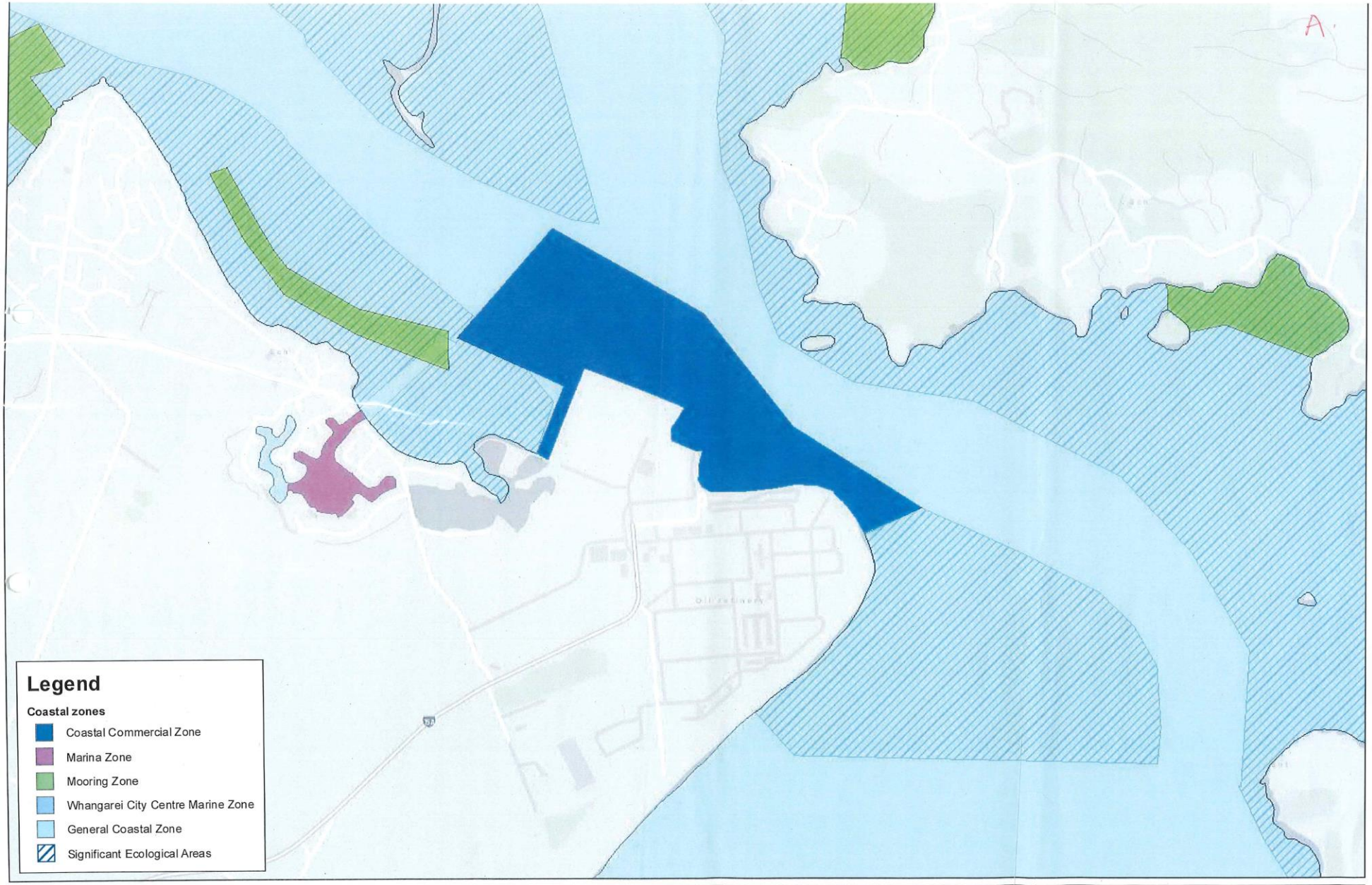
[53] Given that we consider that the evidence is overwhelming for the reinstatement of the SEA over the part that was removed, we confirm its reinstatement. We do not consider it necessary to change the status of reclamation within the MPPZ as the Plan specifically identifies that such an underlying SEA can occur within an RSI area. We confirm that noncomplying status for reclamation is compatible with the MPPZ and simply changes the status of certain activities within that particular area.

[54] For the reasons we have explained, we see no reason to make any changes to the status of activities within the area identified on the map.

[55] Costs are reserved. Any application for costs is to be filed within 20 working days of the date of this decision, any reply within 10 working days and a final reply, if any, five working days thereafter.

For the Court:

J A Smith
Environment Court Judge



Northland REGIONAL COUNCIL

Notified Version Maps - MPPZ and SEA

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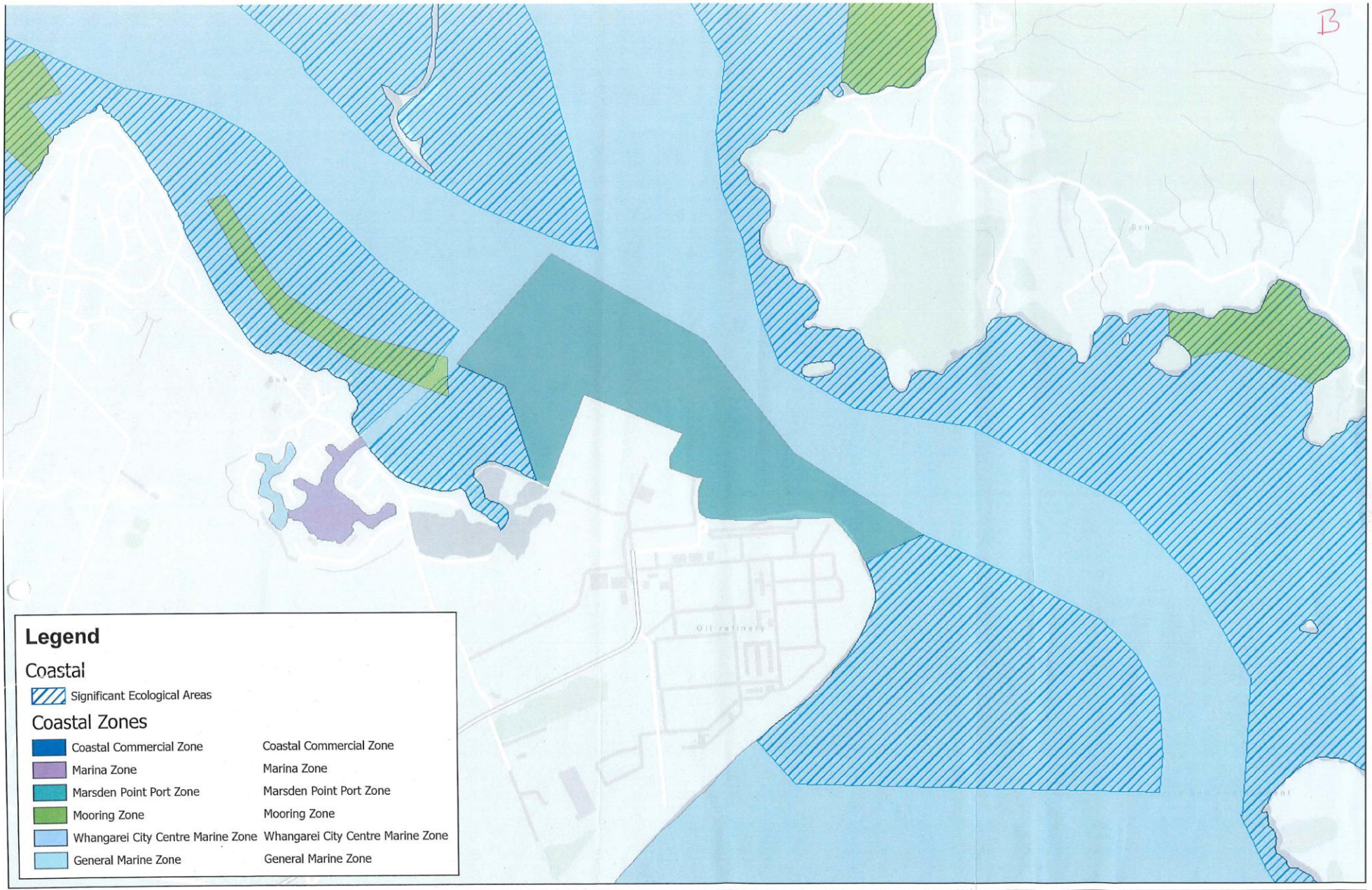

Northland REGIONAL COUNCIL

Decisions Version Maps - MPPZ and SEA

Projection NZTM. Datum NZTM2000.
DISCLAIMER:
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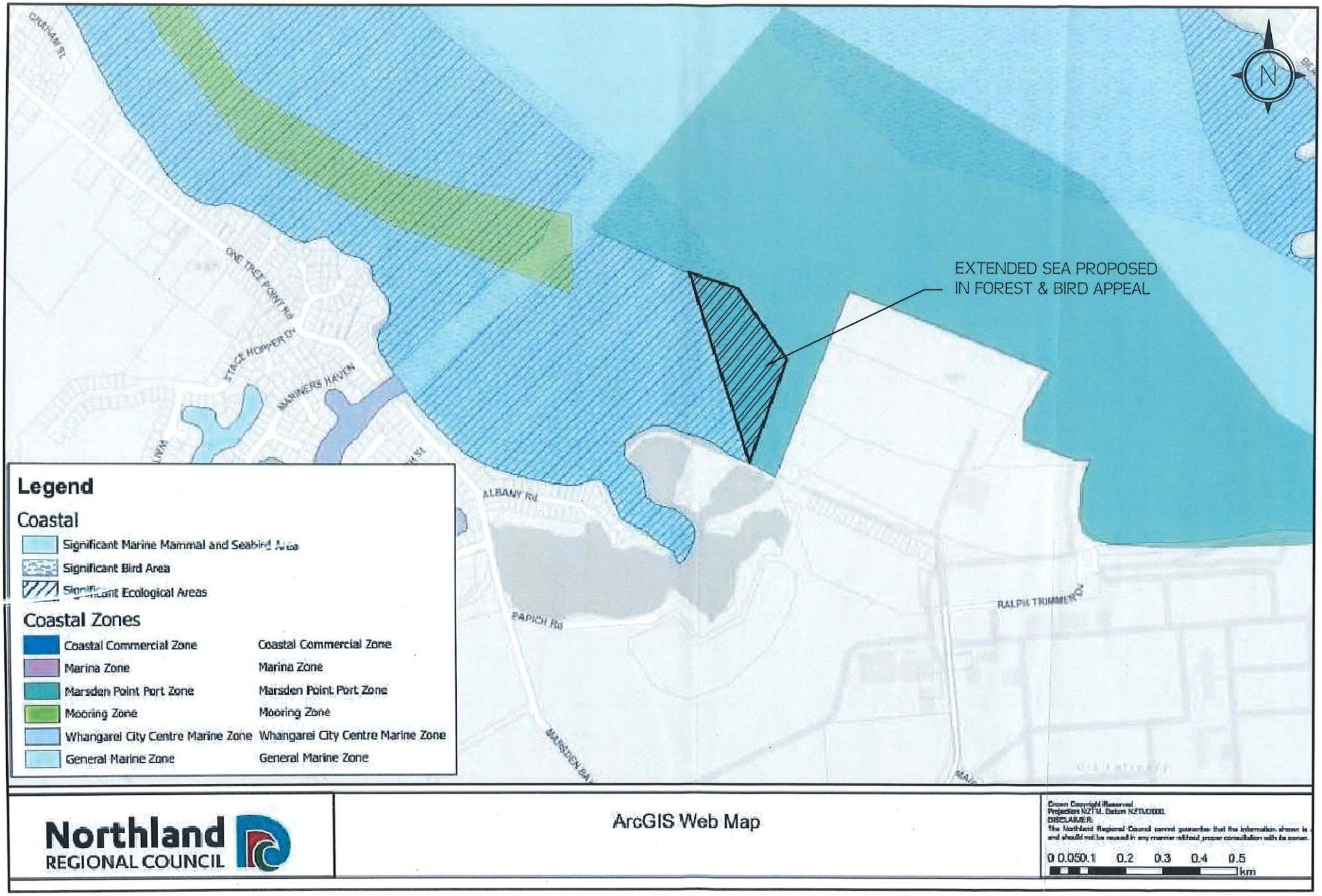
EXTENDED SEA PROPOSED
IN FOREST & BIRD APPEAL
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ONE TREE POINT Rd
STAGE HOPPER Dr
MARINERS HAVEN
ALBANY Rd
PAPICH Rd
RALPH TRIMMER Dr
Legend
Coastal
Significant Marine Mammal and Seabird Area
Significant Bird Area
Significant Ecological Areas
Coastal Zones
Coastal Commercial Zone
Coastal Commercial Zone
Marina Zone
Marina Zone
Marsden Point Port Zone
Marsden Point Port Zone
Mooring Zone
Mooring Zone
Whangarei City Centre Marine Zone
Whangarei City Centre Marine Zone
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