

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

Decision No. [2018] NZEnvC 130

IN THE MATTER of the Resource Management Act 1991
AND of an inquiry under clauses 14(1) and 15(3)
of Schedule 1 to the Act

BETWEEN FRIENDS OF NELSON HAVEN AND
TASMAN BAY INCORPORATED
(ENV-2017-WLG-000010)
Appellant

AND TASMAN DISTRICT COUNCIL
Respondent

AND WAINUI SPAT CATCHING GROUP
Applicant

AND JILLIAN RUTH FOXWELL
FRIENDS OF GOLDEN BAY SOCIETY
(INCORPORATED)
JAMES BEARD ENVIRONMENTAL
TRUST
ROYAL FOREST AND BIRD PROTECTION
SOCIETY OF NEW ZEALAND
INCORPORATED
s274 Parties

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

Hearing: On the Papers

Date of Issue: 10 AUG 2018

FINAL FINDINGS AND DIRECTIONS OF THE ENVIRONMENT COURT



DIRECTIONS AND ORDER

- A: By consent, the amendments to the Tasman Resource Management Plan as set out in the Appendix to this decision are directed to be made.
- B: Rule 25.1.4.4 in the Tasman Resource Management Plan is directed to be amended by deleting the words:

In considering applications and determining conditions, Council will have regard to the following matters as well as other provisions of the Plan and the Act.

- (1) Degree of exclusive occupation, if sought.
- (2) Treaty values.
- (3) Type, scale, location, density and integrity of structures.
- (4) Ecological matters, including monitoring.
- (5) Natural character.
- (6) Navigation, including the form of compliance with Maritime New Zealand guidelines for the marking and lighting of aquaculture structures.
- (7) Management of biosecurity risk organisms, such as *Undaria*. [check definition point]
- (8) Duration of the permit.
- (9) Financial contributions, bonds, administrative charges.
- (10) Timing and purpose of reviews of any or all conditions.

In addition,
so that the Rule reads:

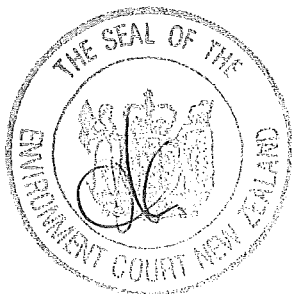
25.1.4.4 Discretionary Activities (Mussel Farming at Wainui Bay)

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

- (a) The activity is at the Wainui Bay mussel farming sites as shown on the planning maps; and
- (b) The activity uses longline structures, incorporating surface buoys.

A resource consent is required. Consent may be refused or conditions imposed. The following standard conditions (to the extent that they are applicable) will be applied to any consent granted under this rule:

- (i) The activity does not discharge contaminants to the sea, and in particular tributyl-tin anti-fouling is not used on any structure or equipment and no artificial feed is added to the sea. For the purposes of this rule, naturally occurring marine material that is discharged by any organism or from any aquaculture structure is not a contaminant.
- (ii) Where any structure or part of a structure sinks, breaks free or otherwise causes a navigation hazard, steps are taken as soon as practicable to recover, secure, and make safe the structure. The consent holder, or site manager, whoever is first aware of the matter, is to notify the Harbourmaster of any such incident as soon as practicable on becoming aware of it.
- (iii) The consent holder removes from the site any structure or material that is superfluous to the activity, including any discarded equipment.
- (iv) The consent holder notifies Maritime New Zealand immediately prior to the placement of structures; and within 24 hours of the placement of structures notifies Land Information New Zealand, and the Council Harbourmaster.
- (v) The whole or any part of the interest in the coastal permit for the activity may be transferred to any other party. The transferor



remains responsible for compliance with the terms and conditions of the permit until written notice of the transfer is given to the Council.

C: There is no order as to costs.

REASONS

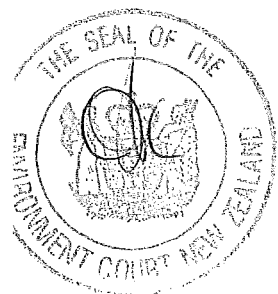
Introduction

[1] In this Court's interim decision,¹ directions were made to the Respondent under s 291 of the Resource Management Act (**RMA**):

- (a) to make certain amendments to Plan Change 61 (PC 61);
- (b) to prepare and consult with the other parties on the final form of the provisions of the Tasman Resource Management Plan (TRMP) which were the subject of the Court's directions; and
- (c) to consider and include any consequential amendments that may be necessary and which the Court had not identified.

[2] In accordance with those directions, a memorandum was filed by counsel for the Respondent on 1 June 2018. That memorandum set out a number of proposed amendments to the TRMP to give effect to the Court's decision and advised that these had been agreed among the parties. It also advised that there was one outstanding matter on which the parties were unable to agree.

[3] The Court has reviewed the agreed proposed amendments, is satisfied that they are appropriate and directs that these amendments, as set out in the Appendix to this decision, be made.



¹ *Friends of Nelson Haven & Tasman Bay Incorporated v Tasman District Council* [2018] NZEnvC 046.

[4] The parties were unable to agree on the final form of part of Rule 25.1.4.4 (the discretionary activity rule for mussel farming applications within Wainui Bay). Specifically, agreement was not reached on the list of ten matters to which the Council is to have regard in considering applications and determining conditions of resource consent.

[5] The issues were identified in terms of three options, being whether:

- (a) the ten matters should be deleted in their entirety (**Option A**); or
- (b) landscape and/or amenity values and/or economic, employment and social benefits should be added to the list of ten matters (**Option B**)²; or
- (c) the list of ten matters should not be changed (**Option C**).

[6] Subsequently, the Court issued a Minute dated 13 June 2018 making directions timetabling the filing of submissions on this outstanding issue.

[7] Submissions were filed as follows:

- (a) jointly on behalf of the Appellant and the Friends of Golden Bay (collectively referred to as **the Friends**) and Royal Forest and Bird Protection Society of New Zealand Inc (**RFAB**) dated 15 June 2018 and, in reply, 29 June 2018.
- (b) the Wainui Spat Catching Group (**Applicant**) dated 22 June 2018.
- (c) the Council (**Respondent**) dated 22 June 2018. (The Respondent had indicated in its Memorandum of 1 June 2018 that "Council has advised the parties it will take a neutral position on the issue, but may make submissions to assist the Court if warranted.")
- (d) the Section 274 parties: James Beard Environmental Trust dated 21 June 2018 and Jill Foxwell representing herself and the Anatimo Trust dated 21 June 2018.

² The Joint Submission from the Friends and RFAB dated 15 June 2018 stated: "It is noted that the option of only adding economic, employment and social benefits was not discussed by the parties. The discussions centred on whether this matter should also be added if landscape and amenity values were to be included in the list of matters."



Policy 22.1.3.2 and Rule 25.1.4.4 of the TRMP

[8] The Court's decision directed that Policy 22.1.3.2 be amended to read as follows:

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

[9] To achieve that policy, Rule 25.1.4.4 is now proposed to be retained³ and, subject to the issue referred to above in [4], amended to read as follows with additions shown underlined and deletions struck through:

25.1.4.4 Discretionary Activities (Mussel Farming at Wainui Bay)

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

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

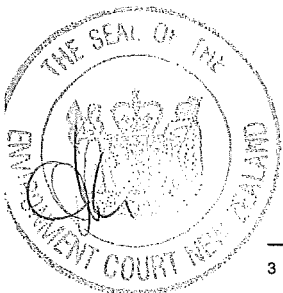
A resource consent is required. Consent may be refused or conditions imposed. In considering applications and determining conditions, Council will have regard to the following matters as well as other provisions of the Plan and the Act.

- (1) Degree of exclusive occupation, if sought.
- (2) Treaty values.
- (3) Type, scale, location, density and integrity of structures.
- (4) Ecological matters, including monitoring.
- (5) Natural character.
- (6) Navigation, including the form of compliance with Maritime New Zealand guidelines for the marking and lighting of aquaculture structures.
- (7) Management of biosecurity risk organisms, such as *Undaria*.
- (8) Duration of the permit.
- (9) Financial contributions, bonds, administrative charges.
- (10) Timing and purpose of reviews of any or all conditions.

In addition, the following standard conditions (to the extent that they are applicable) will be applied to any consent granted under this rule:

- (i) The activity does not discharge contaminants to the sea, and in particular tributyl-tin anti-fouling is not used on any structure or equipment and no artificial feed is added to the sea. For the purposes of this rule, naturally occurring marine material that is discharged by any organism or from any aquaculture structure is not a contaminant.
- (ii) Where any structure or part of a structure sinks, breaks free or otherwise causes a navigation hazard, steps are taken as soon as practicable to recover, secure, and make safe the structure. The consent holder, or site manager, whoever is first aware of the matter, is to notify the Harbourmaster of any such incident as soon as practicable on becoming aware of it.
- (iii) The consent holder removes from the site any structure or material that is superfluous to the activity, including any discarded equipment.

³ PC 61 proposed to delete Rule 25.1.4.4 and provide for mussel spat catching and holding as controlled activities in a new aquaculture management area (AMA 4) at Wainui Bay.



- (iv) The consent holder notifies Maritime New Zealand immediately prior to the placement of structures; and within 24 hours of the placement of structures notifies Land Information New Zealand, and the Council Harbourmaster.
- (v) The whole or any part of the interest in the coastal permit for the activity may be transferred to any other party. The transferor remains responsible for compliance with the terms and conditions of the permit until written notice of the transfer is given to the Council.

The Positions of the Parties

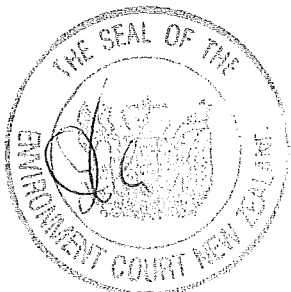
[10] Rule 25.1.4.4 may be considered as being in four parts:

- (a) The rule itself, which is the first sentence of the text quoted above and includes the two pre-conditions;
- (b) The next two sentences, which essentially restate s 87A(4)(a);
- (c) The fourth sentence (commencing "In considering applications ..."), including the list of ten matters for consideration; and
- (d) The last section (commencing "In addition, the following standard conditions ..."), including the list of five standard conditions.

[11] The remaining issue relates to the third part: the list of ten matters for consideration. There is no issue with the rule itself. The second part appears to be superfluous but is not in contention. We do not understand any party to be opposing the last section, although we note that the words "In addition" would not sit well if the third part were to be deleted.

[12] Three options for dealing with the third part were identified by the parties, with each party taking a different position:

- (a) **Option A - deletion:** The Friends and RFAB, supported by the s274 parties (James Beard Environmental Trust and Jill Foxwell representing herself and Anatimo Trust), sought deletion of the third part including all the listed discretionary considerations.
- (b) **Option B - expansion:** The Respondent sought the retention of the list of matters and, if the Court were minded to make any changes, the addition to the list of "landscape", "amenity values" and "economic, employment and social benefits".



- (c) **Option C - no change:** The Applicant's position was that no change should be adopted. If there were to be any amendment, it expressed a preference for Option B over Option A.

[13] We will review the submissions for each party and then assess each option in terms of the following considerations:

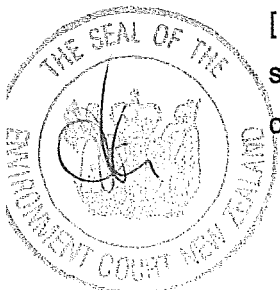
- (i) **Need:** Is there a need for a list?
- (ii) **Completeness:** If a list is needed, does it include all the relevant matters?
- (iii) **Risk:** If the list does not cover all relevant matters, is there a risk of inappropriate focus on listed matters?
- (iv) **Scope:** Is the relief within the scope of the appeal and was it sought by any party?
- (v) **Evidence:** Is there a sufficient evidential basis for the relief?
- (vi) **Appropriateness:** Are the specific additions proposed by the Applicant and the Respondent appropriate?
- (vii) **Consistency:** Is the list consistent with the approach taken in other aquaculture rules in the TRMP?

Should there be a list?

[14] The first three considerations, of need, completeness and risk, can be assessed together.

[15] Rule 25.1.4.4 provides for mussel farming as Wainui Bay as a full discretionary activity. The Friends and RFAB submit that it is appropriate that the relevant matters to be addressed on a discretionary activity under s104B RMA are not restricted other than as set out in s 104 RMA, Part 2 of the RMA, the New Zealand Coastal Policy Statement (**NZCPS**), the Tasman Regional Policy Statement (**TRPS**) and the relevant parts of the TRMP. They say there is accordingly no need for particular matters to be identified or otherwise singled out in the rule.

[16] The Friends and RFAB submit that removing the list of matters is necessary so that the rule is clear and certain in its own terms and therefore more likely to be correctly applied to a fully discretionary activity. Users and decision-makers would



not wrongly direct themselves by considering or focussing only on the listed matters. All the relevant effects of a proposal to which rule 24.1.4.4 applies would be considered. Such consideration would include, importantly, effects on outstanding landscapes and natural features and amenity values which are not identified in the list of matters as it currently stands but which are likely to be relevant given the relevant statutory provisions.

[17] The Friends and RFAB submit that the listed matters include some but not all potentially relevant matters. They point to the implications of Policy 22.1.3.2 as amended by the Court which recognises the favourable characteristics of part of Wainui Bay for spat catching. Key issues for the Friends and RFAB are the effects of mussel spat catching farms on the natural character, natural landscape and features, and amenity values of Wainui Bay. However, there is no corresponding policy in the TRMP in relation to those matters. In this context, the Friends and RFAB consider that it should be made clear that all of these matters are relevant and need to be considered as part of any future resource consent application for mussel farming under Rule 25.1.4.4.

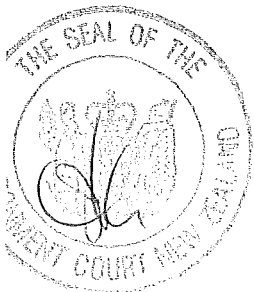
[18] The Friends and RFAB point out that assessment criteria for discretionary activities are sometimes used in plans to provide guidance to an applicant (and others) to assist with the effects to be focussed on when considering an application. In *Stacey v Auckland Council*, the Environment Court observed:⁴

The relevant District Plan references set out for us in the Planners' joint statement also highlighted the District Plan assessment criteria...which apply to this activity as a guide to its assessment as a fully discretionary activity. Obviously, such an assessment is not limited to these criteria, but they assist to focus the issues for an applicant ...

[19] While the TRMP contains a list of matters which are not couched as assessment criteria, we consider the approach to be analogous. The matters listed are likely to guide or direct users toward considering specified environmental effects or issues. But the Friends and RFAB are concerned that including only certain matters under Rule 25.1.4.4 has the potential for applicants, decision makers and others to direct themselves only to those matters, or to consider that priority or greater weight is to be given to those matters when that is not intended by the TRMP.

[20] In addition, the Friends and RFAB submit that listing the matters in this way

⁴ *Stacey v Auckland Council* [2011] NZEnvC 109 at [33].



may suggest they are all criteria to be applied equally, risking a “balancing approach” or an “overall broad judgment” approach which is contrary to the Supreme Court decision in *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd*.⁵

[21] The Applicant considers that the risk propounded by the Friends and RFAB is unfounded and seeks to solve a non-existent problem. It did not consider it possible that an aquaculture proposal at Wainui might be assessed and granted consent without considering its effects on the landscape and on economic and employment matters. The Applicant pointed to that part of Rule 25.1.4.4 which currently states:

In considering applications and determining conditions, Council will have regard to the following matters **as well as other provisions of the Plan and the Act.** (emphasis added)

[22] As the Applicant submits, that provision is clearly a reference to s 104 RMA. In identifying that a discretionary consent is required, as well as referring to other provisions, the TRMP makes it clear that the ten listed matters are not matters to which the consent authority has restricted the exercise of its discretion. Moreover, the Applicant submitted that Issue 22.1.1, Objective 22.1.2 and Policy 22.1.3.1 of the TRMP guide decision makers to have regard to “maintaining, enhancing or protecting natural character, landscape, ... recreational and amenity values.”

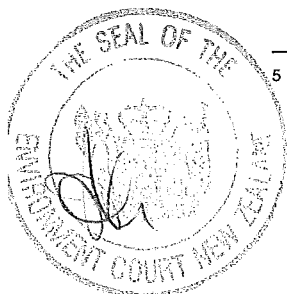
[23] The Council in its support of Option B and the possible expansion of the list, submitted:

... the rule is a practical way to focus a decision-maker and applicant’s attention on the matters that may require consideration. The Council consider it helpful to include the List to assist any applicant, the processing officer, any submitter and decision maker to identify matters that are likely to be important considerations. That is why including the key matters identified by the Court is the most appropriate outcome.

Scope

[24] The Applicant opposes Option A on the ground that this relief was not sought by any party, noting that the Notice of Appeal simply seeks that PC61 be declined. It says that nowhere in the relief sought is it mentioned that the list of matters to be

⁵ *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 (**King Salmon**); see also *Royal Forest and Bird Protection Society of New Zealand Inc v Bay of Plenty Regional Council* [2017] NZHC 3080.



considered under Rule 25.1.4.4 should be deleted. Its view is that the position now being adopted is inconsistent with the submissions by the Friends and RFAB that the status quo should be retained.

[25] The Friends and RFAB submit that the deletion of the list is a necessary consequential amendment for five reasons. First, the change to Rule 25.1.4.4 is fairly and reasonably raised in the overall context of the appeal, with the Notice of Appeal challenging the whole of the Respondent's decision to approve Plan Change 61 with modifications. Relief was not sought in relation to particular plan provisions but rather that the Respondent's decision be cancelled and that the private Plan Change request be declined. The relief sought also included:

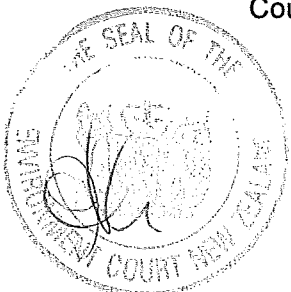
as well as the specific relief sought above, the appellants seek such further, alternative and consequential relief which addresses the appellant's concerns.

[26] Second, the Friends and RFAB submit that PC61 sought to include in the TRMP a specific aquaculture management area (AMA4) and a specific policy and rule framework for mussel spat catching and holding at Wainui Bay. This framework included changing the activity status of mussel spat catching and holding at Wainui Bay from discretionary to controlled if certain requirements were met, and defaulting to a restricted discretionary activity if the thresholds in the requirements were not met.

[27] Third, the Friends and RFAB submit that the appropriateness, scope and provisions of Rule 25.1.4.4 in the context of the TRMP as a whole, and in particular in the context of Chapter 25, are clearly part of PC61 and of the appeal as argued before us. While the relief sought was that the status quo be retained, that was not the decision of the Court, which allowed the appeal in part and declined the appeal in part.

[28] Fourth, the Friends and RFAB referred to the Environment Court having, pursuant to s 290 RMA, the same power, duty and discretion in regard to an appeal made under clause 14 of the First Schedule to the Act in respect of the decision appealed against as the local authority had under clause 10. The Court may confirm, amend or cancel the decision to which the appeal relates. Under clause 10(2)(b), the Court's decision may include:

- (i) matters relating to any consequential alterations necessary to the proposed statement or plan arising from the submissions; and



- (ii) any other matter relevant to the proposed plan or statement arising from the submissions.

[29] Finally, the Friends and RFAB submitted that parties were directed to identify any consequential amendments that may be necessary and which the Court had not identified. The removal of the listed matters is a necessary consequential amendment to Rule 25.1.4.4, to ensure that when new spat catching permits are applied for, all relevant matters will be considered and given due weight under s104. The proposed change does not seek to change the nature of the rule, but rather to ensure its correct application. As such, there is no prejudice to any party.

Evidence

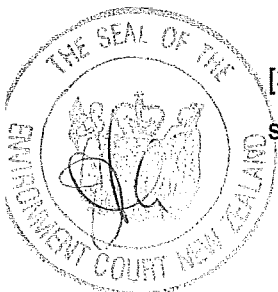
[30] The Applicant submits that the relief was not part of the evidence (particularly the planning evidence) called by any party and was not put to any witness in cross examination. It says that the experts did not consider whether deleting the list of matters may result in inconsistency with other discretionary activity rules in the TRMP (being Rules 25.1.4.3 and 25.1.4.5), or whether it might have unintended consequences.

[31] For example, the Applicant suggests that a deletion of the reference in item (6) to "biosecurity risk organisms, such as Undaria" might result in such organisms being overlooked. Another example was removing specific reference to the Maritime New Zealand Guidelines. The Applicant refers to Chapters 22 - Aquaculture and 26 - Information Required with Coastal Permit Applications and submits that these do not specifically alert a user of the TRMP to these matters. It considers it possible that, had they been alerted to this proposed change, Maritime New Zealand as well as the Ministry for Primary Industries and the Minister for Conservation might have wanted to be heard.

Appropriateness of additional matters

[32] The Respondent submits that Option B should be adopted by including three new matters: landscape; amenity values; and economic, employment and social benefits.

[33] The Applicant would support the inclusion of "economic, employment and social benefits" in the list if landscape were included, but as a less preferred option



than Option C.

[34] The Respondent submits that the inclusion of “economic, employment and social benefits” simply implements the recognition in Policy 22.1.3.2 of the contribution of Wainui Bay contribution to the aquaculture industry.

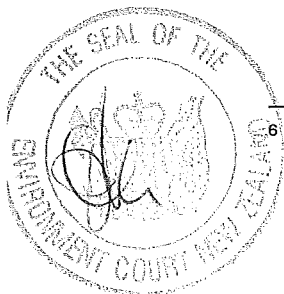
[35] The Friends and RFAB submit that this is an incorrect application of the directions in the Court’s interim decision. They submit that Policy 22.1.3.2 is the context for the rule which provides an opportunity to apply for limited aquaculture activities at the site and for the exercise of the discretion whether or not to grant consent to such activities. However, including “economic, employment and social benefits” additionally as a listed consideration in the rule would, they submit, inappropriately go a step further and elevate the importance of that matter by suggesting that it should be focussed on.

[36] The Applicant says there should be no need to submit that economic benefits is a matter to be considered under Part 2 of the Act. The efficient use and development of natural and physical resources is a matter to which decision-maker must have particular regard under s 7(b) of the Act. Further, the Applicant submits that aquaculture is part of the “environment” as defined in s 2 of the Act and that Policy 22.1.3.2 should be implemented by rules where appropriate.

[37] The Friends and RFAB respond that the addition of economic, employment and social benefits to the list of matters would not be appropriate because unlike landscape, features and amenity values, such matters are not identified in ss 6 or 7 of the RMA. To the extent that the Applicant is relying on the purpose of the Act in which “sustainable management” is defined to mean “managing the use, development and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic and cultural wellbeing,”⁶ the Friends and RFAB submit that this element of the purpose of the Act is not a stand-alone provision, but needs to be read and applied in the context of the whole definition, including the three elements listed at its end:

while -:

- (a) Sustaining the potential of natural and physical resources ... to meet the reasonably foreseeable needs of future generations; and



⁶ Resource Management Act 1991, s 5(2).

- (b) Safeguarding the life supporting capacity of air, water, soil, and ecosystems; and
- (c) Avoiding, remedying, or mitigating any adverse effects of activities on the environment.

[38] In addition, the Friends and RFAB submit that including “economic, employment and social benefits” in the list of matters is particularly problematic where there is already policy guidance in the TRMP in respect of NZCPS Policy 8 - Aquaculture, but not in respect of Policies 13 – Preservation of natural character, 14 – Restoration of natural character and 15 – Natural features and natural landscapes. Including “economic, employment and social benefits” in the list of matters, in addition to the specific policy provision at 22.1.3.2, would, they submit, give those matters particular emphasis and risk importing a “broad overall balancing approach” contrary to the guidance of the Supreme Court in *King Salmon*.⁷

Consistency with the rest of the TRMP

[39] The Respondent, while not opposed in principle to not having a list, considers this not to be the right time to make any change for four reasons:

- (a) The first is that deletion of the list would make the drafting of the Wainui Bay rule inconsistent with the other discretionary activity rules for aquaculture within the AMAs in chapter 25, which also include similar lists of matters for consideration.
- (b) The second is to assert that there is some guidance in the objectives and policies that assists to understand why certain matters are included in the list (although accepting that the TRMP does not explain why some matters were selected and others were not).
- (c) The third was in support of the submissions made by the Applicant on the adequacy or otherwise of the evidence (particularly planning evidence) in relation to deleting the list and whether the nature of aquaculture activities merits listing matters that a decision-maker is to have regard to.
- (d) Finally, the Respondent also considers that any deletion of the list should be done as part of a review of the entire chapter of the TRMP.



Fn 4.

Evaluation

[40] Fundamentally, sections 87A(4) and 104B RMA are both clear that a consent authority may decline granting a resource consent for such an activity or grant consent with or without conditions. On its face, the discretion conferred on the consent authority by those provisions is unrestricted beyond the limits implied by law.⁸ The separate provisions in ss 87A(3) and 104C for restricted discretionary activities⁹ reinforce this conclusion.

[41] It follows that it would be contrary to the scheme of the RMA for a rule in a plan to include restrictions on the exercise of a consent authority's discretion in relation to a fully discretionary activity.

[42] It is also a fundamental matter that a rule in a plan is made for the purpose of carrying out the functions of the council under the RMA and achieving the objectives and policies of the plan.¹⁰ It follows that there should only be a rule where it supports that functional or policy purpose and the terms of a rule should be drafted in the context of the functions or the objectives and policies that are directly relevant to it.

[43] In this case the amended version of policy 22.1.3.2 provides that context, being the most directly relevant policy. The policy effectively calls for:

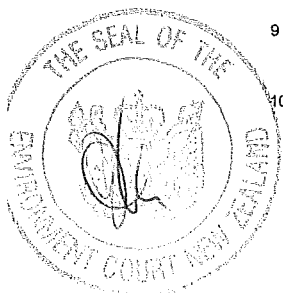
- (a) The identification of a discrete area where resource consent may be sought for limited aquaculture activities; and
- (b) Recognition of that area's favourable characteristics for spat catching and of its contribution to the aquaculture industry.

[44] The terms of rule 25.1.4.4 must achieve that policy. In considering the most appropriate way of doing so, the rule must be drafted in a way that is cognisant of the

⁸ *Aley v North Shore City Council* [1999] 1 NZLR 365; [1998] NZRMA 361 (HC), approving *Rudolph Steiner School v Auckland City Council* A34/97; (1997) 3 ELRNZ 85 and confirming the application of the principle in *Locke v Avon Motor Lodge* (1973) 5 NZTPA 17 to discretionary consent decisions under the RMA. The reference to the limits implied by law is to the requirements for lawful conditions identified in *Newbury District Council v Secretary of State for the Environment* [1981] AC 578; [1980] 1 All ER 731 and confirmed in relation to the RMA in *Waitakere City Council v Estate Homes Ltd* [2006] NZSC 112 at [20] fn 6.

⁹ Originally introduced by ss 40 and 55 Resource Management Amendment Act 1993, then repealed and replaced by ss 33, 34 and 44 Resource Management Amendment Act 2003.

¹⁰ S 68(1) in respect of regional rules and s 76(1) in respect of district rules.



framework of the TRMP (or so much of it as is directly relevant to policy 22.1.3.2) and the manner in which the rule can be expected to operate within the framework of the resource consent procedure under the RMA. This means that while there are likely to be other relevant policies in the TRMP and (to the extent that the TRMP may not give effect to them) other relevant policies in the NZCPS and the TRPS, it is not necessarily appropriate to draft the rule in a way that attempts to encompass all of those other matters. In this case, one may expect that the usual situation in which rule 25.1.4.4 will be considered will be in relation to an application for resource consent. In that situation, the consent authority must have regard to the list of considerations in s 104(1). That list includes all relevant provisions of the NZCPS, the TRPS and the TRMP, so they do not need to be repeated or referred to in the rule.

[45] The first and principal part of rule 25.1.4.4 (being the first sentence, including the two pre-conditions) is not in issue among the parties. That part of the rule expressly states that the activity is classed as a discretionary one. As discussed above, that status requires all matters (and not just any that may be listed) to be considered under Section 104.

[46] This approach does not mean that the Respondent should not assist users of the plan by providing guidance. We note that Chapter 26 - Information Required with Coastal Permits in the TRMP, under the heading "Scope of Chapter 26," begins by stating:

This chapter gives guidelines for the information that may be required to accompany coastal permit applications for activities in the coastal marine area (except for discharges). The matters listed will not be relevant to every application, nor are they an exhaustive list. The obligation remains with applicants to provide sufficient information to meet the requirements of Section 88 and the Fourth Schedule of the Act. In all cases, Council may request further information under Section 92 of the Act.

[47] That introduction clearly conveys to readers that the TRMP does not purport to specify the scope of the information that may be required to accompany an application for resource consent. The introduction expressly directs applicants to consider their obligations under the RMA.

[48] Further guidance can readily be provided outside the TRMP, using other publications and including on-line material. A great advantage of using such media is that they can be changed and updated as and when necessary without first undertaking a plan change. In our view, such methods are better suited to dealing



with information that is likely to be the subject of change by other agencies, for example the management of biosecurity risk organisms such as *Undaria* and the control of navigation under the Maritime NZ Guidelines.

[49] However attractive it may at first appear to incorporate guidance in the rule itself, doing so also presents risks for the administration of the TRMP. There is the potential for there to be other relevant matters arising in respect of a particular application, but not listed in the rule, which may be given less weight or even overlooked. We note the venerable drafting maxim, that the expression of one thing implies the exclusion of the other. While such an approach can be countered by the use of inclusive language, it is nevertheless readily conceivable that a reader of the plan would see the context for the application of the rule framed by what is expressed in it and might discount other matters which are not expressed. Circumstances are also likely to change over time, which may render the list inaccurate or even more incomplete.

[50] The latter risk is exemplified by the Respondent's proposal to add to the list the references to landscape, amenity values, and economic, employment and social benefits. We agree with the submissions by the Friends and RFAB that this proposal illustrates the difficulty with identifying matters to be listed under Rule 25.1.4.4 and the risks associated with the list technique.

[51] In particular, the part of the proposal to include "economic, employment and social benefits" in the list is so broad and general that it would go well beyond the appropriate bounds of recognition of Wainui Bay's contribution to the aquaculture industry in Policy 22.1.3.2.

[52] We have searched for guidance on these suggested additional matters in the TRMP and the TRPS. There appears to be no reference to them in the objectives and policies in Chapters 22, 25 or 26 of the TRMP, although they are referred to in the introduction, issues and reasons in Chapter 22. Whether those are "relevant provisions" for the purposes of s 104(1)(b)(vi) may be open to question in light of the definition of "provisions" in s 32(6).

[53] They do find expression in the TRPS in General Objectives 4 (*Efficient use and development of resources*) and 5 (*Maintenance of economic and social opportunities to use and develop resources in a sustainable manner*), including the



reasons for those objectives. They are not developed further in the more specific objectives and policies in section 9 of the TRPS dealing with the coastal environment.

[54] There is also the guidance in the NZCPS, particularly Objective 6 and Policy 8.

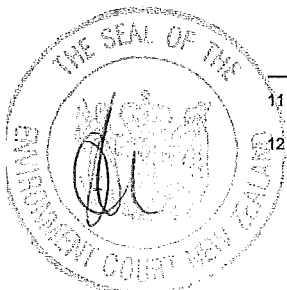
[55] Whether or not the Respondent ought to have provided more guidance on these matters in its policy statement and plan before now, it will undoubtedly do so when it next reviews them, not least because of the explicit requirement in s 32(2) RMA. In the meantime, realistically, such matters will always be presented as part of an application for resource consent and regard must be had to their effects (both positive and adverse) under ss 3 and 104(1)(a) RMA. General Objectives 4 and 5 of the TRPS and Objective 6 and Policy 8 of the NZCPS cover the incomplete range of the TRMP and provide support for consideration of them, effectively to the same extent as if they were added to the list of matters in Rule 25.1.4.4.

[56] In broader terms, the consent authority retains a significant measure of control to be able to ensure that an application is comprehensive. As well as the power to require further information under s 92 RMA, the consent authority also has the power to reject an application as incomplete under s 88(3) or to decline the application under s 104(6) if the necessary information and assessment is not provided by the applicant.

[57] We should add that we do not agree with the argument presented by the Friends and RFAB that the inclusion of a list of particular matters, if that were otherwise appropriate, would necessarily be in conflict with the Supreme Court's decision in *King Salmon*.¹¹ That decision makes it clear that in considering a plan change under ss 66 and 67 RMA (for a regional plan) or ss 74 and 75 RMA (for a district plan), the hierarchy of statutory planning documents is important and the directive policies of higher order documents, such as the NZCPS or a regional policy statement, must be given effect to rather than be assessed as part of an "overall broad judgment."¹² That does not affect the interpretation or application of a range of policies or assessment criteria in a plan in the context of the consideration required under ss 104(1)(b) and 104B of an application for an unrestricted discretionary activity, where the exercise of the discretion will normally involve overall judgments, at least some of

¹¹ *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd*, fn 4.

¹² *Ibid.* at [131] – [140].



which may be broad.

[58] When considering an application for resource consent under s 104 RMA, a consent authority is required to adopt the same approach as in *King Salmon* (which was decided in relation to a plan change) and is not required to consider Part 2 of the RMA beyond its expression in the relevant statutory planning documents, unless there is invalidity, incomplete coverage or uncertainty of meaning in those planning documents.¹³ The requirement that the regard for the matters listed in s 104(1) is “subject to Part 2” does not allow for general recourse to Part 2 in deciding resource consent applications.¹⁴ The consideration to be given to the relevant provisions of the statutory planning documents, together with the effects of the activity on the environment and any other relevant consideration, is a matter of weight to be assessed by the decision-maker.¹⁵

[59] In relation to scope, as identified in our interim decision, in the hearing the parties focussed on two options with regard to whether the marine farms at Wainui Bay should be identified as AMA4 in the TRMP:

- i) one, as sought by the Applicant, was to establish a new AMA for the existing farms at Wainui Bay, providing for spat catching and holding as a controlled activity; while
- ii) the other, the status quo as sought by the Friends, was to retain the exception provisions with the existing Policy 22.3.1.2.

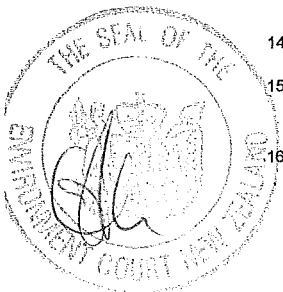
[60] As presented to us, the argument centred on whether the existing activity could be granted consent beyond the term of the current consents, in light of the wording of the operative version of Policy 22.3.1.2 and the dicta in the *Golden Bay Marine Farmers* interim report.¹⁶ In our interim decision we adopted a third, intermediate, option between the two contended for, focussing more on the policy provisions than the rule framework. We directed that a new Policy 22.1.3.2 be

¹³ *R J Davidson Family Trust v Marlborough District Council* [2017] NZHC 52 at [93]. Note that this decision is presently before the Court of Appeal on the question whether this point is correct.

¹⁴ *Ibid.* at [77].

¹⁵ *R J Davidson Family Trust v Marlborough District Council* [2016] NZEnvC 81 at [262]; *Blueskin Energy Ltd v Dunedin City Council* [2017] NZEnvC 150 at [26].

¹⁶ *Golden Bay Marine Farmers & Ors v Tasman District Council* W42/2001.



included to alter the policy framework for consideration of a mussel (spat) farming consent application in Wainui Bay. We consider this to be an outcome between the positions of the parties¹⁷ which was a reasonably foreseeable logical consequence of the issues before this Court on appeal¹⁸ and therefore is within the scope of the Court's jurisdiction.

[61] We also agree with the reasons given by the Friends and RFAB and find that the relief is within the scope of the Notice of Appeal. We also find that there is no prejudice to any party in making the change given it does not change the fundamental nature of the rule, but rather ensures its correct application.

[62] We find the concerns raised by the Applicant in relation to the sufficiency of the evidence to be overstated. The Court heard and considered a great deal of evidence on the background to, and the provisions of, Rule 25.1.4.4 and the other rules that apply to various aquaculture activities including spat catching and spat holding within the zoned AMAs. While the specific wording was not before the witnesses, the essential elements of dealing with aquaculture as a controlled or discretionary activity were at the forefront of the case. We conclude that the Court clearly has sufficient evidence before it regarding the nature of the rule to make this change.

[63] In relation to the consistency issue, we considered the background material provided to us but see no need to traverse the treatment of aquaculture rules in the AMAs or of Wainui Bay in the *Golden Bay Marine Farmers* interim report¹⁹ in this decision. We have not only introduced a new policy for spat catching in a specific area of Wainui Bay but the other provisions (agreed between the parties) directed for the TRMP, including the definitions, rules and map, implement that policy. The format of the rule is somewhat different to other rules relating to discretionary activities in the TRMP which include similar lists, but as it is now clear that Wainui Bay sits outside of the AMA framework, comparisons with the rules for the AMA are unhelpful. For any discretionary activity application for mussel farming in the area shown on the planning maps at Wainui Bay, there is a need for an applicant and decision maker to consider all matters and not just those that were included in a list pre-dating the new policy for

¹⁷ *Re Vivid Holdings Ltd* [1999] NZRMA 467.

¹⁸ *Westfield (New Zealand) Limited v Hamilton City Council*, [2004] NZRMA 556 (HC) at [73]; *Albany North Landowners v Auckland Council* [2016] NZHC 138 at [135].

¹⁹ *Golden Bay Marine Farmers & Ors v Tasman District Council* W42/2001.



spat catching in Wainui Bay. We see no need to wait for a review of the entire chapter and, indeed, no timeframe was mentioned for any review.

[64] We conclude that option A - the deletion of the list of ten matters - is a necessary and consequential amendment to the fully discretionary nature of the rule which requires all relevant matters to be considered and weighed appropriately. There is no reason for the list of matters to be retained or added to. Such an approach risks applicants and decision-makers adopting a focus on the matters listed instead of fully considering all relevant matters. Importantly, the approach to and content of the list was compiled in the context of a plan which has not fully given effect to the directions of the NZCPS and has a current absence of policy guidance regarding natural character, landscapes and features and amenity values, including in respect of Wainui Bay. The removal of the listed matters of discretion will enable applications under Rule 25.1.4.4 to be correctly considered as full discretionary activities in accordance with the Court's interim decision.

[65] We have considered the matters set out in s32 RMA. For the reasons set out in this decision we find that there are inappropriate risks and potential costs with Options B and C and that the amendment to Rule 25.1.4.4 is the most appropriate way to achieve the objectives of our inclusion of a new policy and will be efficient and effective.

Outcome

[66] By consent, the amendments to the TRMP as shown in the Appendix to this decision are to be made.

[67] The relief sought by Friends and RFAB in respect of Rule 25.1.4.4 is upheld.

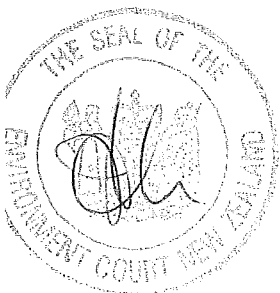
[68] Rule 25.1.4.4 in the TRMP is to be amended to read:

25.1.4.4 Discretionary Activities (Mussel Farming at Wainui Bay)

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

- (a) The activity is at the Wainui Bay mussel farming sites as shown on the planning maps; and
- (b) The activity uses longline structures, incorporating surface buoys.

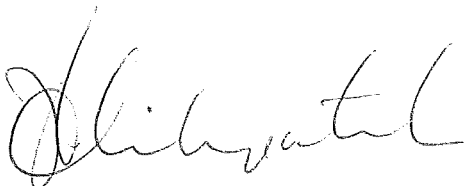
A resource consent is required. Consent may be refused or conditions imposed. The following standard conditions (to the extent that they are applicable) will be applied to any consent granted under this rule:



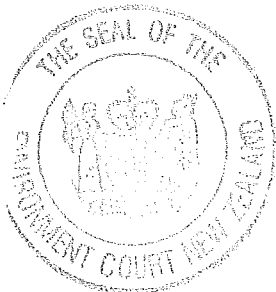
- (i) The activity does not discharge contaminants to the sea, and in particular tributyl-tin anti-fouling is not used on any structure or equipment and no artificial feed is added to the sea. For the purposes of this rule, naturally occurring marine material that is discharged by any organism or from any aquaculture structure is not a contaminant.
- (ii) Where any structure or part of a structure sinks, breaks free or otherwise causes a navigation hazard, steps are taken as soon as practicable to recover, secure, and make safe the structure. The consent holder, or site manager, whoever is first aware of the matter, is to notify the Harbourmaster of any such incident as soon as practicable on becoming aware of it.
- (iii) The consent holder removes from the site any structure or material that is superfluous to the activity, including any discarded equipment.
- (iv) The consent holder notifies Maritime New Zealand immediately prior to the placement of structures; and within 24 hours of the placement of structures notifies Land Information New Zealand, and the Council Harbourmaster.
- (v) The whole or any part of the interest in the coastal permit for the activity may be transferred to any other party. The transferor remains responsible for compliance with the terms and conditions of the permit until written notice of the transfer is given to the Council.

[69] This being an appeal in relation to a plan change, the outcome being between the positions contended for by the parties and there being no issue as to the approach taken by or the conduct of any party, there is no order as to costs.

For the court:



D A Kirkpatrick
Environment Judge



APPENDIX

Schedule of Changes to the operative TRMP

Note:

Regular text - denotes current text In the Tasman Resource Management Plan.

Underlined text - denotes additions to the Tasman Resource Management Plan.

~~Strikethrough text~~ - denotes deletions to the Tasman Resource Management Plan.

1. In Chapter 2: Meaning of Words, Section 2.2 Defined Words, amend paragraph (b) of the definition of *Aquaculture Exclusion Area* as follows:
 - (b) the Wainui Bay marine mussel farming sites as ~~at Wainui Bay~~ shown on the planning maps.
2. In Chapter 2: Meaning of Words, Section 2.2 Defined Words, insert a new definition of *Mussel spat holding* as follows:

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

3. In Chapter 22 Aquaculture, Section 22.0: Introduction, after the seventh paragraph which ends with the words "... natural populations of organisms." and before the paragraph starting "Given the competing ...", insert a new paragraph as follows:

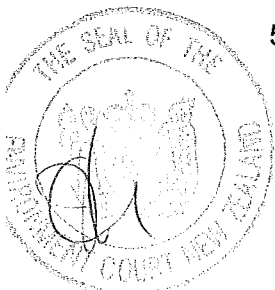
An area In Wainui Bay Is separately recognised as an exception to the AEA. There Is a specific pol/cy recognising the favourable characteristics of this area for spat catching and Its contribution to the aquaculture industry. Aquaculture rules provide for mussel farming, including mussel spat catching and mussel spat holding in the mapped area of Wainui Bav as a discretionary activity for which resource consent may be sought.

4. In Chapter 22 Aquaculture, Section 22.1 Protection of Values, amend Policy 22.1.3.2 as follows:

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

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

5. In Chapter 22 Aquaculture, Section 22.1 Protection of Values, Subsection 22.1.20.1 Methods of Implementation - Regulatory, amend paragraph (a) as follows:



The zoning of areas, as Aquaculture Management Areas, and the prohibition of aquaculture elsewhere except for the Wainui Bay mussel farming sites as shown on the planning maps licences and permits at Wainui Bay that existed on 25 May 1996.

6. In Chapter 22 Aquaculture, Section 22.1 Protection of Values, subsection 22.1.30 Principal Reasons and Explanation, at the end of the second paragraph after (d), insert a new sub-paragraph as follows:

(da) Providing for mussel farming, including mussel spat catching and mussel spat holding in the mapped area of Wainui Bay as a discretionary activity.

7. In Chapter 25 Coastal Marine Area Rules, Section 25.1 Structures and Occupation, amend Rule 25.1.4.4 to insert after the words "mussel farming" and before the words "is a discretionary" the following words:

..., including mussel spat catching and mussel spat holding, ...

8. In Chapter 25 Coastal Marine Area Rules, Section 25.1 Structures and Occupation, amend Rule 25.1.4.4(a) as follows:

The activity is at ~~Wainui Bay on the site of a coastal permit or marine farm licence that existed on 25 May 1996;~~ the Wainui Bay mussel farming sites as shown on the planning maps; and

9. In Chapter 25 Coastal Marine Area Rules, Section 25.1 Structures and Occupation, amend Rule 25.1.4.7 Prohibited Activities (Aquaculture Exclusion Area) as follows:

The occupation and disturbance of any site in the coastal marine area by structures, and the use of those structures, for aquaculture in the Aquaculture Exclusion Area ~~(except for the sites of the marine farm licences and coastal permits that existed at Wainui Bay on 25 May 1996)~~ is a prohibited activity for which no resource consent application will be received or granted.

10. In the Planning Maps, Part III, Map 1 – Map Locator and Legend, amend the text under Coastal Marine Area Legend as follows:

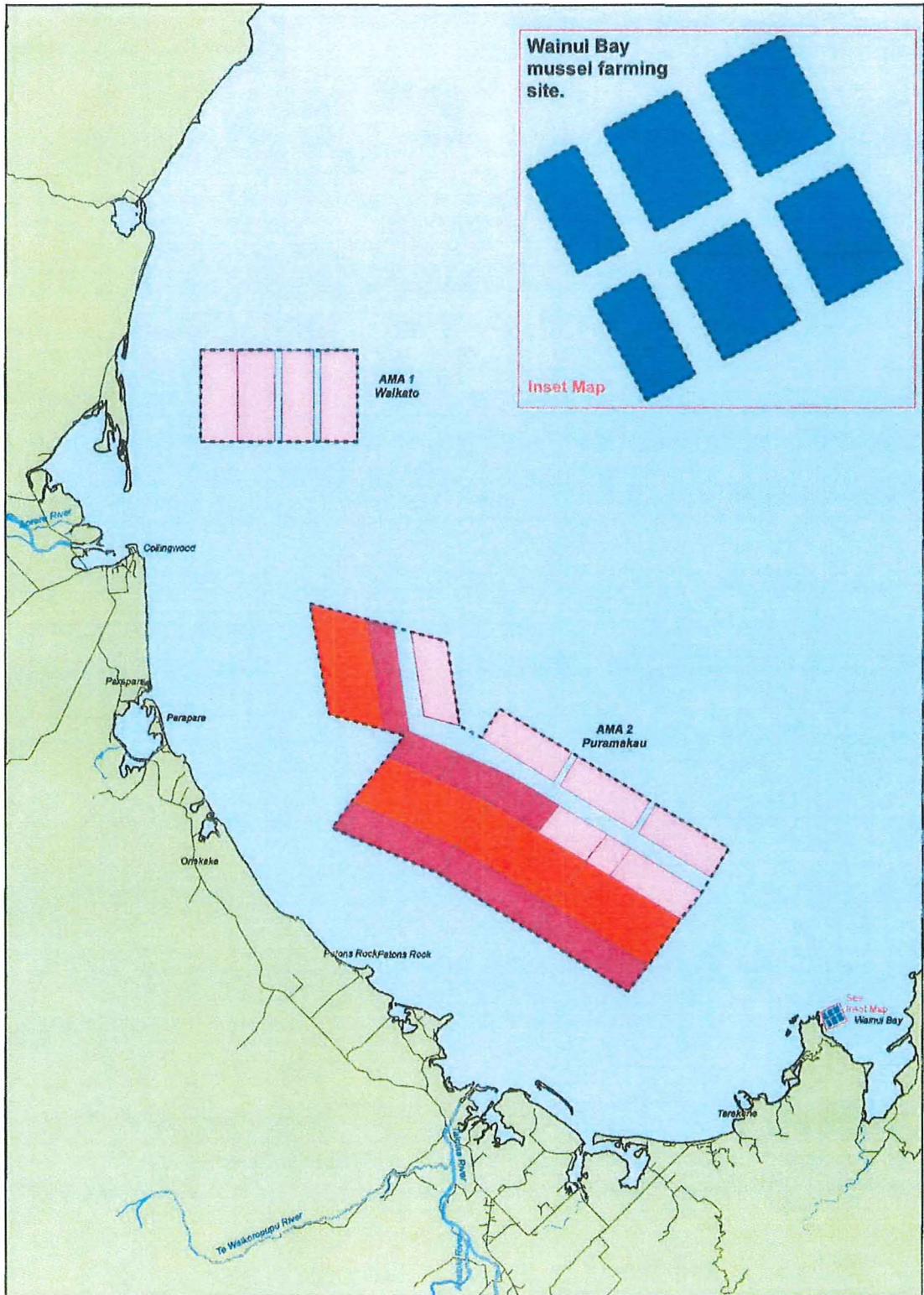
~~Mussel Spat Catching and Mussel Spat Holding~~ Wainui Bay mussel farming sites

11. In the Planning Maps, amend Planning Map 181 – SPAT CATCHING AND MARINE FARMING SITES - GOLDEN BAY by renaming the inset map in accordance with item 10 above, as shown below.

12. Otherwise cancel the provisions of Plan Change 61.

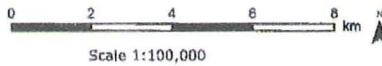


Planning Map 181 – Spat Catching and Marine Farming Sites - Golden Bay



SPAT CATCHING AND MARINE FARMING SITES - GOLDEN BAY

TASMAN RESOURCE MANAGEMENT PLAN
20 August 2005
Status



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Map 181